

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN PAUL MCMILLAN,

Defendant-Appellant.

UNPUBLISHED
December 1, 2009

No. 286419
Saginaw Circuit Court
LC No. 07-029535-FC

Before: Borrello, P.J., and Whitbeck and K. F. Kelly, JJ.

PER CURIAM.

Defendant John McMillan appeals as of right from his jury conviction of one count of assault with a dangerous weapon (felonious assault),¹ one count of carrying a dangerous weapon with unlawful intent,² one count of resisting and obstructing a police officer,³ and one count of possession of cocaine less than 25 milligrams.⁴ The trial court sentenced McMillan as a second habitual offender,⁵ to serve concurrent prison terms of 2 to 6 years for felonious assault, 24 to 90 months for carrying a dangerous weapon with unlawful intent, 15 to 36 months for resisting and obstructing a police officer, and 15 to 72 months for possession of cocaine less than twenty five milligrams. McMillan now appeals only his conviction of felonious assault. We affirm.

I. Basic Facts And Procedural History

McMillan's conviction of felonious assault resulted from an altercation between himself and Jamie Hakowski on the evening of July 26, 2007. Hakowski testified that McMillan was visiting the home of Herman Garcia, one of Hakowski's neighbors, at approximately 6:30 p.m. that night. While waiting in his truck, McMillan entered into a verbal altercation with an African-American minor, Jedquareus ("Ju-Ju") Hutson, in which McMillan called him "nigger." Hakowski intervened and verbally defended the boy, at which time McMillan "jumped out" of his truck, walked up to Hakowski, and pulled a knife on her. At trial, Hakowski positively

¹ MCL 750.82.

² MCL 750.226.

³ MCL 750.81d(1).

⁴ MCL 333.7403(2)(a)(v).

⁵ MCL 769.11.

identified the knife that McMillan used against her. McMillan held the knife under Hakowski's throat, called her a "nigger-lover," forcefully took her cordless phone, and smashed it on the ground. Hakowski pleaded for her life, and McMillan returned to his truck. Aside from Ju-Ju, no one else witnessed the assault.

After the altercation, Dale Hutson, Ju-Ju's grandmother and Garcia's neighbor, left her home and spoke with McMillan. Although Hutson was unavailable to testify at trial, the trial court admitted her testimony from the preliminary examination into evidence. Hutson testified that on the evening of July 26, 2007, Ju-Ju ran into her home and excitedly uttered, "There's a man got a knife on Jamie [Hakowski]." Hutson then left her home, walked up to the truck, and asked McMillan why he was picking on Ju-Ju and Hakowski. At that time, McMillan pulled out a knife, called her a "black bitch," and told her to get away from the truck. Hutson then went back into her home and retrieved her own knife (a meat cleaver), and confronted McMillan. She testified that she saw white powder in the truck on top of a blue folder, which she believed to be cocaine. After Hutson reached into the car and scattered the powder with the cleaver, McMillan became enraged, grabbed a small sledgehammer, and made threatening gestures toward her. Hutson noted that McMillan appeared to be under the influence of cocaine or alcohol at this time, as his hair was wet and stringy, he possessed a half-empty bottle of liquor, and was acting "crazy." However, after learning that the police were on their way, McMillan hurriedly left the scene.

Saginaw City Police Department police officers obtained the identity and home address of McMillan through his license plate number. Officer Douglas Wortley was the first to arrive at McMillan's residence, where he found McMillan sitting in his truck. Officer Wortley testified that McMillan refused to comply with lawful police orders, used his wife to shield himself from the police, and attempted to flee into his home. The police had to use a tazer on McMillan four times before he complied with their orders and submitted to the arrest. After searching McMillan's truck, the police recovered a knife, a bayonet, a sledgehammer, and white powder, which the Michigan State Police Crime Lab later confirmed to be cocaine. Detective Mark Walker measured the knife blade to be in excess of three inches in length.

II. Sufficiency Of The Evidence

A. Standard Of Review

McMillan argues that Hakowski was so thoroughly impeached that no reasonable jury could have believed her testimony. Accordingly, McMillan contends that the prosecution's evidence was legally insufficient for the jury to have found McMillan guilty of felonious assault beyond a reasonable doubt.

We review de novo a sufficiency of the evidence claim, viewing the facts in the light most favorable to the nonmoving party and deferring to the fact-finder's credibility determinations.⁶

⁶ *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

B. Elements of the Crime

A person is guilty of felonious assault when he “assaults another person with a . . . knife . . . or other dangerous weapon without intending to commit murder or inflict bodily harm less than murder.”⁷ The only two elements needed to prove felonious assault are: (1) an assault, (2) that is performed with a dangerous weapon.⁸ An assault is “an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.”⁹ Felonious assault is a general intent crime.¹⁰ For a knife to be considered a “dangerous weapon,” it must be in excess of three inches in length and was either intended to be used in an assault, or is likely to cause serious injury.¹¹

C. Analysis

More specifically, McMillan claims that Hakowski was an unreliable witness because she impeached herself regarding her association with Anthony Johnson, a friend who drives her to AA meetings. When asked why she denied her association with Johnson, Hakowski testified that she was embarrassed about attending AA meetings.

Due process requires that a criminal conviction be founded on sufficient, legally admissible evidence upon which the fact-finder could find the defendant guilty beyond a reasonable doubt.¹² As long as a witness’s testimony has not been robbed of all probative value or trustworthiness, the impeached or contradicted testimony is not sufficient to reverse and grant a new trial.¹³ When it comes to the weight and credibility of a witness’s testimony, we defer to the fact-finder’s determinations.

The evidence clearly supported that McMillan feloniously assaulted Hakowski. McMillan committed an unlawful act toward her by making verbal threats while holding a knife under her throat, forcefully taking her phone and smashing it on the ground.¹⁴ These actions were sufficient to give Hakowski “reasonable apprehension of receiving an immediate battery,” as evidenced by the fact that she began pleading for her life.¹⁵ McMillan’s behavior also clearly demonstrated his intent to commit an assault against Hakowski, as he deliberately placed the knife just below her neck.¹⁶ The knife was clearly a dangerous weapon, as it was being used to

⁷ MCL 750.82.

⁸ *People v Johnson*, 407 Mich 196, 222; 284 NW2d 718 (1979).

⁹ *People v Sanford*, 402 Mich 460, 479; 265 NW2d 1 (1978).

¹⁰ *Johnson*, *supra* at 222.

¹¹ MCL 750.226; *People v Czerwinski*, 99 Mich App 304, 307; 298 NW2d 19 (1980).

¹² *Id.*

¹³ *People v Musser*, 259 Mich App 215, 219; 673 NW2d 800 (2003).

¹⁴ *Sanford*, *supra* at 479.

¹⁵ *Id.*

¹⁶ *Johnson*, *supra* at 222.

assault someone and the blade exceeded three inches.¹⁷ These facts, when taken in the light most favorable to the prosecution, demonstrate that a reasonable jury could have found McMillan guilty of felonious assault beyond a reasonable doubt.

Further, McMillan is incorrect in arguing that the only probative evidence of his guilt is Hakowski's direct testimony. The record is clear that Ju-Ju witnessed McMillan's assault on Hakowski when he exclaimed to Hutson, "There's a man got a knife on Jamie." There is also substantial of circumstantial evidence that corroborates Hakowski's statements. First, Hakowski was able to positively identify the knife used against her. The police found that very knife in McMillan's possession at the time of his arrest. Additionally, both Hutson and the police officers who arrested McMillan had consistent testimony regarding McMillan's erratic state of mind after the assault. These statements corroborated Hakowski's testimony on the same subject. Therefore, there was sufficient circumstantial evidence in addition to Hakowski's testimony to support McMillan's conviction of felonious assault.

While Hakowski's testimony was impeached during cross-examination, it was on collateral matters that cannot be said to have robbed her testimony of all probative value or to be completely untrustworthy.¹⁸

III. Great Weight Of The Evidence

Alternatively, McMillan claims that the jury verdict was against the great weight of the evidence. A verdict is against the great weight of the evidence when the record evidence preponderates so heavily against the verdict that a miscarriage of justice will result in letting the verdict stand.¹⁹ Because McMillan failed to properly preserve this argument, we review it for plain error affecting his substantial rights.²⁰ And, given Hakowski's testimony and the considerable other evidence adduced at trial, we conclude that McMillan has not shown plain error with respect to his great weight challenge.

Affirmed.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly

¹⁷ *Czerwinski, supra* at 307.

¹⁸ *Musser, supra* at 219.

¹⁹ *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

²⁰ *Musser, supra* at 218.