STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 28, 2000
v	No. 216501 Wayne Circuit Court
MICHAEL HELTON, Defendant-Appellant.	LC No. 98-006565

Before: Collins, P.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

The trial court, acting as factfinder, convicted defendant Michael Helton of felonious assault[1] and possession of a firearm during the commission of a felony (felony-firearm).[2] The trial court sentenced Helton to five years' probation for the felonious assault conviction and two years' imprisonment for the felony-firearm conviction. Helton appeals of right. We affirm.

I. Basic Facts And Procedural History

This case arises from a dispute between Helton and the complainant, Michael McKarge, at a party store on May 13, 1998, in Westland. McKarge testified that he went to Al's Beverage to purchase some beer and, when he entered the store, he recognized his friend Michael Gobel. While McKarge and Gobel were speaking, Walter Wyeth, Jr. started arguing with Gobel. Wyeth then left the store.

Sometime later, Wyeth returned to the store along with Helton and Rodney Smith. McKarge and Helton then got into an argument.[3] According to McKarge, Helton threatened to kill him and Gobel. McKarge responded by cursing at Helton who then told Wyeth and Smith to go get his SKS rifle. Wyeth and Smith left, while Helton, McKarge, and Gobel remained at the party store. McKarge positioned himself behind a rack stocked with potato chips and continued arguing with Helton. When the other store patrons realized Helton was serious about his threats,

[1] MCL 750.82(1); MSA 28.277(1).

[2] MCL 750.227b; MSA 28.424(2).

[3] McKarge stated that he had never had any previous "run-ins" with Helton or his friends.

they "hit the floor," dropping their groceries as they sought shelter. When the store owner yelled that he was calling the police, Helton warned him not to place the call. Less than a minute after Helton had directed his friends to get the gun, they returned carrying an SKS rifle. They did not enter the store, but McKarge could see them through the glass storefront passing the gun to Helton, who was approximately thirty feet away from him at the time.

McKarge said that after Helton obtained the gun, while he was still outside, Helton pointed the gun at him. McKarge flung himself to the floor to avoid being shot, but landed on a broken bottle, cutting his leg. As McKarge tried to crawl to the rear exit of the store, he heard the store owner repeatedly warn Helton that the police were on their way to the store, which apparently made Helton nervous. After about thirty seconds, Helton, Wyeth, and Smith were fled.

At trial, Gobel's recollection of what happened at the party store was fairly similar to McKarge's version of the events that transpired on the evening of May 13, 1998. He said that he went to Al's Beverage to get some pop, where he saw Wyeth accompanied by two women. Wyeth disliked Gobel because there had been an occasion at the apartment complex where they both lived when he thought Gobel was staring at him, which explains why Gobel overheard Wyeth tell the women, "Here goes that punk. We should beat his ass." Gobel did not respond, because he did not want to start trouble. After McKarge arrived, Gobel stated, Wyeth told him they should "take this in the alley." However, Wyeth left the store and returned with Helton and Smith, who told Wyeth and Smith to go get his SKS rifle. Although Gobel heard McKarge say "He's got a gun," he never saw Helton with a gun because he was hiding behind a shelf that blocked his view. Gobel ran to the back of the store and Wyeth, Smith, and Helton left.

Helton's perspective on the course of events was very different. According to him, on the evening of the altercation, he was sitting in his living room watching TV. Suddenly Wyeth, whom he knew as "James," appeared at his apartment and asked if he could borrow a baseball bat because he was having problems at the party store. Helton thought that he should go to the store to investigate the problem and to act as a "peacekeeper." When he arrived there, he saw a large man standing inside the store. The man started yelling at him and, Helton said, he asked the man to step outside the store, but the man refused to do so. Helton recalled that by this time he had abandoned the idea of trying to calm the situation and said that he wanted to fight the man so they could "settle [the dispute] like men." At this point, Wyeth appeared with a gun, which he tried to point at the man standing in the store. Helton shoved Wyeth and told him that they did not need a gun. Helton did not realize at the time that he owned the gun over which he and Wyeth were fighting; he believed that Wyeth had taken his gun from his apartment.

II. Sufficiency Of The Evidence

A. Standard Of Review

Helton challenges whether the prosecutor introduced sufficient evidence to support his convictions of both offenses. In reviewing the sufficiency of the evidence in an appeal from a bench trial, we must determine whether, when viewing the evidence in a light most favorable to

the prosecutor, a rational factfinder could determine that the prosecutor had proved the essential elements of the crime beyond a reasonable doubt.[4] In effect, despite this somewhat deferential view of the evidence, we review the record itself de novo. To the extent that Helton's argument also requires us to construe and apply a statute, review is also de novo.[5]

B. Felonious Assault

The prosecutor in this case had to prove beyond a reasonable doubt that there was an assault with a dangerous weapon and that Helton intended to injure his victim or make his victim reasonably fear an immediate battery at the time of the assault.[6] Helton argues that the prosecutor failed to present sufficient evidence that he had the requisite intent to be guilty of felonious assault because, at the time he allegedly pointed the gun at McKarge, he was outside the party store while McKarge was inside the store. This, Helton argues, indicates that he did not actually intend to shoot McKarge and he was too far away for McKarge to fear him.

Generally speaking, evidence that a defendant pointed a gun at another person is sufficient evidence to support a felonious assault conviction.[7] In this case, however, the prosecutor introduced additional evidence supporting the intent element. For instance, McKarge testified that Helton pointed a gun at him and that Helton told him that he was going to kill him, which minimally supports an inference that Helton intended to injure McKarge. Further, McKarge said that he threw himself on the ground when he saw Helton with the gun, which strongly suggests that he feared an immediate battery – being shot. Although Helton's testimony contradicted McKarge's testimony on certain points, the trial court was entitled to find that McKarge was the more credible witness.[8] Therefore, we conclude that the evidence was sufficient to support Helton's felonious assault conviction.

C. Felony-Firearm

Helton also contends that there was insufficient evidence to support his felony-firearm conviction because the prosecutor failed to introduce evidence showing the gun used to commit this crime was a firearm and that the gun the police seized was the gun he used to commit the crime. MCL 8.3t; MSA 2.212(20) defines a firearm:

> The word "firearm", except as otherwise specifically defined in the statutes, shall be construed to include *any weapon* from which a dangerous projectile may be propelled by using explosives, gas or air as a means of propulsion, except any

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[4] See *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

[5] See *People v Miller*, 238 Mich App 168, 170; 604 NW2d 781 (1999).

[6] *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

[7] *Id*. at 506.

[8] *People v Givans*, 227 Mich App 113, 123-124; 575 NW2d 84 (1997).

> smooth bore rifle or handgun designed and manufactured exclusively for propelling BB's not exceeding .177 calibre by means of spring, gas or air.[9]

The arresting officer testified that the rifle the police seized from Helton's apartment was a loaded semiautomatic. Because the gun was loaded with a projectile, it is a firearm within the meaning of the statute. McKarge identified the gun the police seized from Helton's apartment as the gun used in the offense. Further, McKarge testified that Helton told his companions to retrieve an SKS rifle, which was the same type of gun the police seized from Helton's apartment. Thus, we conclude that the prosecutor introduced sufficient evidence to show that the gun the police seized was a firearm and that it had been used in the offense.

Affirmed.

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen
/s/ William C. Whitbeck

[9] Emphasis added.