STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS HAROLD HORB III,

Defendant-Appellant.

UNPUBLISHED
December 16, 1997

No. 199506
Kent Circuit Court
LC No. 95-002687-FH

Before: Smolenski, P.J., and MacKenzie and Neff, JJ.

PER CURIAM.

Defendant was convicted by the trial court of felonious assault, MCL 750.82; MSA 28.277. Defendant was sentenced to two years' probation, the first year to be served in jail beginning September 16, 1996. Defendant's sentence of incarceration was subsequently suspended effective November 22, 1996. Defendant appeals as of right. We affirm.

Defendant's conviction arises out of an incident in which defendant's vehicle and a truck were involved in a near collision. Both vehicles pulled to the side of the road. Mitchell and Wojciakowski, two of the truck's three male occupants got out of that vehicle and approached defendant's vehicle. Defendant and the two men began a loud verbal altercation. Defendant then got out of his vehicle swinging a metal baseball bat. Mitchell and Wojciakowski did not have anything in their hands. At some point Couturier, the truck's third male occupant who was also unarmed, got out of the truck and joined his two companions.

After the arguing had continued for some time, Mitchell went to the truck, lowered its tailgate and began to rummage in the truck bed. When defendant asked whether Mitchell was getting a gun, Mitchell replied "Yes. I'm getting a gun." However, the tone of Mitchell's reply was so sarcastic that it really constituted a denial. Defendant went to his vehicle and took out an unloaded shotgun. Before defendant had gotten the gun, Mitchell had closed the truck's tailgate and was again standing in the street empty-handed. While holding the gun at waist-level, defendant pointed the gun at Mitchell and Couturier and asked them "do you want to die?" The incident that forms the basis for defendant's

conviction occurred when defendant held the gun to his shoulder, pointed it at Wojciakowski's head and asked "do you want to die?"

Defendant initially raises four sub-issues under an issue entitled "whether the appellant, as a matter of law, had formed the specific intent which is a necessary element of the crime of felonious assault?" The elements of the crime of felonious assault are (1) an assault, (2) with the intent to injure or place the victim in reasonable apprehension of an immediate battery, and (3) with a dangerous weapon. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996).

Specifically, defendant first contends that the mutual fight between himself and the three men negated the requisite intent for felonious assault as a matter of law. Defendant raised this issue below in his motion for a new trial, citing *People v Sherman*, 14 Mich App 720; 166 NW2d 22 (1968), in which this Court stated in relevant part:

> "Mutual fight" is not the same as self-defense. "Mutual fight" could include self-defense but not necessarily so. The theory of "mutual fight" may be asserted not for purposes of showing a justification or an excuse for what would otherwise be an assault, but rather to characterize the affray for purposes of negating a specific intent such as the intent to do great bodily harm. But, the phrase "mutual fight" may also include self-defense under appropriate circumstances. [*Id*. at 722.]

In denying defendant's motion for a new trial, the trial court rejected defendant's argument that *Sherman* stood for the proposition that the existence of a mutual fight negates the requisite intent as a matter of law. The court stated that, like the defense of intoxication, the existence of a mutual fight was merely one factor to be considered in determining whether defendant had the requisite intent. The court reaffirmed its finding that defendant had the requisite intent for felonious assault.

We find no error. Here, defendant does not seek to use the defense of mutual fight as a justification or excuse like the defense of self-defense, i.e., the defendant admits committing the crime, including possessing the requisite intent, but claims the crime was justified or should be excused by self-defense. Rather, defendant seeks to use the defense of mutual fight to negate one of the essential elements of the crime--intent. The rule is that intent is a question of fact for the trier of fact. *In re Forfeiture of $25,505*, 220 Mich App 572, 581; 560 NW2d 341 (1996). Here, although there was evidence that Mitchell, Wojciakowski and Couturier willingly entering into a mutual verbal altercation with defendant, there was no evidence that they willingly entered into mutual assaults with a dangerous weapon. We conclude that the trial court properly considered all of the facts and circumstances in determining whether defendant possessed the requisite intent for felonious assault. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial on this ground. *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997).

Second, defendant contends that the trial court erred in finding that defendant possessed the requisite intent for felonious assault from the facts that defendant pointed the gun at Wojciakowski and asked "do you want to die?" We disagree. As stated previously, intent is a question of fact for the trier of fact. *$25,505, supra*. This Court defers to the trial court's resolution of factual issues, especially

where, as in this case, it involves the credibility of the witnesses. *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997).

Third, defendant contends that in light of the trial court's determination that defendant had no duty to retreat where only non-deadly force was used, the trial court's repeated references in its written opinion to defendant's failure to retreat indicates that the court used the failure to retreat against defendant. We disagree. Although the court questioned the application of the no-retreat rule where non-deadly force is used, the court specifically stated that "[b]ecause the issue need not be addressed, however, it is not being addressed. The Court is assuming that the no-retreat rule is absolute and is deciding this case based exclusively on other considerations."

Fourth, defendant contends that the trial court's factual finding that defendant removed the shotgun from its fabric case before pointing the weapon at Wojciakowski is clearly erroneous. We disagree. Wojciakowski testified that defendant removed the gun from its case. As stated previously, the credibility of the witnesses is for the trier of fact. *Cartwright, supra*.

Next, defendant contends that the prosecution failed to prove an essential element of the offense by not producing any evidence that the gun was operable at the time of the alleged assault. However, in *People v Prather,* 121 Mich App 324; 328 NW2d 556 (1982), this Court held in pertinent part:

> [I]t is the general rule that an unloaded gun is a dangerous weapon for purposes of the felonious assault statute. . . . Further, we find that the prosecutor need not present proof of operability as an element of a prima facie case in a felonious assault prosecution.
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> Defendant's reliance on *People v Stevens,* 409 Mich 564; 297 NW2d 120 (1980), is misplaced. In that case, the parties stipulated that the weapon involved, a starter pistol, was mechanically defective to the point where it was incapable of firing. The Supreme Court held that since the pistol was not capable of propelling a dangerous projectile, because of the very nature of a starter pistol, it was not a gun, revolver, or pistol within the meaning of the felonious assault statute. In the instant case, there was no stipulation. The defendant testified that he did not know if the gun would fire because he had never fired it. The operability of the gun could not be established at trial because the gun was never retrieved. However, unlike the starter pistol in *Stevens*, a .38 caliber gun is one of the weapons enumerated in the felonious assault statute and is capable of propelling a dangerous projectile. . . . Therefore, we find that *Stevens* is distinguishable on its facts. [*Id*. at 329-330.]

Here, too, there was no stipulation nor even a contention that the shotgun was mechanically defective and incapable of firing. On the contrary, defendant testified that he used the gun for target practice. The evidence also showed that defendant had ammunition for this gun in his vehicle. Viewing this evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found beyond a reasonable doubt that the gun was operable on the day in question. *People v Truong (After Remand),* 218 Mich App 325, 337; 553 NW2d 692 (1996).

Next, defendant takes issue with the trial court's rejection of his defense of self-defense. Specifically, defendant contends that the trial court erred in finding that defendant had no reasonable basis to believe that it was necessary to protect himself by using non-deadly force consisting of pointing the unloaded gun at Wojciakowski's head and threatening to kill him.

Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt. *Truong, supra*. As relevant to this issue, the justifiable use of non-deadly force in self-defense is explained as follows in a leading treatise:

> One thus uses deadly force if he fires at another with intent to kill him or do him serious bodily harm, though actually he misses him completely or causes him only minor bodily injury. But merely to threaten death or serious bodily harm, without any intention to carry out the threat, is not to use deadly force, so that one may be justified in pointing a gun at his attacker when he would not be justified in pulling the trigger.
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> In determining how much force one may use in self-defense, the law recognizes that the amount of force which he may justifiably use must be reasonably related to the threatened harm which he seeks to avoid. One may justifiably use *nondeadly* force against another in self-defense if he reasonably believes that the other is about to inflict unlawful bodily harm (it need not be death or serious bodily harm) upon him (and also believes that it is necessary to use such force to prevent it). That is, under such circumstances he is not guilty of assault (if he merely threatens to use the nondeadly force or if he aims that force at the other but misses) or battery (if he injuries [sic] the other by use of that force). [LaFave & Scott, Criminal Law (2d ed), § 5.7, pp 455-457.]

See also *Troung, supra*; CJI2d 7.22.

In this case, the trial court found as a matter of fact that "[b]y the time defendant had gone to this van, exchanged a bat for a shotgun, and returned to where Mr. Wojciakowski and his companions were standing in the street, it was plain that none of the three was armed with anything, a gun or anything less offensive." After reviewing the record, we conclude that this factual finding is not clearly erroneous. MCR 2.613(C). In light of this factual finding, we likewise find no error in the court's legal conclusion that "it was unreasonable of him to then do what he did. Pointing a gun at Mr. Wojciakowki's head and threatening to kill him was far more force than was appropriate to the circumstances both as they were and as defendant saw them." *Truong, supra*; LaFave, *supra*. Accordingly, the trial court did not err in rejecting defendant's defense of self-defense. See LaFave, *supra* ([O]ne who honestly though unreasonably believes in the necessity of using force in self-defense loses the defense). In light of this conclusion, we need not consider defendant's alternative contention that the trial court erred in finding that defendant was not entitled to assert self-defense because he was the aggressor.

Finally, defendant claims that the trial court erred in rejecting the defense of duress as a justification or excuse for defendant's conduct. Defendant raised this argument in his motion for a new trial. The defense of duress requires, in relevant part, that the "threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm." *People v Lemons*, 454 Mich 234, 247; 562 NW2d 447 (1997). As indicated previously, in rejecting defendant's defense of self-defense, the trial court found in its written opinion that defendant had no reasonable basis for believing that he was in danger where the three men were standing in the street unarmed. In light of this finding, we likewise find no error in the trial court's rejection of defendant's defense of duress. The trial court did not abuse its discretion in denying defendant's motion for a new trial on this ground. *Torres*, *supra*.

Affirmed.

/s/ Michael R. Smolenski
/s/ Barbara B. MacKenzie
/s/ Janet T. Neff