

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BENNY JAMES GASTON,

Defendant-Appellant.

UNPUBLISHED

June 10, 2004

No. 246775

Wayne Circuit Court

LC No. 02-007281-01

Before: Sawyer, P.J., and Gage and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b, entered after a bench trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

When reviewing a challenge to the sufficiency of the evidence in a bench trial, we view the evidence presented 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. The trier of fact may make reasonable inferences from direct or circumstantial evidence in the record. *People v Petrella*, 424 Mich 221, 268-270, 275; 380 NW2d 11 (1985); *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990). A trial court's findings of fact are reviewed for clear error. MCR 2.613(C).

A new trial may be granted on some or all of the issues if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). If the evidence conflicts, the issue of credibility ordinarily should be left for the trier of fact. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). A defendant convicted in a bench trial need not move for a new trial in order to preserve the issue for appeal. MCR 7.211(C)(1)(c).

The elements of felonious assault are: (1) an assault; (2) with a dangerous weapon; and (3) with the intent to place the victim in reasonable apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). An assault is an attempt to commit a battery or an unlawful act that places another person in reasonable apprehension of receiving an immediate battery. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). The

elements of felony-firearm are: (1) the possession of a firearm; (2) during the commission of, or the attempt to commit, a felony. MCL 750.227b.

Defendant argues that the evidence was insufficient to support his convictions or, in the alternative, that the verdicts were against the great weight of the evidence. We disagree. The critical issue in this case was whether defendant possessed a handgun during the encounter with complainant. The trial court acknowledged that testimony from police officers was contradictory and could not, standing alone, support the verdicts, but found that complainant's testimony was credible and established the elements of the charged offenses. The trial court was entitled to determine the credibility of the witnesses. *Lemmon, supra*; *People v Marji*, 180 Mich App 525, 542; 447 NW2d 835 (1989). Complainant, who had a background in law enforcement, testified that defendant threatened to injure him and that he saw what appeared to him to be the grip of a handgun in defendant's hand. The trial court's finding that defendant possessed a handgun during the incident was a permissible inference and was not clearly erroneous. *Vaughn, supra*; MCR 2.613(C). The evidence was sufficient to support defendant's convictions. *Petrella, supra*. Defendant is not entitled to a new trial. *Gadomski, supra*.

A defendant has the constitutional, statutory, and common-law right to be personally present during all critical stages of his trial, including when witnesses testify against him. US Const, Ams VI, XIV; Const 1963, art 1, §§ 17, 20; MCL 768.3; *People v Parker*, 230 Mich App 677, 689; 584 NW2d 753 (1998). A defendant's voluntary absence from the courtroom after the trial has begun does not preclude the court from continuing with the proceedings. *People v Swan*, 394 Mich 451, 452; 231 NW2d 651 (1975). Where the record is silent concerning whether the defendant's absence was voluntary, a valid waiver of the right to be present cannot be presumed. In the absence of a valid waiver, a defendant's absence from trial warrants reversal only if there was any reasonable probability that the defendant was prejudiced by the absence. *People v Armstrong*, 212 Mich App 121, 129; 536 NW2d 789 (1995).

Defendant argues that the trial court denied him due process and the right to confront witnesses against him by allowing complainant to begin testifying in his absence. We disagree. Defendant did not object to the trial court's decision; therefore, absent plain error, he is not entitled to relief. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The trial court did not attempt to ascertain the reason for defendant's absence at the beginning of the second day of trial before allowing the trial to proceed. The trial court could not presume a valid waiver under the circumstances; however, reversal is not warranted. *Armstrong, supra*. Defendant does not indicate how complainant's testimony would have differed or how the assistance he afforded his counsel would have changed had he been present for all of complainant's testimony or had the trial court called a recess to allow defense counsel to review with him that portion of the testimony he missed. Defendant has not shown that it is reasonably probable that he was prejudiced by the trial court's decision to continue the trial in his absence. *Id.* No plain error occurred. *Carines, supra*.

Affirmed.

/s/ David H. Sawyer
/s/ Hilda R. Gage
/s/ Donald S. Owens