

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRETT W. SOWERS,

Defendant-Appellant.

UNPUBLISHED

July 8, 1997

No. 194340

Recorder's Court

LC No. 95-010539

Before: Markey, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of felonious assault, MCL 750.82; MSA 28.277. Defendant was sentenced to three years' probation with the first year to be served in the county jail. He now appeals as of right, and we affirm.

Defendant argues on appeal that the evidence presented at trial was insufficient to support his conviction. We disagree. In determining whether sufficient evidence has been presented to sustain a conviction following a bench trial, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985).

The elements of felonious assault are (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 Malkowski*, 198 Mich App 610, 614; 499 NW2d 450 (1993). Defendant contends that the prosecution failed to prove beyond a reasonable doubt the second element of the crime: that defendant's tennis shoes were dangerous weapons.¹ We disagree.

The felonious assault statute specifically refers to a gun, revolver, pistol, knife, iron bar, club, or brass knuckles as a dangerous weapon. MCL 750.82; MSA 28.277. Recognizing, however, that it could not reasonably foresee every type of instrument that could be used as a dangerous weapon,

the Legislature also included the phrase “or other dangerous weapon” in the statute. *People v Buford*, 69 Mich App 27, 29-30; 244 NW2d 351 (1976).

In *People v Goolsby*, 284 Mich 375, 378; 279 NW 867 (1938), our Supreme Court clarified the nature of the instrumentality that would fall within the definition of “other dangerous weapon.” The Court explained:

Some weapons carry their dangerous character because so designed and are, when employed, per se, deadly, while other instrumentalities are not dangerous weapons unless turned to such purpose. *The test as to the latter is whether the instrumentality was used as a weapon and, when so employed in an assault, dangerous. The character of a dangerous weapon attaches by adoption when the instrumentality is applied to use against another in furtherance of an assault. When the purpose is evidenced by act, and the instrumentality is adapted to accomplishment of the assault and capable of inflicting serious injury, then it is, when so employed, a dangerous weapon. [Goolsby, supra at 378 (emphasis added).]*

In *Buford, supra* at 32, this Court considered whether a boot could constitute a dangerous weapon. At trial, evidence was produced indicating that the defendant, who was wearing boots at the time, struck the victim, knocked him to the floor and then proceeded to ‘stomp’ on the victim’s face several times rendering him unconscious. *Id.* at 29. This Court held, as a matter of law, that a boot may be used as a dangerous weapon. In doing so, the Court stated, “In determining if a booted foot is a dangerous weapon within the statute, the courts have looked at the nature of the footwear and the manner in which the boot was used to injure the victim.” *Id.* at 31. Given that a boot could be used as a dangerous weapon, this Court affirmed the defendant’s conviction leaving to the jury to determine whether, in fact, the boot was being used as a dangerous weapon. *Id.* at 32.

Following *Buford*, this Court, in *People v Hale*, 96 Mich App 343, 345; 292 NW2d 204, vacated on other grounds, 409 Mich 937; 298 NW2d 421 (1980), considered whether a shoe could likewise constitute a dangerous weapon for purposes of the felonious assault statute. In *Hale*, the defendant kicked a police officer while resisting arrest. *Id.* at 345. Relying upon *Buford*, the Court held:

We thus conclude that a shoe as well as a boot may be considered a dangerous weapon under the statute since it is an object that may be used in a dangerous manner. It is for the fact finder to determine if the shoe was, in fact, employed in a dangerous manner. In the instant case, we are unable to conclude that the shoe was not a dangerous weapon as a matter of law. [*Id.* at 345.]

This conclusion is consistent with the vast majority of other jurisdictions which have considered this question. See anno: *Kicking as aggravated assault, or assault with a dangerous or deadly weapon*, 19 ALR5th 823.

In this case, complainant testified that defendant jumped up and down on his face while wearing Converse high-top tennis shoes and that defendant ceased his assault only after his foot turned and he slid off. Complainant testified that he suffered lumps on his head, a bloody eye and that he had some shoe marks on his chest. He further testified that he “passed out” for a few seconds. Viewing the above evidence in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt, specifically, that defendant’s shoes were used to further the assault and in a manner capable of causing serious physical injury to complainant, who was in fact seriously injured.

Defendant also argues that he is entitled to a new trial because the trial court failed to disclose potential grounds for disqualification that were revealed at the time of sentencing. We disagree. Viewing the record as a whole, it is not evident that the trial court was aware of any relationship between the court and complainant’s father that would have required the court to inform the parties that possible grounds for disqualification existed. More importantly, defendant has failed to make any showing of actual bias or prejudice. Absent a showing of actual bias or prejudice, a judge will not be disqualified pursuant to MCR 2.003. *Cain v Dep’t of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996).

Affirmed.

/s/ Jane E. Markey
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra

¹ Defendant also argues that the trial judge erroneously concluded that boots, rather than tennis shoes, were used in the attack. Our review of the entire record convinces us that the trial court understood the nature of the foot apparel worn by defendant and that the court’s use of the term “boot” in rendering its opinion was simply a misstatement by the court.