STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 27, 2004
v	No. 250460 Marquette Circuit Court
DAVID PATRICK MCMAHON, Defendant-Appellant.	LC No. 02-040219-FH

Before: Whitbeck, C.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of felonious assault, MCL 750.82. He was sentenced by the trial court to five months in jail and twelve months on probation. We affirm.

The charge against defendant arose out of an incident that occurred at his home in November 2002. The complainant, a registered nurse and medical case manager for a local company, had attempted to make contact with defendant to resolve some outstanding insurance-related medical treatment and billing issues. It is undisputed that an acrimonious relationship existed between defendant and his insurance company, and that defendant had not been cooperative with the complainant from the outset of her assignment to his case. In fact, defendant advised her not to come to his home unless she had an insurance check to cover costs related to his treatment for ongoing health problems. The complainant nonetheless attempted to meet with defendant, called in advance to let him know she was coming, and arrived at his house with groceries for him. She testified that when she knocked on the front door, defendant pointed a .22 caliber rifle at her. She stated that he "jabbed" the gun at her while yelling obscenities. The complainant testified that, in response, she froze and "just stood there." Defendant finally slammed the door, and the complainant got into her car and left the area.

Defendant testified at trial and denied that he ever pointed the rifle at the complainant. He claimed that he was cleaning the rifle when the complainant arrived and didn't answer the door at first, but the knocking continued. He then went to the door with the gun he was cleaning in his left hand and opened the door with his right. Defendant testified that he held the rifle in an upright position, perpendicular to the floor, and never pointed it at the complainant. Defendant did admit that he hollered obscenities at the complainant and ordered her to get off his property. At the conclusion of proofs, the jury convicted defendant of the charged offense of felonious assault.

On appeal, defendant contends that the trial court erred in denying his motion for a directed verdict because insufficient evidence was produced by the prosecution at trial on the issue of whether the gun in question was a dangerous weapon. Defendant asserted that the rifle was in such disrepair that it was incapable of firing and, thus, was not a "dangerous weapon" as contemplated by the felonious assault statute, MCL 750.82.[1] In a related argument, defendant contends that due to this same alleged evidentiary deficiency, his conviction should be reversed because the verdict is not supported by sufficient evidence.

This Court reviews de novo a trial court's ruling on a defendant's motion for directed verdict to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001); *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999). "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). It is not permissible for this Court to determine the credibility of witnesses in reviewing a trial court's ruling on a motion for directed verdict. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). This Court will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991). We apply the same analysis to determine whether there was sufficient evidence of guilt to support the jury's verdict, i.e., this Court views the evidence presented at trial in a light most favorable to the prosecution to determine whether there was sufficient evidence for a rational trier of fact to find the essential elements of the crime were proven beyond a reasonable doubt. *Jolly*, *supra* at 466; *People v Avant*, 235 Mich App 499, 506; 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. *Avant*, *supra* at 505; *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). On appeal, defendant does not challenge the proofs regarding the first or third elements of the charged offense. Defendant argues only that the .22 caliber rifle is not a "dangerous weapon" under the felonious assault statute because the prosecution failed to establish that the gun was operable at the time of the alleged assault. We disagree.

In *People v Doud*, 223 Mich 120, 128-129; 193 NW 884 (1923), our Supreme Court held that the prosecution need not show that a revolver is, in fact, loaded in order to prove a felonious

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[1] MCL 750.82 provides in pertinent part:

> (1) Except as provided in subsection (2), a person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.

assault case. In *People v Stevens*, 409 Mich 564; 297 NW2d 120 (1980), the Court reversed this Court's determination that a completely inoperable starter pistol constituted a dangerous weapon under the felonious assault statute. The defendant in *Stevens* committed an assault using a starter pistol loaded with eight .22-caliber shells. However, the barrel had been bored out and the firing pin filed down to prevent firing. Utilizing the definition of a firearm contained in MCL 8.3t,[2] the *Stevens* Court concluded that the starter pistol was not a dangerous weapon because it was incapable of firing a projectile.

Subsequently, in *People v Prather*, 121 Mich App 324, 329-330; 328 NW2d 556 (1982), this Court considered whether an unloaded gun, which was not shown to have the capacity of being fired if loaded, constituted a dangerous weapon within the meaning of the felonious assault statute. The *Prather* Court, *supra* at 329-330, held in pertinent part:

> [I]t is the general rule that an unloaded gun is a dangerous weapon for purposes of the felonious assault statute. *People v Doud*, 223 Mich 120; 193 NW 884 (1923); *People v Williams*, 6 Mich App 412; 149 NW2d 245 (1967). . . . Further, we find that the prosecutor need not present proof of operability as an element of a prima facie case in a felonious assault prosecution.
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> Defendant's reliance on *People v Stevens*, 409 Mich 564; 297 NW2d 120 (1980), is misplaced. In that case, the parties stipulated that the weapon involved, a starter pistol, was mechanically defective to the point where it was incapable of firing. The Supreme Court held that since the pistol was not capable of propelling a dangerous projectile, because of the very nature of a starter pistol, it was not a gun, revolver, or pistol within the meaning of the felonious assault statute. In the instant case, there was no stipulation. The defendant testified that he did not know if the gun would fire because he had never fired it. The operability of the gun could not be established at trial because the gun was never retrieved. However, unlike the starter pistol in *Stevens*, a .38 caliber gun is one of the weapons enumerated in the felonious assault statute and is capable of propelling a dangerous projectile. MCL 8.3t; MSA 2.212(20). Therefore, we find that *Stevens* is distinguishable on its facts.

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[2] MCL 8.3t defines "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 smooth bore rifle or handgun designed and manufactured exclusively for propelling BB's not exceeding .177 caliber by means of spring, gas or air.

The definition of a firearm set forth in MCL 8.3t is consistent with MCL 750.222 and MCL 28.421.

See also *People v Smith*, 231 Mich App 50, 53; 585 NW2d 755 (1998).

In the instant case, defendant's reliance on *Stevens, supra,* is similarly misplaced. Unlike the starter pistol with a bored out barrel and no firing pin in the *Stevens* case, here the weapon was a .22 caliber rifle which clearly meets the requirements of a firearm set forth in MCL 8.3t. Moreover, unlike the *Stevens* case, there was no stipulation in this case that the weapon was inoperable. On the contrary, testimony, albeit conflicting, was introduced that the rifle may have been operable.

Investigating police officer Joel Johnson testified that, when executing a search warrant at defendant's residence, a rifle was found. Johnson testified that he and the chief of police, Bradford Arnsparger, then checked to make sure the rifle wasn't loaded and "found a round in the chamber that appeared to have not been fired off." According to Johnson, "[i]t appeared to be a live round." They attempted to empty the round, but it had to be pried out of the chamber. Johnson testified that when he first looked at the rifle, the bolt was "all the way forward and down" in a "locked position, meaning the bolt was down so that the weapon could be fired." Johnson did not recall whether the safety was on or off.

Chief Arnsparger testified that he was present when the search warrant was executed and defendant's gun was located. According to Arnsparger, the rifle was rather rusty and in need of cleaning; when it was handed to him, the gun's bolt was open, and there was a round in the chamber. Chief Arnsparger testified that Officer Johnson had to use a thin-bladed paring knife to get in behind the cartridge and gently dislodge the round from the chamber. Arnsparger testified that after the cartridge was removed, the bolt could not be closed. He further testified that when the rifle was brought to the police station, an effort was made to close the bolt on the gun but it would not close. When asked hypothetically if a gun with its bolt back (in an open position) could be fired, Arnsparger testified that "If the bolt is back, yes, the weapon cannot be fired." Significantly, however, he testified that he did not know whether or not the rifle was incapable of firing because he never test fired the weapon.

We conclude that the trial court did not err in denying defendant's motion for a directed verdict. As previously noted, the prosecution need not present proof of operability as an element of a prima facie case of felonious assault, *Smith, supra; Prather, supra.* Here, the prosecution presented evidence that the gun was a .22 caliber rifle that met the definition of a firearm. Moreover, Officer Johnson testified that when he first found the gun, its bolt was in a locked position ready to fire. Although Chief Arnsparger's testimony regarding the position of the gun's bolt when he first saw it differed from that of Officer Johnson, Arnsparger did not attempt to close the bolt before removal of the ammunition and further testified that he did not test fire the gun. Thus, he could not conclusively state that the rifle was inoperable. Viewing the above evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that the rifle was operable on the day in question. *Aldrich, supra.*

For the same reasons, we also conclude that there was sufficient evidence to support defendant's conviction for felonious assault. Defendant did nothing more than raise a question about the rifle's operability. Defendant testified at trial that the rifle, which had been given to him just after the opening of hunting season, was so dirty that it was not safe to fire. He stated that the bolt was not moving properly and "if you pull the bolt back, the round would not come

out of the chamber, out of the barrel." Defendant was purportedly attempting to clean the rifle when the complainant arrived at his house.

"Questions of credibility are left to the trier of fact and will not be resolved anew by this Court." *Avant, supra* at 506. Here, viewing the evidence in the light most favorable to the prosecution, sufficient evidence was introduced at trial for a rational trier of fact to find that the rifle was a dangerous weapon within the meaning of the felonious assault statute, MCL 750.82, and that the elements of felonious assault were proven beyond a reasonable doubt. *Id.*

Affirmed.

/s/ William C. Whitbeck
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello