# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>September 7, 2010 |
| v | No. 290225<br>Wayne Circuit Court |
| EDWARD PINDER,<br><br>Defendant-Appellant. | LC No. 08-008998-01 |

Before: WILDER, P.J., AND CAVANAGH AND SAAD, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of firearm, MCL 750.224f, felonious assault, MCL 750.82, intentional discharge of a firearm at a dwelling or occupied structure, MCL 750.234b, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.[1] The trial court sentenced defendant as a second habitual offender, MCL 769.13, to five to ten years for the assault with intent to do great bodily harm conviction, two to five years for the felon in possession of a firearm conviction, two to four years for the felonious assault conviction, two to four years for the discharging a firearm toward a building conviction, and two years for the felony-firearm conviction. We affirm.

All of defendant's convictions stem from a series of encounters he had with the complainants, Anthony and Gracie Gladney. The complainants first encountered defendant as they were exiting their vehicle outside Anthony's mother's home. Gracie testified that, as she exited the vehicle, she was almost struck by defendant as he rode by on a bike. Words were exchanged and defendant took a gun from a pocket and brandished it about. The complainants retreated into the house. The record suggests that, less than one hour later, defendant returned while the complainants, Anthony's mother, and her caregiver were sitting on the porch. The four occupants on the porch quickly retreated into the home, and defendant called out, "If I see you again tonight, you're done." According to Gracie's testimony, at this same time, she attempted to close the window blinds and saw defendant point a gun at the home. She recalled hearing five

[1] Defendant was found not guilty of assault with intent to murder, MCL 750.83.

gunshots fired toward the home. Anthony's testimony differed only in that he recalled a period of time, less than one-half hour, separating the retreat from the porch and the gunshots.

Defendant argues on appeal that there was insufficient evidence to convict him of assault with intent to do great bodily harm less than murder and of felonious assault. This Court reviews sufficiency of the evidence claims de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In doing so, this Court must review "the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Circumstantial evidence and reasonable inferences may be satisfactory proof of the elements of a crime. *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

The charge of assault with intent to commit great bodily harm less than murder stems from the first encounter between defendant and the complainants. In order to prove this charge, plaintiff had to show that defendant (1) attempted or threatened with force or violence to do corporal harm to another (an assault), while (2) acting with the intent to do great bodily harm less than murder (specific intent). *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). "A simple criminal assault has been defined as 'either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.'" *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995), quoting *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979).

The evidence clearly established that Gracie was assaulted when defendant pulled the gun from his pocket. Gracie testified that she "feared that he was going to shoot us," and the couple retreated into the home of Anthony's mother. The evidence was also sufficient to establish defendant's specific intent to inflict serious injury. When asked directly whether she perceived that the gun was aimed at her, Gracie answered in the affirmative. Pointing the gun at Gracie is evidence of defendant's intent to inflict serious injury. See *People v Counts*, 318 Mich 45, 54; 27 NW2d 338 (1947). Given the court's superior ability to assess witness credibility, MCR 2.613(C); *People v Sexton* (*After Remand*), 461 Mich 746, 752; 609 NW2d 822 (2000), and to discern and understand Gracie's demonstration of the position of the gun, we find there was sufficient evidence to support defendant's conviction for assault with intent to do great bodily harm less than murder. *Johnson*, 460 Mich at 723.

The trial court also found that defendant committed felonious assault when he encountered the complainants on the porch. "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." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Defendant relies on Anthony's testimony to argue that the retreat from the porch and the shooting were separate incidents. Consequently, he argues that there is no evidence that defendant possessed a gun when he approached the porch or used it to threaten Anthony. Gracie's testimony, however, indicates that defendant approached the porch, causing the occupants to retreat into the home, at which time, Gracie observed defendant point a gun toward the home. Then, she heard gunshots. Again, the trial court had a superior opportunity to evaluate witness credibility, *Sexton*, 461 Mich at 752, and all conflicts in the evidence must be resolved on appeal in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569

NW2d 641 (1997). Accordingly, there was sufficient evidence for the trial court to conclude beyond a reasonable doubt that defendant committed an assault with a dangerous weapon by threatening Anthony and pointing and firing a gun toward the home.

Defendant also argues that the trial court erred in scoring 25 points for offense variable (OV) 1. MCL 777.31(1)(a) ("A firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon."). The score related to the assault with intent to do great bodily harm conviction, which was based on the complainants' first encounter with defendant as they exited their vehicle. Defendant maintains that there is no evidence that a firearm was discharged or that a victim was cut or stabbed during that particular encounter. Rather, defendant notes that his gun was discharged during a subsequent encounter.

At the time of defendant's sentencing hearing, the law then in effect provided "where the Legislature has not precluded it [and] the crimes involved constitute one continuum of conduct . . . it is logical and reasonable to consider the entirety of [the] defendant's conduct in calculating the sentencing guideline range with respect to each offense." *People v Cook*, 254 Mich App 635, 641; 658 NW2d 184 (2003), overruled in part by *People v McGraw*, 484 Mich 120, 133 n 42; 771 NW2d 655 (2009). When scoring OV 1, the trial court considered the entirety of defendant's criminal episode, beginning at the complainants' vehicle and continuing until he fired the gun toward the home when Gracie stood at the front window. Thus, pursuant to *Cook*, the trial court properly scored OV 1 at 25 points.

We note that in *McGraw*, our Supreme Court concluded that a "defendant's conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise." There is no explicit mention in MCL 777.31 that conduct outside the sentencing offence should be considered when scoring OV 1, thus seeming to lend some credence to defendant's assertion on appeal that OV1 was improperly scored. However, "the retroactive effect of *McGraw* is limited to cases pending on appeal when *McGraw* was decided and in which the scoring issue had been raised and preserved." *People v Mushatt*, 486 Mich 934; 782 NW2d 202 (2010). At sentencing, defendant challenged the scoring of OV 1 on the basis that it is "more appropriately scored when there is someone standing in the line of fire." Defendant did not argue that the assessment of 25 points was improper because the gun was discharged after the first encounter was completed. Consequently, we decline to apply *McGraw* to this case.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Henry William Saad