STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERICK DUANE FORSHEE,

Defendant-Appellant.

UNPUBLISHED
September 5, 1997

No. 189218
Ingham Circuit Court
LC No. 94-067547-FC

Before: Hood, P.J., and McDonald and Young, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by jury of assault with intent to commit great bodily harm, MCL 750.84; MSA 28.279, and leaving the scene of an accident, MCL 257.617; MSA 9.231. Defendant pleaded guilty to being an habitual offender third offense, MCL 769.12; MSA 20.1084, and was sentenced to respective prison terms of three and one-half to fifteen years and two to seven years to run concurrently. We affirm.

Defendant was charged with one count of assault with intent to commit murder, two counts of felonious assault, and one count of leaving the scene of a personal injury accident. Defendant first argues the trial court erred in denying his motion for a directed verdict of acquittal on the count of assault with intent to murder, MCL 750.83; MSA 28.278, maintaining the prosecution never established he assaulted his victim or had the intent to kill, which are both elements of this crime. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). He contends his conviction of the lesser offense of assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, evinces the possibility of a compromise verdict. *People v Vail*, 393 Mich 460, 464; 227 NW2d 535 (1975). We disagree. In ruling on defendant's motion for a directed verdict, the trial court views the evidence presented up to the time the motion was made in a light most favorable to the prosecution to determine whether a trier of fact could find the elements of the crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 666; 502 NW2d 177 (1983). See also, *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979) (Coleman, C.J.). We apply the same standard on appeal.

A criminal assault occurs upon the happening of either an attempted battery, or when one's actions place another in apprehension of receiving an immediate battery. *People v Sanford*, 402 Mich 460, 479; 255 NW2d 1 (1978). Here, defendant drove his motorcycle down a street which was lined with tents and displays for an art fair, traveling at a high rate of speed and then proceeded up a sidewalk, all the while having a police officer hanging off the side pleading with him to be released. This evidence was sufficient to establish defendant's unlawful act placed the officer in reasonable apprehension of receiving an immediate battery. Moreover, such facts, coupled with the officer's testimony he felt like he was being rammed into "a brick wall," supported a determination defendant attempted to batter the officer. Consequently, the trial court did not err in allowing the jury to consider whether an assault took place.

The second component of defendant's argument concerns the intent to kill. In determining whether the prosecution has established the intent to kill, a trial court may evaluate several factors which include: (1) the nature of the defendant's act constituting an assault; (2) the temper and disposition of mind with which they were apparently performed; (3) whether the instrument and means used were naturally adapted to produce death; (4) his conduct and declarations prior to, at the time of, and after the assault; and (5) any other relevant circumstances. *People v Taylor*, 422 Mich 554; 375 NW2d 1 (1985). Although the Supreme Court has not granted leave to fully consider the issue and law to the contrary has not been expressly overruled [see *People v Eisenberg*, 72 Mich App 106, 114; 249 NW2d 313 (1976) ("An intent to kill may be inferred from conduct the natural tendency of which is to cause death or great bodily harm.")], the Supreme Court's order in *People v Hart*, 437 Mich 898; 465 NW2d 328 (1991), indicates the intent to kill may not be inferred solely from behavior, the natural tendency of which is to cause death or great bodily harm. Nonetheless, we note that because the intent to kill is subjective, it may be proved by inference from any facts in evidence including circumstantial evidence. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993), quoting *People v Lawton*, 196 Mich App 341, 350; 492 NW2d 810 (1992). We note also that the order in *Hart, supra*, was based on the Supreme Court's decision in *Taylor, supra*, so evaluating the factors listed in *Taylor, supra*, allows us to determine whether the jury could have properly considered defendant's intent to kill.

Defendant's actions prior to his physical contact with the officer, i.e., "popping wheelies" down Albert Street, revving his motorcycle after being ordered to turn it off, and his virtual showdown with a fully-uniformed officer, demonstrated he was predisposed to commit a violent assault. Defendant's actions during the assault -- racing through the streets of East Lansing, in and out of narrow passageways, at speeds of at least forty to forty-five miles per hour while the officer clung to him -- demonstrated an intent to seriously harm the officer. Although a motorcycle is not customarily thought of as a death-producing mechanism, there is nothing to suggest it could not be so used. Finally, and most compelling, defendant's acceleration in the face of the officer's screams to stop the motorcycle, coupled with the officer's testimony that he felt like he was "being driven into a brick wall" permits the inference of the specific intent to kill. We note the trial court was not required to determine defendant intended to kill the officer, but that the evidence presented was sufficient to allow the trier of fact to infer that intent. Based on the testimony of the officer and those who testified as to defendant's actions prior

to, during, and after the assault, we find the trial court did not err in allowing the jury to consider whether defendant had the specific intent to kill.

Defendant next argues his conviction of assault with intent to do great bodily harm goes against the great weight of the evidence and requires a new trial. In his motion for a new trial before the lower court, defendant argued the verdict resulted in a miscarriage of justice. However, he made this argument by maintaining the verdict went against the great weight of the evidence. Since the trial court ruled on defendant's motion for a new trial based on the argument the verdict went against the great weight of the evidence, we may properly review defendant's claim the trial court abused its discretion in denying defendant's motion.

Assault with intent to do great bodily harm occurs upon proof of (1) an attempt or offer; (2) with force or violence; (3) to do a corporeal hurt to another; (4) with the intent to do great bodily harm less than murder. *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995). Like assault with intent to murder, the elements of assault with intent to do great bodily harm less than murder may by proven by either direct proof or circumstantial evidence, or by reasonable inferences drawn therefrom. *Id*. The evidence established defendant made his "attempt" to hurt the officer when he drove down a narrow sidewalk at forty to forty-five miles per hour with the officer hanging off the side of his motorcycle. Defendant's persistence in driving the motorcycle in this fashion in the face of the officer's pleas for release provided evidence of force or violence. The officer's testimony he thought he was being driven into a brick wall and defendant's increasing acceleration gave rise to an inference of the requisite intent. *Lugo, supra* at 710. Finally, the question whether defendant's level of intoxication vitiated his specific intent was a question properly weighed by the jury. Accordingly, the verdict did not go against the great weight of the evidence.

Affirmed.

/s/ Harold Hood
/s/ Gary R. McDonald
/s/ Robert P. Young, Jr.