

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD POOLE,

Defendant-Appellant.

UNPUBLISHED

March 24, 1998

No. 184474

Recorder's Court

LC No. 94-004033

Before: Fitzgerald, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of carrying a concealed weapon, MCL 750.227; MSA 28.424, and assault and battery, MCL 750.81; MSA 29.276. Defendant was sentenced to five years' probation for the CCW conviction and two years' probation for the assault and battery conviction. We affirm in part and reverse in part.

Defendant first claims that the evidence was insufficient to support his assault and battery conviction. In reviewing a claim of insufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. *People v Reeves*, 222 Mich App 32, 34; 564 NW2d 476 (1997).

Assault and battery requires a finding of willful touching of another by the aggressor or some object put in motion by him. *People v Solak (On Remand)*, 146 Mich App 659, 666; 382 NW2d 495 (1985). Here, the complainant testified that defendant "sucker-punched" him on two separate occasions. Defendant also admitted that he punched the complainant while in a parking lot. This evidence is sufficient to support the assault and battery conviction.

Defendant also claims, and the prosecution concedes, that the evidence presented was insufficient to support the CCW conviction. We agree.¹ Defendant possessed neither a stabbing weapon, MCL 750.227(1); MSA 28.424(1), *People v Smith*, 393 Mich 432; 225 NW2d 165 (1975), nor a pistol, MCL 750.227(2); MSA 28.424(2), which is defined as being less than thirty inches in length. MCL 750.222(c); MSA 28.419(c). Therefore, the evidence was insufficient to

support a conviction under §§ 750.227(1) or (2). See *People v Nixon*, 13 Mich App 684; 164 NW2d 775 (1968).

The prosecution contends that this case should be remanded to the trial court for clarification of the verdict. In support of its position, the prosecution suggests, without argument or analysis, that defendant may have violated MCL 750.227c; MSA 28.424(3), or MCL 750.227d; MSA 28.424(4). We disagree.

MCL 750.227c; MSA 28.424(c) prohibits the carrying of a *loaded* firearm in a motor vehicle. Here, the trial court found that defendant retrieved the firearm from his trunk and then proceeded to load it. This factual finding is consistent with the testimony presented at trial. Because the rifle was not loaded while in defendant's vehicle, the evidence was not sufficient to support a conviction under § 227c.

MCL 750.227d; MSA 28.424(4) prohibits the transportation or possession of an *unloaded* firearm unless the firearm is one or more of the following: (1) taken down; (b) enclosed in a case; (c) carried in the trunk of the vehicle; or (4) inaccessible from the interior of the vehicle. Here, the evidence was undisputed that the rifle was unloaded at the time defendant retrieved it from his vehicle. The evidence was also undisputed that the rifle was carried in the trunk of defendant's vehicle. Hence, there was insufficient evidence to support a conviction under § 227d. Consequently, a remand to the trial court for clarification of the verdict is unnecessary. Defendant's conviction for carrying a concealed weapon is reversed.²

Affirmed in part and reversed in part.

/s/ E. Thomas Fitzgerald

/s/ Harold Hood

/s/ David H. Sawyer

¹ The trial court stated that it found defendant guilty of "carrying a rifle in a motor vehicle without a license," and cited the concealed weapons statute, MCL 750.227(1); MSA 28.424(1), in support of its finding. The court then stated that "rifles can be carried in motor vehicles if they are in a wrapper and are unloaded," and stated that no testimony was presented that the rifle was "in a wrapper." This statement suggests that the trial court found defendant guilty of violating MCL 750.227d; MSA 28.424(4). The order of conviction, however, indicates that defendant was convicted of CCW.

² The sentencing transcript reflects that the trial court sentenced defendant to five years' probation for the firearm conviction and two years' probation for the assault and battery conviction. The order of conviction and sentence, however, simply indicates that defendant was sentenced to a five year term of probation for his convictions. Because defendant now stands convicted only of misdemeanor assault and battery, the order of conviction and sentence must be revised to reflect a two-year term of probation for the A & B conviction, which is the statutory maximum term for this offense. See MCL 771.2; MSA 28.1132.