STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant	UNPUBLISHED February 16, 2001
v	No. 219575 Wayne Circuit Court
VICTOR WALKER, Defendant-Appellee.	LC No. 98-009689

Before: Neff, P.J., and Holbrook, Jr., and Jansen, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of felonious assault, MCL 750.82; MSA 28.277, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was subsequently sentenced to concurrent terms of one to four years in prison for the convictions of felonious assault, to be served consecutively and following a two-year sentence for felony-firearm. Defendant appeals as of right and we affirm.

Defendant raises two issues on appeal. He contends that there was insufficient evidence to support his convictions of felonious assault and that his sentences violate the principle of proportionality.

I

Defendant first argues that the evidence at trial was insufficient to support a guilty verdict of felonious assault because a rational trier of fact could not have found the essential elements of the offenses beyond a reasonable doubt. When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution to determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

Defendant argues that the prosecution failed to demonstrate that he did not act in self-defense. The killing of another in self-defense is justifiable homicide if the defendant honestly and reasonably believed that his life was in imminent danger or that there was a threat of serious bodily harm. *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). Once evidence of self-

defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt. *People v Truong*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

In the present case, although defendant had been attacked by some other men after an outdoor party, he was able to get away from those men and went to his house. The other men also left for another house nearby, and defendant later shot his handgun into the air a few times. Defendant then reentered his house and a few minutes later, a bottle was thrown into defendant's window. Police officers arrived at the scene, and as the police officers were walking near defendant's house, defendant again shot his gun several times. Under these circumstances, defendant was not in imminent danger either at the time when he first fired his gun into the air because he had retreated to his own house and the other men were at another house or at the time he shot in the direction of the police officers. The most recent threat to defendant had occurred several minutes before he shot outside the house. Furthermore, although defendant stated that he recognized the voice of one of his attackers at the time he shot, the group of men from the party were not approaching the house. Consequently, there was sufficient evidence presented by the prosecution for the jury to conclude that defendant did not honestly or reasonably believe that his life was in imminent danger or that there was a threat of serious bodily harm at the times that he shot his gun.

Defendant also contends that the evidence was insufficient to show that he was trying to harm anyone when he fired his gun. 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 Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Even if defendant was not actually trying to harm anyone, the intent element requires that there be an intent to injure *or* to place the victim in reasonable apprehension of an immediate battery.

In the present case, taken in a light most favorable to the prosecution, the two police officers who initially responded to the scene testified. Officer Bray testified that defendant opened the door of his house and shot his gun two or three times straight ahead, not up in the air. He and his partner, Officer Montgomery, took cover and returned fire and yelled "Police" several times. Officer Montgomery saw the barrel of a gun pointed at him when they arrived at defendant's house and immediately took cover. Officer Montgomery believed defendant shot his gun twice and the officer believed that he was going to be hit because the barrel of the gun was pointed at his face. Under these circumstances, the jury could reasonably conclude that defendant intended to place the victims in reasonable apprehension of an immediate battery even if there was no intent to injure. Accordingly, there was sufficient evidence presented by the prosecution to prove the elements of felonious assault beyond a reasonable doubt.

II

Next, defendant argues that the trial court abused its discretion by sentencing him to one to four years in prison for each count of felonious assault, in violation of the principle of proportionality.

Defendant's minimum sentence of one year for the assault convictions is at the lowest end of the guidelines range of twelve to forty-eight months. Sentences falling within the

recommended range are presumptively neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). However, "even a sentence within the sentencing guidelines could be an abuse of discretion in unusual circumstances." *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). Defendant contends that his lack of a criminal history and the nature of the offense make the sentence disproportionate. Lack of a criminal history, however, is not an unusual circumstance that overcomes the principle of proportionality as it is accounted for in the guidelines. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Further, defendant does not explain how the nature of the offense creates an unusual circumstance such that the one-year minimum term is disproportionate. We find no unusual circumstances of this case to conclude that the sentence is disproportionate.

Consequently, the trial court did not abuse its discretion because defendant's sentence does not violate the principle of proportionality.

Affirmed.

/s/ Janet T. Neff
/s/ Donald E. Holbrook, Jr.
/s/ Kathleen Jansen