

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ALLEN DOVER,

Defendant-Appellant.

UNPUBLISHED

August 21, 1998

No. 196604

Macomb Circuit Court

LC No. 95-001855 FH

Before: Doctoroff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of felonious assault, MCL 750.82; MSA 29.277. The trial court sentenced him to two years' probation. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in denying his motion for a new trial on the basis of (1) its failure to suppress evidence of the gun obtained from his garage before his arrest, and (2) its failure to exclude prior acts evidence admitted in violation of MRE 404(b). We disagree. A trial court may grant a new trial to a criminal defendant on the basis of any ground that would support reversal on appeal, or because it believes that the verdict has resulted in a miscarriage of justice. MCR 6.431(B). We review a trial court's decision on a motion for new trial for an abuse of discretion. *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997). An abuse of discretion occurs when the decision was so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Id.*

After a brief mid-trial evidentiary hearing, the trial court ruled that the search and seizure of defendant's gun was justified under the exigent circumstances exception to the warrant requirement. The exigent circumstances exception allows officers to enter a dwelling without a warrant if the officers possess probable cause to believe that a crime was recently committed on the premises, and probable cause to believe that the premises contain evidence or perpetrators of the suspected crime. *In re Forfeiture of \$176,598*, 443 Mich 261, 271; 505 NW2d 201 (1993). To justify a warrantless search pursuant to exigent circumstances, the police must show that an actual emergency existed on the basis of

specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect. *Id.* Here, there is ample support in the record for the trial court's finding that Officer Darcy Leuzinger acted reasonably in entering defendant's property to secure the safety of the responding officers and other neighbors. Of particular importance was the fact that defendant had told another police officer at the scene that he left his loaded gun on the trunk of an automobile parked in his open garage.

Defendant also suggests that Leuzinger should not have been permitted to give "hearsay" testimony on voir dire regarding what he was told by the other officers. This argument is without merit. First, the statements were not hearsay, because they were not offered to prove the truth of the matter asserted. MRE 801(c). Second, even if the statements had been hearsay, a trial court is generally not bound by the rules of evidence in making preliminary determinations on the admissibility of evidence. See MRE 104(a).

With respect to defendant's contention regarding the alleged improper introduction of prior acts evidence, we note that defendant failed to preserve the issue with an objection at trial. MRE 103(a)(1); *People v Yarger*, 193 Mich App 532, 539; 485 NW2d 119 (1992). Absent an objection, this Court may take notice of plain errors affecting substantial rights. MRE 103(d). After reviewing the record, we are not persuaded that the admission of the prior acts evidence, first challenged in defendant's post-trial motion, was a plain error affecting substantial rights. Accordingly, we hold that the trial court did not abuse its discretion in denying defendant's motion for a new trial.¹

Defendant next argues that the trial court erred in refusing to grant his motion for directed verdict. We disagree. When ruling on a motion for directed verdict, the trial court must consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find the essential elements of the charged crime proven beyond a reasonable doubt. *People v Warren*, 228 Mich App 336, 345; 578 NW2d 692 (1998). The trial court may not assess the credibility of witnesses. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). This Court tests the validity of the motion by the same standard as the trial court. *Warren, supra* at 345-346.

The elements of felonious assault are (1) a simple assault, (2) aggravated by the use of a weapon, and (3) including the element of present ability or apparent present ability to commit a battery. See *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). A simple assault is defined as either an attempt to commit a battery or an unlawful act that placed another in reasonable apprehension of receiving an immediate battery. *Id.* Viewed in a light most favorable to the prosecution, we conclude that the evidence presented at the time defendant moved for a directed verdict could have led a rational trier of fact to find the essential elements of felonious assault proved beyond a reasonable doubt. First, the evidence showed the existence of a simple assault. Defendant pulled a gun on Gary Dixon and "waved" it around, thus placing Dixon in reasonable apprehension of an immediate battery. Intentionally aiming a firearm at another person constitutes an unlawful act. See MCL 750.233; MSA 28.430. Considering the evidence of defendant's threatening words, the sudden withdrawal of the gun from its holster, and his failure to replace the gun as Dixon backed down his driveway, defendant's argument that he meant to use the gun as a "conditional threat" is unconvincing. Second, it is clear that

the simple assault was aggravated by the use of a weapon. Finally, it is also clear that defendant's use of a gun evidenced, at the very least, an apparent present ability to inflict a battery on Dixon. Accordingly, we believe the trial court did not err in denying defendant's motion for directed verdict. Cf. *People v Jones*, 443 Mich 88, 102; 504 NW2d 158 (1993).

Next, defendant argues that the trial court abused its discretion by refusing to grant his motion for a new trial on the basis that the verdict was against the great weight of the evidence. We disagree. In ruling on a motion for new trial based on the great weight of the evidence, a trial court may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemon*, 456 Mich 625, 627; 576 NW2d 129 (1998). We review the trial court's decision for an abuse of discretion. See, e.g., *Torres, supra* at 415.

As discussed above, the prosecution submitted sufficient evidence to prove beyond a reasonable doubt that defendant was guilty of felonious assault. Although defendant advances that he brandished his weapon in self-defense, the trial court (sitting as trier of fact) did not find defendant's testimony to be credible. Accordingly, we hold that the trial court did not abuse its discretion by denying defendant's motion for a new trial based on the great weight of the evidence.

Affirmed.

/s/ Martin M. Doctoroff

/s/ E. Thomas Fitzgerald

/s/ Michael J. Talbot

¹ Defendant's brief on appeal also contained some additional arguments regarding the law of self-defense. Because defendant failed to raise these issues in his statement of the questions involved, they were not properly preserved for review by this Court. MCR 7.212(C)(5); *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990). In any event, defendant's additional claims are without merit.