

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARLAND HOUSER,

Defendant-Appellant.

UNPUBLISHED
November 1, 1996

No. 185227
LC No. 94-006836

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARLAND HOUSER,

Defendant-Appellant.

No. 185228
LC No. 94-006847

Before: Corrigan, P.J., and Taylor, and D.A. Johnston,* JJ.

PER CURIAM.

In these consolidated appeals, defendant appeals by right his bench trial convictions of felonious assault, MCL 750.82; MSA 28.277; assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g(2); MSA 28.788(7)(2) and habitual offender, second offense, MCL 769.10; MSA 28.1082. We affirm.

These appeals arose from two separate incidents. In the first, defendant was visiting the victim, Renee Thompson, whom he had been dating. At Thompson's apartment, the two began to argue. The

* Circuit judge, sitting on the Court of Appeals by assignment.

victim told defendant that she did not want him to leave because it was too late in the evening. Thompson testified that defendant hit her on the head and shoulders with a liquor bottle. After the bottle broke, he struck her with his fists and kicked her. The victim fell and suffered a torn knee ligament. Defendant countered that Thompson had blocked the doorway and that he was simply attempting to leave.

In the second incident, defendant attacked Mabelene Manier at a bus stop. Manier claimed that defendant approached her, started pushing her, and told her to remove her clothes. Defendant pulled and ripped Manier's dress, and yelled at her. Vincent Moore came to Manier's aid and stabbed defendant in the leg with a box cutter. Moore chased defendant from the scene into a building where police eventually arrested defendant.

On appeal, defendant first contends that the evidence was insufficient to convict him of felonious assault. In an appeal challenging the sufficiency of the evidence, this Court views the evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). The elements of felonious assault are: (1) an assault, (2) with a dangerous weapon, and (3) with intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Malkowski*, 198 Mich App 610, 614; 499 NW2d 450 (1993).

In this case, defendant used the liquor bottle as a dangerous weapon. An item is a dangerous weapon under the felonious assault statute if it was used as a weapon and, when so employed in an assault, was dangerous. *People v Rivera*, 120 Mich App 50, 55-56; 327 NW2d 386 (1982). Defendant hit Thompson repeatedly in her head and upper body with the bottle. Defendant continued to strike Thompson until the bottle broke. The bottle was capable of inflicting serious injury. This evidence supports a determination that the bottle was a dangerous weapon.

The prosecution adequately proved defendant's intent. Felonious assault is a specific intent crime that requires that the defendant either intended to injure the victim or intended to place her in reasonable fear of an immediate battery. *People v Wilson*, 159 Mich App 345, 351-352; 406 NW2d 294 (1987); *People v Gary Davis*, 126 Mich App 66; 337 NW2d 315 (1983). The circumstantial evidence reveals that defendant intended to injure Thompson.

Although defendant claimed self-defense, the evidence, considered in a light most favorable to the prosecution, shows that defendant used an unreasonable amount of force and intended to injure Thompson. Despite defendant's claim of self-defense, the trial judge found defendant's testimony incredible. Questions of credibility are left to the trier of fact, and will not be resolved anew by this Court. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, modified 441 Mich 1201 (1992).

Next, defendant contends that because the pretrial line-up was unduly suggestive, Mabelene Manier's pretrial identification of defendant was not admissible. Defendant did not challenge the suggestiveness of the pretrial line-up in the trial court. Absent manifest injustice, this Court will not review a claim of an unduly suggestive line-up for the first time on appeal. *People v Melvin Davis*, 146

Mich App 537, 547; 381 NW2d 759 (1985). Manifest injustice can result if identification was a contested issue at trial. *Id.* The suggestiveness of a corporeal line-up must be examined in light of the totality of the circumstances surrounding the pretrial identification. *People v Kurlyczyk*, 443 Mich 289, 311-312; 505 NW2d 528 (1993). The test is whether the line-up was so unnecessarily suggestive as to give rise to a substantial likelihood of irreparable misidentification and thus constitutes a denial of due process.

Because defendant did not challenge the lineup below, he did not present any evidence that the challenged factors such as skin tone and hair style affected Manier's identification of him. The record does not reflect that these factors distinguished defendant from the others in the line-up. Therefore, defendant has not presented a modicum of evidence to support a challenge to the pretrial identification.

Defendant contends that the evidence was insufficient because Manier could not identify defendant at the preliminary examination or at trial. We disagree. Although Manier did not identify defendant, several witnesses to the incident including eyewitness Moore, who came to Manier's aid, identified defendant as the perpetrator. Viewing the evidence in a light most favorable to the prosecution, sufficient evidence established defendant's identification as the perpetrator beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

Finally, defendant argues that the evidence was insufficient to sustain his conviction of assault with intent to commit second-degree criminal sexual conduct because the prosecution failed to show that he committed sexual penetration or that he intended sexual penetration. This argument is without merit. The elements of assault with intent to commit second-degree criminal sexual conduct are: (1) an assault; (2) the use of force or coercion; (3) the specific intent to touch the victim's genital area, groin, inner thigh, buttock, breast, or clothing covering those areas, for the purpose of sexual arousal or sexual gratification. *People v Evans*, 173 Mich App 631, 634; 434 NW2d 452 (1988). As indicated above, sexual penetration or intent to commit sexual penetration are not required elements.

Defendant tore Manier's dress at the neckline and under the arms and told Manier to remove her clothes. This evidence reflects that defendant intended to touch Manier for the purpose of sexual gratification or arousal. Sufficient evidence supported defendant's conviction of assault with intent to commit second-degree criminal sexual conduct.

Affirmed.

/s/ Maura D. Corrigan
/s/ Clifford W. Taylor
/s/ Donald A. Johnston