STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK WILLIAM MAISON,

Defendant-Appellant.

UNPUBLISHED
November 12, 1996

No. 181894
LC No. 93-002320

Before: Gribbs, P.J., and Markey and T.G. Kavanagh,* JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of felonious assault, MCL 750.82; MSA 28.277. He subsequently pleaded guilty to being an habitual offender, third offense, MCL 769.12; MSA 28.1084. The trial court sentenced him to 32 to 96 months' imprisonment on the habitual offender plea. Defendant appeals as of right. We affirm.

On the afternoon in question, St. Clair Shores Police Officers David Scheuer and Gary Sems were called to the scene of the crime to investigate an alleged drunk and disorderly person. As the officers exited their patrol car, defendant approached the officers while holding two galvanized lead pipes. Defendant was rapidly shaking the pipes up and down as he walked. Scheuer immediately instructed defendant to drop the pipes, but he refused. At a distance of approximately forty feet, defendant said "C'mon" to one or both of the officers. He continued to approach the officers while being told to drop the pipes. He again refused. When defendant was approximately fifteen feet away, Sems sprayed mace in defendant's face. Thereafter a struggle ensued and the officers gained possession of the pipes.

First, defendant argues that the trial court erred in denying his motion for a new trial based upon newly discovered evidence. We review the trial court's decision to grant or deny a motion for new trial for an abuse of discretion. *People v Miller (After Remand)*, 211 Mich App 30, 47; 535 NW2d 518 (1995). Before a new trial is warranted on the grounds that there exists newly discovered evidence, a

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

defendant must demonstrate that the evidence (1) is newly discovered; (2) is not merely cumulative; (3) probably would have caused a different result; and (4) was not discoverable and producible at trial with reasonable diligence. *Id.* at 46-47.

In moving for a new trial, defendant relied upon certain statements in the presentence investigation report that Officer Scheuer made to the probation agent whereby Scheuer said that he and his partner were aware of defendant's intoxication, were not in fear of their lives, and that defendant was not in a position to seriously injure them. Defendant contends that this "newly discovered" evidence contradicts the police officer's testimony at trial and thereby warrants a new trial given that the evidence undermines the felonious assault charges. We disagree. First, our review of Officer Scheuer's trial testimony reveals nothing inconsistent with the statements contained in the PSIR. Also, defendant could have elicited this allegedly new evidence during a more vigorous cross-examination during trial. Further, where recanted testimony is presented as newly discovered evidence, it is traditionally regarded as suspect and untrustworthy. *People v Canter*, 197 Mich App 550, 559-560; 496 NW2d 336 (1992). Moreover, Scheuer's statement regarding his fear and defendant's position would not likely render an acquittal since the statement does not negate the elements for the felonious assault convictions, particularly in light of the second complaining witness' testimony at trial. *Miller, supra* at 46-47; *Canter, supra* at 560-561. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial. *Id.*

Next, defendant contends that the trial court erred in denying his motion for directed verdict because there was insufficient evidence to support his conviction. We review a claim of insufficient evidence after viewing the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the elements of the crime were proven beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). The elements of the crime of felonious assault are (1) either an attempt to commit a battery or an unlawful act which places the victim in reasonable apprehension of receiving a battery; (2) aggravated by the use of a weapon; and (3) the present or apparent ability to commit a battery. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995).

Defendant contends that there is insufficient evidence to show that his acts could put the officers in reasonable apprehension of an imminent battery. We disagree. Both officers testified that defendant walked toward them with two lead pipes and disregard their demands to stop and drop the pipes. Defendant said "C'mon," which Scheuer interpreted as a threatening challenge. Defendant also moved forward in a threatening fashion while holding and shaking the pipes before the officer sprayed him with mace. From this testimony, a rational trier of fact could have found that defendant's acts placed both officers in reasonable apprehension of an immediate battery. Therefore, the trial court did not err in denying defendant's motion for directed verdict. *Hutner, supra.*

Defendant also contends that the trial court erred in requiring him to file the affirmative defense of intoxication as evidenced by the court's failure to allow him to further develop this defense. The record reveals, however, that the court allowed testimony from defendant, his mother, and both officers regarding defendant's intoxication. Indeed, defendant's contention has no merit.

Defendant further argues that the trial court erred in finding that the defense of intoxication did not negate the specific intent required of felonious assault.[1] We review the trial court's findings of fact for clear error. *In re Forfeiture of $19,250*, 209 Mich App 20, 29; 530 NW2d 759 (1995). Voluntary intoxication is a defense to a specific intent crime. *People v Langworthy*, 416 Mich 630, 638; 331 NW2d 171 (1982). Because felonious assault is a not a specific intent crime, however, *People v Johnson*, 407 Mich 196, 218-219, 227; 284 NW2d 718 (1979),[2] defendant may not assert as a defense his voluntary intoxication. *Langworthy, supra* at 638-639. Thus, we find no clear error.

Finally, defendant argues that the trial court erred in denying his motion to dismiss the habitual offender charge because the charging information was not timely filed. The notice requirements applicable to filing the information for an habitual offender charge are inapplicable, however, where the defendant pleads guilty to that charge. Cf. *People v Lannom*, 441 Mich 490, 492; 490 NW2d 396 (1992), citing *People v Shelton*, 412 Mich 565; 315 NW2d 537 (1982). Accordingly, defendant's argument has no merit.

Affirmed.

/s/ Jane E. Markey
/s/ Roman S. Gribbs
/s/ Thomas Giles Kavanagh

[1] As of September 1994, when defendant was tried, MCL 750.82; MSA 28.277, as amended, states:

> (1) Except as provided in subsection (2), a person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more then $2,000.00 or both.

[2] Our Supreme Court, in reviewing the statutory language of MCL 750.82; MSA 28.277, stated that:

> The statutory language does not require any specific intent, it simply requires an assault with a dangerous weapon. In fact the language negates the requirement of two types of specific intent, i.e., intent to commit murder and intent to inflict great bodily harm less than murder. Consequently, the wording of the statute cannot support the allegation that a specific intent is an element of felonious assault. <u>The only intent necessary is the general intent to do acts involved in the assault</u>. The statute is clear in requiring only an assault and with a dangerous weapon.