

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HECTOR B. RUIZ, a/k/a HECTOR G. RUIZ,

Defendant-Appellant.

UNPUBLISHED
February 27, 2001

No. 220099
Wayne Circuit Court
LC No. 98-011268

Before: White, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant was charged with three counts of assault with intent to murder, MCL 750.83; MSA 28.278, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was convicted of three counts of the lesser included offense of felonious assault, MCL 750.82; MSA 28.277, and one count of felony-firearm. Defendant was sentenced to two years in prison for the felony-firearm conviction and five years' probation for the felonious assault convictions. We affirm.

On September 27, 1997, Lynn Copley, who was living with defendant and his mother, ended her relationship with defendant. Later that same evening, Copley returned to defendant's home with Frank Matteini and Maurine O'Donnell in order to obtain personal belongings. Once they arrived, defendant came outside and began an argument with Copley and eventually retrieved his gun from his home. After putting the gun in O'Donnell's face and uttering a threat, defendant intentionally fired one shot in the air in order to scare Copley, Matteini, and O'Donnell, but defendant claimed that two other shots were fired accidentally as he was bringing the gun down. Unfortunately, O'Donnell was shot in the chest.

I

Defendant first argues that the trial court erred in denying his motion for directed verdict on the original charge of assault with intent to commit murder, MCL 750.83; MSA 28.278. We disagree. In reviewing a trial court's decision regarding a motion for a directed verdict, we review the record de novo and consider the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999); *People v Crawford*, 232 Mich App 608, 615-616; 591 NW2d 669 (1998).

The elements of assault with intent to murder are: (1) an assault, (2) with an actual intent to kill, and (3) which, if successful, would make the killing murder. *People v Plummer*, 229 Mich App 293, 305; 581 NW2d 753 (1998). Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. *Crawford, supra*; *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). The intent to kill may be proven by inference from any facts in evidence, *id.*, and because proving a defendant's state of mind is difficult, minimal circumstantial evidence is sufficient. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). In addition, all conflicts in the evidence must be resolved in favor of the prosecution. *Id.*

In *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996), this Court found sufficient evidence of assault with intent to commit murder when the prosecution provided testimony that the defendant pointed a gun at his former girlfriend's boyfriend and warned the boyfriend not to come any closer or he would kill him. *Id.* The defendant then pulled the trigger several times, but no bullets were fired. *Id.*

Similarly, in the instant case, there was testimony that defendant put his gun in O'Donnell's face, pointed the gun directly at the vehicle, and asked her, "Do you want some of this?" Also, O'Donnell was struck by one of the bullets. Further, Matteini thought that he was going to be shot when he saw defendant bring the gun over defendant's head and straight down. Moreover, all the victims were in fear that they might be struck by one of the shots defendant had fired. Based on this evidence, we are persuaded that the evidence presented by the prosecutor was sufficient to prove beyond a reasonable doubt the essential elements of assault with intent to murder. *Mayhew, supra*; *Crawford, supra*. Consequently, the trial court did not err in denying defendant's motion for directed verdict regarding the assault with intent to murder charges.

II

Defendant next argues that there was insufficient evidence to support his conviction and that the jury's verdict was against the great weight of the evidence. Again, we disagree.

The prosecutor must introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). A conviction based on anything less than this would violate due process. *Id.* When reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*; *People v Randolph*, 242 Mich App 417, 419; 619 NW2d 168 (2000).

The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). 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. *Davis, supra* at 53. In the instant case, defendant testified that he "pointed the gun in the air" and "fired a shot to scare them away." Since the intentional discharge of a firearm at someone within range is an assault, there was sufficient evidence presented supporting the first element of the crime. *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992).

Also, defendant committed the assault with a handgun, which is a dangerous weapon. *People v Norris* 236 Mich App 411, 415; 600 NW2d 658 (1999). Hence, there was sufficient evidence supporting the second element of the crime. Finally, defendant testified that he intended to place the victims in reasonable apprehension of an immediate battery and firing the gun caused apprehension in the victims. Thus, there was sufficient evidence supporting the final element of felonious assault.

With regard to defendant's felony-firearm conviction, the fact that defendant committed the felonious assaults while using a handgun sufficiently proves the elements of the crime. *Davis, supra* at 53. Therefore, in reviewing the facts in the light most favorable to the prosecution, a rational trier of fact could have concluded that the elements of felonious assault and felony-firearm were proven beyond a reasonable doubt.¹

III

Defendant's final argument is that the trial court committed reversible error when it failed to instruct the jury on accident, refused defendant's request to instruct the jury on reckless or careless discharge of a firearm, MCL 752.861; MSA 28.436(21),² and failed to adequately respond to questions the jury asked. We disagree.

Pursuant to MCL 768.29; MSA 28.1052,³ it is the duty of the trial court to instruct the jury concerning the law applicable to the case and to fully and fairly present the case to the jury

¹ Regarding defendant's argument that the jury's verdict was against the great weight of the evidence, an objection going to the weight of the evidence can be raised only by a motion for new trial before the trial court. *People v Norman*, 184 Mich App 255, 257; 457 NW2d 136 (1990). Because defendant failed to bring such a motion, this issue has not been preserved for appeal. *Id.* Nonetheless, after a thorough review of the lower court record, we conclude that the jury verdict was not against the great weight of the evidence.

² MCL 752.861; MSA 28.436(21) states:

Any person who, because of carelessness, recklessness or negligence, but not willfully or wantonly, shall cause or allow any firearm under his immediate control, to be discharged so as to kill or injure another person, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison for not more than 2 years, or by a fine of not more than \$2,000.00, or by imprisonment in the county jail for not more than 1 year, in the discretion of the court.

³ MCL 768.29; MSA 28.1052 states:

It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the

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in an understandable manner. *People v Mills*, 450 Mich 61, 80; 537 NW2d 909, modified 450 Mich 1212 (1995); *People v Pouncey*, 437 Mich 382, 386; 471 NW2d 346 (1991). A criminal defendant has the right to have a properly instructed jury consider the evidence against him. *Mills, supra*, 450 Mich 80-81. However, a trial court is only required to present an instruction of the defendant's theory if the defendant makes such a request and it is supported by the evidence. *Id.* at 81.

After a thorough review of the record, we conclude that the trial court did instruct the jury on accident. Therefore, defendant's argument has no merit. In addition, defendant's own testimony indicates that the evidence adduced at trial could not have supported a misdemeanor conviction for the careless, reckless, or negligent discharge of a firearm. Thus, this instruction was not appropriate. In *People v Cummings*, 458 Mich 877; 585 NW2d 299 (1998), our Supreme Court stated that

[b]ecause the uncontested facts adduced at trial established that the firing of the weapon by the defendant was intentional, the circuit court properly refused a requested instruction on the lesser offense of careless, reckless and negligent discharge of a firearm causing death because defendant's conduct did not fall within the scope of the conduct prohibited by the statute. [*Id.*]

Here, defendant testified that he intentionally fired his weapon at least once. Therefore, the trial court properly refused a requested instruction on the lesser offense of careless, reckless and negligent discharge of a firearm because defendant's conduct did not fall within the scope of the conduct prohibited by the statute. *Id.* In addition, we find defendant's argument that the trial court did not adequately answer the jury's questions unpersuasive. Each time the trial court was asked a question by the jury, the trial court re-read the applicable instruction. Accordingly, the jury was properly instructed by the trial court.

Affirmed.

/s/ Helene N. White
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra

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truth regarding the matters involved. The court shall instruct the jury as to the law applicable to the case and in his charge make such comment on the evidence, the testimony and character of any witnesses, as in his opinion the interest of justice may require. The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused.