STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 25, 2003
v MICHAEL WYATT, Defendant-Appellant.	No. 242366 Wayne Circuit Court LC No. 01-010733

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v MARSHALL BROWN, Defendant-Appellant.	No. 242367 Wayne Circuit Court LC No. 01-010733

Before: Fort Hood, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendants Michael Wyatt and Marshall Brown were tried jointly, before a single jury. Defendant Wyatt was convicted of felonious assault, MCL 750.82, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of eighteen months to four years for the assault conviction, and two to five years for the CCW conviction, to be served consecutively to a two-year term for the felony-firearm conviction. Defendant Brown was convicted of third-degree fleeing or eluding a police officer, MCL 750.479a(3), CCW, and felony-firearm. He was sentenced to concurrent prison terms of two to five years for the fleeing or eluding conviction, and two to five years for the CCW conviction, to be served consecutively to a two-year term for the felony-firearm conviction. Defendant Wyatt appeals as of right in Docket No. 242366, and defendant Brown appeals as of right in Docket No. 242367. We affirm both defendants' convictions and sentences.

I. Underlying Facts

Defendants' convictions arise from allegations that, at approximately 2:00 a.m. on August 27, 2001, defendants and Tony Mumphord[1] assaulted two women outside a Detroit nightclub. Complainant Angie Hunter testified that, as she was leaving a nightclub with Juanna Edwards,[2] they were approached by a man, whom she later identified as defendant Wyatt, and a second man, who were both en route to a nearby car. She indicated that defendant Wyatt appeared to be going toward the rear passenger seat of the car, and that a third man, whom she identified as defendant Brown, was already seated in the driver's seat of the car. Complainant Hunter testified that, when defendant Wyatt approached her, he pointed a gun "at her face" and said, "You ain't saw sh**. You ain't saw a motherf**kin' thing." At the time, defendant Wyatt was approximately fifteen to twenty feet away from her. Complainant Hunter indicated that she and Edwards began screaming and running away from defendants, and that she tripped and fell. After she fell, police officers drove up, she told them what happened, and they pursued defendants' car.

Officers Kenneth Germain and John Mozak testified that they were patrolling the subject area in a marked police car, when Officer Germain observed a 1988 Ford Crown Victoria parked in the middle of a street. The officer indicated that, just past the vehicle, he observed two women standing directly in front of a man, who had his right arm extended with a black handgun in his hand. Officers Germain and Mozak testified that, according to their report, Mumphord was identified as the man pointing the gun at the two women. Officer Germain indicated that, at the time, he could not see anyone else in the car, and did not see anyone else in the street. The officers testified that the man holding the gun then ran to the car, and the officers chased the vehicle. Officers Germain and Mozak were subsequently assisted by several other officers, including Officers John Baritche, Alvin Cherry, Matthew Gnatek and John Chaisson.

At some point during the chase, the officers observed that three people were in the car. During the chase, a bulletproof vest and a handgun were thrown from the front passenger side window of the car[3]. Ultimately, the car stopped, and the three men emerged from the car and ran in different directions. The officers later discovered that defendant Brown was the driver of the car, Mumphord was the front seat passenger, and defendant Wyatt was the rear seat passenger. Officers Germain and Baritche pursued and ultimately arrested defendant Brown. Three officers testified that, as defendant Brown was being escorted back to the patrol car, a .38 blue steel revolver fell from his pant leg.

Officers Mozak, Gnatek and Chaisson pursued and ultimately arrested defendant Wyatt. Officer Gnatek testified that, upon searching the suspect car, he discovered a loaded .380 caliber Titan semiautomatic handgun lying on the rear seat.

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[1] Mumphord pleaded guilty to felonious assault and felony-firearm.

[2] Edwards did not testify at trial.

[3] Both items were later retrieved by police officers; the handgun was fully loaded.

I. Issues raised by Defendant Wyatt in Docket No. 242366

A. Sufficiency of the Evidence

Defendant Wyatt first argues that the evidence was insufficient to support his convictions arguing that "[t]he overwhelming evidence produced at trial showed that the defendant did not participate in any criminal conduct." Defendant makes no specific argument with regard to any particular element of any of the three offenses charged. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a 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. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514. Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of felonious assault are (1) an assault,[4] (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 Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The intent to place the victim in fear of an immediate battery may be inferred from the circumstances. See *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992).

The elements of CCW in a motor vehicle are (1) the presence of the weapon in a vehicle operated or occupied by the defendant, (2) the defendant knew or was aware of its presence in the vehicle, and (3) the defendant took part in carrying or keeping the weapon in the vehicle. *People v Nimeth*, 236 Mich App 616, 622; 601 NW2d 393 (1999).

The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempted commission of any felony other than those four enumerated in the statute. MCL 750.227b(1); *People v Mitchell*, 456 Mich 693, 698; 575 NW2d 283 (1998). Possession of a weapon may be actual or constructive and may be proved by circumstantial evidence. *People v Hill*, 433 Mich 464, 469-470; 446 NW2d 140 (1989). "[A] defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant." *Id.* at 470-471.

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[4] A simple criminal assault is either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995).

Here, viewed in a light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to conclude that defendant Wyatt committed the crimes of felonious assault, CCW, and felony-firearm. There was evidence that defendant Wyatt, whom complainant Hunter identified in a lineup, approached complainants Hunter and Edwards, and pointed a gun at them from approximately fifteen feet away. In fact, complainant Hunter testified that defendant Wyatt pointed the gun "at her face." The complainants began screaming and running away from defendant Wyatt. Although two officers indicated in their report that Mumphord was the person who pointed the gun at the women, given complainant Hunter's positive identification of defendant Wyatt, this discrepancy was a matter involving credibility, which is appropriately left to the trier of fact to resolve and will not be resolved anew by this Court. *People v Givans*, 227 Mich App 113, 123-124; 575 NW2d 84 (1997).

There was also evidence that, after menacing the women, defendant Wyatt got into the rear seat of the getaway car, which was immediately pursued by the police, and was ultimately arrested. Upon searching the getaway car, an officer discovered a loaded .380 caliber Titan semiautomatic handgun lying on the rear seat. It can be inferred from this evidence that defendant Wyatt, who was the sole rear seat passenger of the car, was aware of and had possession of the weapon. In sum, viewed in a light most favorable to the prosecution, the evidence was sufficient to sustain defendant Wyatt's convictions of felonious assault, CCW, and felony-firearm.

B. Cumulative Error Theory

We reject defendant Wyatt's final argument that the cumulative effect of several other claimed errors deprived him of a fair trial. Within this issue, defendant claims that the trial court erred by failing to give certain jury instructions, failing to order separate juries, and failing to fully ascertain whether proposed witness Mumphord clearly exercised his right against self-incrimination. But the record reflects that, in each of these instances, defense counsel either acquiesced or expressed satisfaction with the trial court's actions. Because any objections were waived, there are no errors to review. See *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

II. Issues raised by Defendant Brown in No. 242367

A. Double Jeopardy

Defendant Brown first argues that his convictions of both CCW and felony-firearm for the same criminal intent are prohibited by the Double Jeopardy Clauses of the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 15. We disagree.

Because defendant Brown failed to raise this double jeopardy claim below, we review this unpreserved constitutional claim for plain error affecting defendant's substantial rights, i.e., affecting the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

We reject defendant Brown's argument in light of *People v Sturgi*s, 427 Mich 392, 405-406, 410; 397 NW2d 783 (1986), in which our Supreme Court held that felony-firearm and CCW are distinct offenses which may be separately punished in a single trial when the CCW offense is not the predicate of the felony-firearm offense. The Court in *Sturgis* explained:

> The conduct made punishable under the felony-firearm statute, is not the mere possession of a firearm. Rather, it is possession of the firearm *during the commission of or attempt to commit a felony* that triggers a felony-firearm conviction. The conduct made punishable by the concealed weapon statute is likewise not the possession of a firearm, it is the carrying of a weapon, concealed. Each statute is directed at a distinct object which the Legislature seeks to achieve through the imposition of criminal penalties. Where the act giving rise to the predicate felony is distinct from the act giving rise to the concealed weapon felony, both convictions are authorized by the Legislature. [*Id*. 409-410 (emphasis in original).]

In this case, because the felony-firearm conviction against defendant Brown was not based on the CCW conviction, but instead on the fleeing or eluding conviction, there is no double jeopardy violation. See *id*. at 405-406. Because defendant Brown's convictions of both CCW and felony-firearm do not violate the double jeopardy protection against multiple punishments, defendant Brown has failed to demonstrate plain error.

B. Right to present a defense

Defendant Brown's final argument is that the prosecutor's intimidation of proposed witness Mumphord prompted him to invoke his Fifth Amendment privilege against self-incrimination, thereby violating his constitutional right to present a defense.[5] We disagree.

Defendant Brown listed Mumphord as a witness. On the first day of trial, the prosecutor, noting that he was unaware if the court was aware, advised the court and the parties that there was a pending federal warrant for Mumphord for felon in possession of a firearm. He then noted that, because Mumphord would be called to testify and anything he said could be used against him, he should be appointed counsel. The matter was raised again after the prosecution rested. In the interim, the trial court appointed counsel for Mumphord. Appointed counsel indicated that, after talking to the parties involved, he had advised Mumphord to assert his Fifth Amendment right not to testify because, by testifying, he would be placing himself in jeopardy in the possible federal court case. The following exchange then occurred:

[5] Contrary to defendant Brown's statement of this issue, Mumphord was listed as a defense witness for defendant Brown, as opposed to a prosecution witness.

> [*Mumphord*]: It's not that I don't want to testify. It's that if I do testify due to the threats sent to you through him to me that, you know it's gon' be some severe consequences if I help these men defend themselves.[6]
>
> [*Mumphord's counsel*]: Okay. So based on that you choose not to testify, correct?
>
> [*Mumphord*]: Right.

Thereafter, the prosecutor attempted to clarify that there were "no threats," and that Mumphord was referring to the fact that "[w]hat he says can and will be used against him in a potential federal trial." Mumphord's counsel also stated that the information regarding the possible federal trial is what he discussed with Mumphord. Mumphord subsequently began spurting out comments, and indicated:

> No, I'll testify. Ain't no more y'all can do to me but kill me. That's the only thing left.

Mumphord's counsel subsequently indicated that Mumphord had stated that he wasn't "gon' do nothing. [He's] just gonna sit back there," and noted, "[t]hat's a quote." The court granted defendant Brown's attorney's request to speak with Mumphord in the presence of Mumphord's attorney. Ultimately, defendant Brown's attorney indicated that Mumphord wanted to speak with his previous appointed attorney, which the trial court denied, noting that he was unavailable. Thereafter, defendant Brown's counsel indicated that they had no further witnesses.

This Court reviews de novo the constitutional issue of whether a defendant was denied his constitutional right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). However, because defendant Brown failed to object to the prosecutor's alleged intimidation of Mumphord, that issue is reviewed for plain error affecting defendant's substantial rights. *Carines*, *supra*.

We reject defendant Brown's claim that the prosecutor intimidated Mumphord into not testifying. The prosecutor's conduct during his exchange with Mumphord and Mumphord's counsel cannot reasonably be construed as an attempt to intimidate him into refusing to testify. As previously indicated, an attorney was appointed by the court to represent Mumphord with respect to the potential issues of self-incrimination. After Mumphord's counsel had an opportunity to consult with Mumphord, he explicitly stated on the record that he had advised Mumphord not to testify. Thereafter, in response to his counsel's question, Mumphord stated on the record that he was choosing not to testify. The record demonstrates that Mumphord's decision was based on the advice of his counsel, which weighs against a finding of improper prosecutorial intimidation. See *People v Dyer*, 425 Mich 572, 578 n 5; 390 NW2d 645 (1986). Further, there is no indication that the prosecutor threatened to bring criminal charges against

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[6] Mumphord was referring to alleged threats by the prosecutor related to him by his attorney. Both the prosecutor and the defense attorney denied any threats were made.

Mumphord or otherwise punish him for testifying. Rather, the "threat" or "intimidation" alluded to by defendant Brown was the prosecutor informing Mumphord of the possibility that his trial testimony could be used against him in a pending federal court proceeding, which does not amount to coercion. In sum, there is nothing to suggest that Mumphord's decision, made in consultation with his court-appointed attorney, to invoke the privilege against self-incrimination was the result of improper intimidation. Accordingly, this issue does not warrant reversal.

Affirmed.

/s/ Karen M. Fort Hood
/s/ William B. Murphy
/s/ Janet T. Neff