

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
December 27, 2011

v

JOE CEPHUSE DAVENPORT,  
Defendant-Appellant.

No. 298418  
Macomb Circuit Court  
LC No. 2008-005683-FH

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Before: SAAD, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions of felonious assault, MCL 750.82, receiving and concealing a stolen firearm, MCL 750.535b, felon in possession of a firearm, MCL 750.224f, carrying a weapon with unlawful intent, MCL 750.226, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and carrying a concealed weapon, MCL 750.227. For the reasons set forth below, we affirm.

I. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the prosecutor presented insufficient evidence to support his convictions. To determine a claim based on the sufficiency of the evidence, this Court reviews the evidence de novo, in the light most favorable to the prosecutor, to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Odom*, 276 Mich App 407, 418; 740 NW2d 557 (2007). We hold that the prosecution presented sufficient evidence to support each of defendant's convictions.

A. FELONIOUS ASSAULT

"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). "An assault may be established by showing either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). "Moreover, a 'battery is an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person.'" *People v Nickens*, 470 Mich 622, 628; 685 NW2d 657 (2004), quoting *People v*

*Reeves*, 458 Mich 236, 240 n 4; 580 NW2d 433 (1998). “Intent, like any other fact, may be proven indirectly by inference from the conduct of the accused and surrounding circumstances from which it logically and reasonably follows.” *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992), quoting *People v Johnson*, 54 Mich App 303, 304; 220 NW2d 705 (1974).

Here, Brian Williams testified that, as he walked along the street, defendant pulled up in his truck, pointed a gun with a scope at Williams, and stated, “b---, I’m going to kill you.” Williams thought he was going to lose his life. This evidence established that defendant unlawfully placed Williams in reasonable apprehension of receiving an immediate battery and that defendant used a dangerous weapon in the assault. Moreover, from defendant’s act of pointing the weapon and his threat to kill Williams, a reasonable inference arises that he intended to place Williams in reasonable apprehension of receiving an immediate battery. It is true that defendant’s testimony contradicted Williams’s account. However, “[t]his Court will not interfere with the trier of fact’s role of determining the weight of the evidence or the credibility of witnesses.” *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). “All conflicts in the evidence must be resolved in favor of the prosecution.” *Id.* The evidence was clearly sufficient to support defendant’s felonious assault conviction.

#### B. RECEIVING AND CONCEALING STOLEN FIREARM

The elements of receiving and concealing a stolen firearm are that the “defendant (1) received, concealed, stored, bartered, sold, disposed of, pledged, or accepted as security for a loan (2) a stolen firearm or stolen ammunition (3) knowing that the firearm or ammunition was stolen.” *People v Nutt*, 469 Mich 565, 593; 677 NW2d 1 (2004). Here, the testimony of Williams and his mother, Crystal Rucker, established that defendant possessed a firearm in his truck when he pointed it at each of them. The gun was later found inside a blue bin in an upstairs bedroom closet of defendant’s home. Also, defendant admitted to the police that he owned the gun recovered from his home and that he paid either \$35 or \$25 for it. A police officer familiar with firearms opined that the gun recovered from defendant’s home was worth between \$400 and \$500. The parties stipulated that the gun was stolen from a home in 2007, that the owner of the gun does not know who took it, and that the owner does not know defendant. A rational trier of fact could infer from this evidence that defendant received or concealed a stolen firearm and that he knew that it was stolen, in light of the difference between the value of the gun and the amount defendant paid for it. Accordingly, sufficient evidence supported defendant’s receiving and concealing a stolen firearm conviction.

#### C. FELON IN POSSESSION OF A FIREARM

The felon in possession of a firearm statute, MCL 750.224f(2), provides that “a person convicted of a specified felony is prohibited from possessing a firearm until five years after he has paid all fines, served all terms of imprisonment, and completed all terms of probation or parole imposed for the offense.” *People v Perkins*, 262 Mich App 267, 270; 686 NW2d 237 (2004). “Moreover, after the five-year period has passed, the convicted felon is prohibited from

possessing a firearm until his right to do so has been formally restored under MCL 28.424.” *Id.* at 270-271. The evidence discussed above established that defendant possessed a firearm. Further, the parties stipulated that defendant had been convicted of a prior felony.<sup>1</sup> “The prosecutor must prove that the defendant’s right to possess a firearm has not been restored only if the defendant produces some evidence that his right has been restored.” *Id.* at 271. Here, defendant produced no evidence that his right to possess a firearm had been restored. Thus, “the prosecution was not required to prove the contrary beyond a reasonable doubt.” *Id.* Therefore, the prosecutor presented sufficient evidence to support defendant’s felon in possession of a firearm conviction.

#### D. CARRYING A CONCEALED WEAPON WITH UNLAWFUL INTENT

The elements of carrying a weapon with unlawful intent “are: (1) carrying a firearm or dangerous weapon, (2) with the intent to unlawfully use the weapon against another person.” *People v Harrington*, 194 Mich App 424, 428; 487 NW2d 479 (1992). Here, Williams’s testimony established that defendant possessed a gun with a scope, he pointed it at Williams, and he threatened to kill Williams. A jury could infer from defendant’s conduct and statement that he intended to use it illegally against Williams. Thus, sufficient evidence existed to support defendant’s conviction of carrying a weapon with unlawful intent.

#### E. CARRYING A CONCEALED WEAPON

The carrying a concealed weapon statute, MCL 750.227(2), provides:

A person shall not carry a pistol concealed on or about his or her person, or, whether concealed or otherwise, in a vehicle operated or occupied by the person, except in his or her dwelling, house, place of business, or on other land possessed by the person, without a license to carry the pistol as provided by law and if licensed, shall not carry the pistol in a place or manner inconsistent with any restrictions upon such license.

Carrying a concealed weapon is a general intent crime. *People v Hernandez-Garcia*, 266 Mich App 416, 418; 701 NW2d 191 (2005), vacated in part on other grounds 477 Mich 1039 (2007). “Thus, the prosecution need only establish that an accused had the intent to do the act prohibited — that is, ‘to knowingly carry the weapon on one’s person or in an automobile.’” *Id.*, quoting

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<sup>1</sup> The stipulation presented to the jury that defendant had been convicted of a felony did not indicate whether defendant was convicted of a “specified felony” for the purpose of MCL 750.227f(2) and did not indicate the amount of time that had elapsed since the date of defendant’s prior felony conviction. However, before the jury was chosen, the parties agreed that defendant had a qualifying felony conviction that prohibited him from possessing a firearm. The prosecutor told the trial court that defendant’s prior conviction was for drug delivery which is a specified felony under MCL 750.224f(6)(ii). Defendant did not dispute the prosecutor’s statement that the prior conviction was for drug delivery. Therefore, the record reflects that defendant could not possess a firearm until his right to do so was restored.

*People v Combs*, 160 Mich App 666, 673; 408 NW2d 420 (1987). Also, the statutory language, “without a license to carry the pistol as provided by law,” MCL 750.227(2), does not add an element to the crime. *Id.* Here, the testimony of Williams and Rucker established that defendant carried a gun in his truck while he operated or occupied it. Moreover, a reasonable inference arises that defendant knowingly carried the weapon because he pointed it at both Williams and Rucker. Therefore, the prosecution presented sufficient evidence to support defendant’s conviction of carrying a concealed weapon.

#### F. FELONY-FIREARM

“The elements of felony-firearm are that defendant possessed a firearm during the commission of, or the attempt to commit, a felony.” *Avant*, 235 Mich App at 505. Williams testified that defendant pointed a gun at him and threatened to kill him. Thus, defendant possessed a firearm when he committed felonious assault and the other felony weapons offenses, which, as discussed above, were supported by sufficient evidence. Thus, the prosecutor presented sufficient evidence to support defendant’s felony-firearm conviction.

#### II. GREAT WEIGHT OF THE EVIDENCE

Defendant argues that the verdict was against the great weight of the evidence. To preserve an argument that the verdict was against the great weight of the evidence, a defendant must timely move for a new trial in the trial court. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). Here, defendant did not move for a new trial and thus failed to preserve his great weight of the evidence argument. Accordingly, this Court’s review is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A new trial should not be granted on the ground that the verdict is against the great weight of the evidence unless the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). “Generally, a verdict may be vacated only when the evidence does not reasonably support it and it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence.” *Id.* The determination of credibility falls within the exclusive province of the jury. *Id.* at 470. “Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.” *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998).

Here, defendant has not established that the verdict was against the great weight of the evidence. Although defendant denied committing the offenses, and other defense witnesses claimed that Williams had tried to sell the gun in question at defendant’s house, the testimony of Williams and Rucker and of the police witnesses supported defendant’s convictions. The determination of credibility was a question for the jury. *Lacalamita*, 286 Mich App at 469. Moreover, there is no indication that the verdict was likely the result of extraneous factors such as passion, prejudice, or sympathy. Because the evidence does not preponderate against the verdict, defendant has failed to establish that he is entitled to a new trial. *Id.*

#### III. FELONY-FIREARM STATUTE

Defendant claims the felony-firearm statute, MCL 750.227b, infringes on the constitutional right to bear arms. To preserve a constitutional challenge for appellate review, a defendant is required to raise the issue in the trial court. *People v Hogan*, 225 Mich App 431, 438; 571 NW2d 737 (1997). Here, defendant acknowledges that he did not raise this issue below. Thus, because defendant did not preserve this issue, this Court reviews defendant's claim for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764. Whether the felony-firearm statute, MCL 750.227b, violates the constitutional guarantee of the right to bear arms is a question of law. This Court reviews questions of law de novo. *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995).

Const 1963, art 1, § 6 states: "Every person has a right to keep and bear arms for the defense of himself and the state." Also, US Const, Am II provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The Second Amendment right to keep and bear arms applies to the states through the Fourteenth Amendment. *McDonald v Chicago*, \_\_\_ US \_\_\_; 130 S Ct 3020, 3026, 3050; 177 L Ed 2d 894 (2010). In *People v Graham*, 125 Mich App 168, 172-173; 335 NW2d 658 (1983), this Court rejected an argument that the felony-firearm statute unconstitutionally infringed on the right to bear arms: "A right to bear arms does not encompass the possession of a firearm during the commission of a felony." In *District of Columbia v Heller*, 554 US 570, 626; 128 S Ct 2783; 171 L Ed 2d 637 (2008), the United States Supreme Court explained that the right secured by the Second Amendment is not unlimited and that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . . ." Defendant has failed to establish that *Heller* recognized a constitutional right to possess a firearm during the commission of a felony. Thus, we adhere to the holding in *Graham* that the right to bear arms does not encompass possession of a firearm during the commission of a felony.

#### IV. EXCITED UTTERANCE

Defendant avers that the trial court abused its discretion in admitting Rucker's hearsay statement as an excited utterance. "This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion." *People v Breeding*, 284 Mich App 471, 479; 772 NW2d 810 (2009).

Significantly, defendant does not develop his argument or cite authority to establish that the excited utterance exception does not apply. In fact, defendant devotes only one sentence of his brief to this issue. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

In any event, the trial court did not abuse its discretion when it admitted Rucker's statement. Hearsay is a "statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Under MRE 802, hearsay is generally inadmissible. *People v Yost*, 278 Mich App 341, 363; 749 NW2d 753 (2008). MRE 803(2) provides an exception to the hearsay rule for "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." "A statement is admissible under this exception if

(1) there was a startling event and (2) the resulting statement was made while the declarant was under the excitement caused by that event.” *People v Layher*, 238 Mich App 573, 582; 607 NW2d 91 (1999). The rationale for this exception is that “a person who is still under the ‘sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy.” *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), quoting 5 Weinstein, *Evidence* (2d ed), § 803.04[1], p 803-19. “The pertinent inquiry is not whether there has been time for the declarant to fabricate a statement, but whether the declarant is so overwhelmed that she lacks the capacity to fabricate.” *People v McLaughlin*, 258 Mich App 635, 659-660; 672 NW2d 860 (2003).

Here, Rucker’s statement to Warren Police Officer James Wolfe qualified as an excited utterance. The record reflects that a startling event occurred. Defendant drove his truck in front of Rucker’s house, pointed a gun at her, and stated, “I’m going to kill that b----.” Rucker thought that defendant was going to shoot her. Rucker jumped back into the door of her house, knocking down her four-year-old autistic granddaughter who was standing behind her. The evidence also reflects that Rucker was under the stress of excitement caused by the startling event when she made her statement to Wolfe. Rucker called 911, and the police arrived approximately 10 to 15 minutes later. Wolfe testified that he received a dispatch to go to Rucker’s house and arrived there within four to five minutes. Wolfe testified that Rucker was excited, trembling, and scared from the incident. Rucker told Wolfe that defendant pulled his truck in front of her home, pointed a gun at her while Williams’s daughter was standing next to her, and stated, “I’m going to kill that b----,” at which point Rucker ducked and pushed the child down in case defendant was going to shoot into the house. Because the evidence supports a conclusion that a startling event occurred and that Rucker was under the stress of excitement caused by the startling event when she made the statement to Wolfe, the trial court did not abuse its discretion in admitting the statement as an excited utterance.

Affirmed.

/s/ Henry William Saad  
/s/ Cynthia Diane Stephens  
/s/ Amy Ronayne Krause