

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERMAINE SPENCER PERRY,

Defendant-Appellant.

UNPUBLISHED

March 10, 2011

No. 293706

Wayne Circuit Court

LC No. 08-003734-FH

Before: MURPHY, C.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction following a bench trial of felonious assault, MCL 750.82. The trial judge sentenced defendant to one year in jail. We reverse and remand for entry of a conviction of simple assault.

Defendant argues that the trial court rendered a verdict requiring reversal when it convicted him of felonious assault yet acquitted him of felony-firearm, finding that the evidence did not prove beyond a reasonable doubt that defendant possessed a gun.

For cases tried without a jury, we review the trial court's findings of fact for clear error and its conclusions of law de novo. MCR 2.613(C); *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). We find that the trial court's factual findings did not support the felonious-assault conviction and that the conviction must be reversed.

"The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 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." *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996) (internal citation and quotation marks omitted). An individual assaults another when he attempts a battery against the person or commits an unlawful act that places the person in reasonable apprehension of an immediate battery. *People v Starks*, 473 Mich 227, 240; 701 NW2d 136 (2005). "Felonious assault is defined as a simple assault aggravated by the use of a weapon." *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993).

Only the victim purported to have seen a gun. An eyewitness testified that she did not see a gun, and defendant denied that he was carrying a gun. The trial court noted that there was

no evidence that defendant used any words to imply that he had a gun. Finally, no gun was recovered or introduced into evidence. The court stated the following:

When you have some testimony that supports an allegation, other testimony that doesn't support an allegation, and then no physical evidence to corroborate either one or the other, it becomes a definite hard thing for this Court to say that it was proof beyond a reasonable doubt that it was a gun as it relates to being a weapon capable of firing.

But as it relates to an article used or fashioned in a way to make one feel an immediate battery, I think it's sufficient for that purpose. And for that reason the Court is going to find [d]efendant guilty of [felonious assault].

The trial court found that the existence of a gun had not been established beyond a reasonable doubt. Because no other weapon was ever discussed to support the felonious-assault charge, finding defendant guilty of felonious assault was not supportable.¹

The prosecutor agrees that defendant's conviction of felonious assault must be reversed. However, she argues that the case should be remanded for entry of a conviction of simple assault. We agree. The trial court clearly found that defendant committed an "apprehension-type assault" in this case, see *Starks*, 473 Mich at 240, even though it erroneously elevated the offense to felonious assault based on a "feigned weapon." Accordingly, an appropriate remedy is to remand for entry of the lesser offense whose elements were found by the trial court and supported by the evidence. This remedy has been used multiple times in cases involving armed versus unarmed robbery. See, e.g., *People v Saenz*, 411 Mich 454, 458; 307 NW2d 675 (1981), and *People v Chandler*, 201 Mich App 611, 616; 506 NW2d 882 (1993); see also *People v Bearss*, 463 Mich 623, 631; 625 NW2d 10 (2001), and *People v Randolph*, 466 Mich 532, 553; 648 NW2d 164 (2002) (when vacating a verdict, an appellate court may, in appropriate circumstances, remand for entry of a judgment of guilt on a necessarily included lesser offense that was subsumed in the verdict).

¹ As noted in *People v Walker*, 461 Mich 908; 603 NW2d 784 (1999), "[w]hile juries are not held to rules of logic, or required to explain their decisions, a judge sitting without a jury is not afforded the same lenience." It seems likely that the trial court, in rendering the verdict, mistakenly conflated the elements of felonious assault with those of armed robbery. Indeed, for an armed robbery offense, a "feigned weapon" may be used as the basis for a conviction. See *People v Jolly*, 442 Mich 458, 468-470; 502 NW2d 177 (1993); see also MCL 750.529. For a conviction of felonious assault, however, an *actual* weapon must have been employed. MCL 750.82.

Reversed and remanded for entry of a conviction of simple assault and for resentencing.
We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Patrick M. Meter

/s/ Douglas B. Shapiro