STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HARRIETTA ALISA ROBINSON,

Defendant-Appellant.

UNPUBLISHED
May 23, 1997

No. 189662
Oakland Circuit Court
LC No. 95-137153-FH

Before: Michael J. Kelly, P.J., Wahls, and Gage, JJ.

PER CURIAM.

A jury convicted defendant of one count of carrying a concealed weapon, MCL 750.227; MSA 28.424, two counts of felonious assault, MCL 750.82; MSA 28.277, and one count of driving while her license was suspended, MCL 257.904(1)(a); MSA 9.2604(1)(a). The trial court sentenced her to terms of two years' probation with 183 days in jail for the assault convictions, and to terms of ninety days in jail for the concealed weapon and suspended license convictions. Defendant appeals as of right. We affirm.

This incident occurred on November 14, 1994, as a result of a traffic altercation between defendant and another driver. Defendant apparently became frustrated when following the victim's automobile and hit the back of his car. When the victim got out to look at the damage to his car and to talk to defendant, she pulled out a handgun to get the victim to return to his car. When the victim went around the back of defendant's car to try to get her license plate number, defendant backed up her vehicle and struck him. Defendant then drove forward at the victim as he was walking back to his car, hitting him a second time.

Defendant denied that she hit the victim's vehicle or had a gun, but explained that she feared that the victim was going to take her car as she had been the victim of a carjacking in the past. She claimed that if she hit the victim with her car, it was not with the intent to cause injury to him or place him in fear of a battery. The jury convicted defendant on all counts as charged.

I

Defendant first argues that there was insufficient evidence to support the convictions of carrying a concealed weapon and felonious assault because the prosecution never produced the gun it claimed was used in this incident and the prosecution did not prove that the gun was operable. Defendant alternatively argues that the jury's verdict was against the great weight of the evidence for the same reason. We disagree.

Inoperability of a firearm is an affirmative defense for both carrying a concealed weapon and felonious assault. *People v Parr*, 197 Mich App 41, 45; 494 NW2d 768 (1992); see *People v Doud*, 223 Mich 120, 128-129; 193 NW 884 (1923). It is not an element of the prosecution's prima facie case for either of these crimes. *People v Jones*, 150 Mich App 440, 445; 387 NW2d 875 (1986); see *People v Hill*, 433 Mich 464, 475; 446 NW2d 140 (1989). Because the operability of the gun was not put into issue in this case, the jury was entitled to conclude that the firearm was operable. See *Parr, supra*, p 45; *People v Gardner*, 194 Mich App 652, 655-656; 487 NW2d 515 (1992).

Viewed in a light most favorable to the prosecution, sufficient evidence was presented to establish that defendant used a dangerous weapon to commit this crime when the victim was able to observe a .32 caliber loaded revolver pointed at him by defendant. *Gardner, supra*, p 655. Moreover, the jury's verdict was not against the great weight of the evidence. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993). The trial court properly denied defendant's motions for acquittal and a new trial.

II

Defendant also argues that there was insufficient evidence presented that she possessed the specific intent required for the felonious assault convictions. She also contends that the jury's verdict was against the great weight of the evidence for the same reason. We disagree.

The crime of felonious assault involves the following elements: (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The defendant's intent need not be proven directly by a witness or by a confession. Rather, it may be proven indirectly by inference from the defendant's conduct and the surrounding circumstances. *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992).

The victim testified that he was placed in fear when defendant pulled out a gun and pointed it at him. The fact that the victim did not immediately leave the area does not mean that the evidence was insufficient. Viewed in a light most favorable to the prosecution, sufficient evidence was presented to establish that defendant acted with the requisite state of mind for felonious assault involving the use of the gun. *Gardner, supra*, p 655. Moreover, the jury's verdict was not against the great weight of the evidence. *DeLisle, supra*, p 661. The trial court properly denied defendant's motions for acquittal and a new trial as to this count of felonious assault.

Defendant also argues that there was insufficient evidence to support her conviction for felonious assault involving her automobile. Defendant's actions with her car provided sufficient evidence for the jury to find beyond a reasonable doubt that she intended to place the victim in reasonable apprehension of an immediate battery. Defendant intentionally backed up her car after the victim told her that he was going to get her license plate number. When the victim began to walk back to his car, defendant gunned the engine of her car and drove straight at the victim, who was forced to jump out of the way to avoid serious injury. Defendant admitted to the police that she drove at the victim in order to scare him. Accordingly, the trial court properly denied defendant's motions for acquittal and a new trial as to this count of felonious assault. *DeLisle*, *supra*, p 661; *Gardner*, *supra*, p 655; see *People v Sheets*, 138 Mich App 794, 799; 360 NW2d 301 (1984).

III

Defendant next claims that the two convictions of felonious assault violated her right against double jeopardy for multiple punishment for the same offense. US Const, Am V; Const 1963, art 1, § 15. We disagree.

Double jeopardy protection shielding defendants from multiple punishments for the same offense operates to ensure that defendants do not receive more punishment than was intended by the Legislature. *People v Griffis*, 218 Mich App 95, 100; 553 NW2d 642 (1996). In this case, our analysis must focus on whether the Legislature authorized cumulative punishment based upon the Legislature's intent in making felonious assault a crime. *Id*., p 101. The determination of legislative intent involves traditional consideration of the subject, language, and history of the statute. *People v McClain*, 218 Mich App 613, 615-616; 554 NW2d 608 (1996).

Here, the felonious assault which defendant committed with a gun was complete before she committed felonious assault with her car. In addition, although the two crimes were committed within a short period of time, defendant had different motives in committing the two crimes and used different weapons. Accordingly, defendant's convictions did not violate the double jeopardy protection against multiple punishments. *People v Lugo*, 214 Mich App 699, 708; 542 NW2d 921 (1995).

IV

Next, defendant argues that the prosecutor did not prove beyond a reasonable doubt that she knowingly violated the statute prohibiting driving while one's license is suspended. Defendant argues that MCL 257.904; MSA 9.2604 expressly requires that the prosecution prove that she received notice of her suspension as part of its prima facie case. We disagree.

MCL 257.904(1); MSA 9.2604(1) requires that the Secretary of State send out a notice of revocation of a driver's license, as provided in MCL 257.212; MSA 9.1912. Notice is complete upon the expiration of five days after the deposit of the notice in the mail. MCL 257.212; MSA 9.1912. A certificate of mailing can serve as proof of notice. *Id.* Accordingly, the Secretary of State was allowed to send out a notice by mail of the suspension of defendant's license and that notice was presumed to have been served within five days. *Id.*

Here, defendant claimed she did not receive notice of suspension of her license because she had moved and the notice had not been forwarded to her new address. However, the notice requirement contained in MCL 257.904(1); MSA 9.2604(1) and MCL 257.212; MSA 9.1912 focuses only on the Secretary of State's actions, not whether the defendant actually received notice. Notice is presumed to have been served after five days. On these facts, the prosecution was not required to prove notice as part of its prima facie case.

In addition, defendant admitted she was at fault for not receiving notice because she did not change her address with the Secretary of State. Under these circumstances, the prosecution was not required to come forward with evidence to prove beyond a reasonable doubt that a notice was sent out to defendant. See e.g. *Parr, supra,* p 45; *Gardner, supra,* pp 655-656.

V

Defendant cites error with the trial court's instructions to the jury in three instances. Defendant did not request instructions on notice for license suspension or on the firearm's operability. In addition, she did not object when these instructions were not read to the jury. Accordingly, appellate review is foreclosed as to these two arguments absent manifest injustice. *People v Ullah*, 216 Mich App 669, 676; 550 NW2d 568 (1996). Having reviewed defendant's arguments, we do not believe that manifest injustice will result where the evidence did not support the reading of either instruction. See *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

Defendant preserved for review her objection to the court's preliminary instructions. The court explained to the jury the mechanics of an opening statement as an introduction to what the parties intended to prove at trial. After reviewing this instruction in its entirety, we believe that it fairly presented the issues to be tried and sufficiently protected defendant's rights. *Davis, supra,* p 54.

VI

Defendant argues that she was wrongly prevented from admitting into evidence a police report she filed in 1992 concerning a carjacking committed against her. We disagree. First, because defendant did not argue that the report was admissible in the trial court on the same ground cited on appeal, this issue has not been properly preserved for appellate review. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996), lv pending. Second, the prosecution never suggested that she had fabricated her story about being the victim of a carjacking. Accordingly, the statement was not admissible under MRE 801(d)(1)(B). Third, in light of the weight and strength of the untainted evidence, any error was harmless. *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996).

VII

Defendant argues that the prosecutor engaged in misconduct during her closing argument by making arguments and statements that were not supported by the evidence. Defendant failed to object to the prosecutor's closing argument. Therefore, this issue may only be reviewed on appeal if an instruction could not have cured the prejudicial effect of the comments or if the failure to consider the

issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Here, the prosecutor did not make an improper argument where her comments were based upon the evidence or reasonable inferences that could be drawn from the evidence. *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996). No miscarriage of justice occurred.

VIII

Because no error occurred during the proceedings, defendant was not denied a fair trial due to cumulative error.

Affirmed.

/s/ Michael J. Kelly
/s/ Myron H. Wahls
/s/ Hilda R. Gage