

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAPPY CHANDLER MILLER, SR.,

Defendant-Appellant.

UNPUBLISHED

May 15, 1998

No. 198126

Lenawee Circuit Court

LC No. 96-006886 FH

Before: Holbrook, Jr., P.J., and White and J.W. Fitzgerald*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of assault with a dangerous weapon (“felonious assault”), MCL 750.82; MSA 28.277, one count of carrying a dangerous weapon with unlawful intent, MCL 750.226; MSA28.423, and one count of possession of a firearm during the commission of a felony (“felony-firearm”), MCL 750.227b; MSA 28.424(2). Defendant was sentenced to twelve to forty-eight months’ imprisonment for the felonious assault convictions, twelve to sixty months’ imprisonment for the carrying a dangerous weapon with unlawful intent conviction, and two years’ imprisonment for the felony-firearm conviction. Defendant’s felonious assault and carrying a dangerous weapon with unlawful intent sentences are to run consecutive to his felony-firearm sentence. We affirm.

Early in the evening on March 24, 1996, defendant received a collect telephone call from his teenage granddaughter. Distraught, the granddaughter told defendant that she was at a restaurant in the Irish Hills and that she was “being mistreated.” Defendant testified that he thought his granddaughter had said she was “being molested.” When the telephone call abruptly ended, defendant, fearing the worst, grabbed his loaded gun and drove from Romulus to the mobile home trailer of Jan Nielson located in Clinton.¹ Inside the trailer were the granddaughter, Nielson, Paul Jeffrey and Tammy Ragay, who is defendant’s daughter and mother of the granddaughter. When defendant entered the trailer, a fight ensued between defendant, Nielson and Jeffrey. During that fight, defendant pulled out his gun and pointed it at both Nielson and Jeffrey. No shots were fired, and eventually defendant and his granddaughter left.

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

Defendant argues that the trial court abused its discretion when it denied his motion for a new trial. We disagree. Defendant asserts that the jury's verdict was against the great weight of the evidence because the evidence established that he was acting in lawful defense of his granddaughter. As the trial court instructed the jury, when considering whether a defendant employing nondeadly force acted in the lawful defense of another, the jury should consider: (1) whether the defendant honestly and reasonably believed that he had to use nondeadly force to protect another; (2) whether the defendant used only the degree of nondeadly force that appeared necessary to protect the other person; (3) that the right to defend another lasts only as long as necessary under the circumstances to effectively protect the other person; and (4) whether any wrongful acts by defendant instigated the assault. CJI2d 7.22. Accepting defendant's assertion that he honestly believed his granddaughter was being molested when he received the telephone call, we nonetheless conclude that the jury could have reasonably concluded that his choice to employ this degree of nondeadly force in defense of the girl was unreasonable and therefore unjustified. Defendant testified that he headed for the Nielson trailer in Clinton because he believed his granddaughter told him that she "was somewhere near Clinton." If defendant believed that the threat of violence was imminent, we agree with the trial court that the reasonable action would have been for him to notify either the nearby authorities or the state police, who could have immediately come to the aid of the granddaughter. Accordingly we conclude that the trial court did not abuse its discretion when it denied defendant's motion for a new trial.

On a related matter, defendant argues that the prosecution improperly shifted the burden of proof on the issue of lawful self-defense in two specific ways: (1) by posing questions to various witnesses on whether the granddaughter was molested, whether the granddaughter could have left the trailer, and whether anyone inside the trailer was armed with a weapon other than defendant; and (2) by remarking during his closing argument that defendant was obligated "to demonstrate the actions or the force or the nature of [his] . . . activity was reasonable and proportional to the threat imposed." We note that defendant never raised a specific and timely objection during trial to either of these challenged actions. MRE 103(a)(1).

Once defendant raised in his opening statement that he had acted in lawful self-defense of his granddaughter, the prosecution then bore the burden of proving beyond a reasonable doubt that the defendant's actions did not constitute lawful self-defense of another. *People v Stallworth*, 364 Mich 528, 535; 111 NW2d 742 (1961). Accordingly, we conclude that because the various questions posed were relevant to the issue of self-defense, defendant was not unfairly prejudiced by the prosecutor's queries. See *People v Mateo*, 453 Mich 203, 214; 551 NW2d 891 (1996); MRE 103(d).

As for the challenged remarks made during closing argument, defendant's failure to raise a specific and timely objection precludes our review of the issue unless the prejudicial effect could not have been cured by a cautionary instruction or if the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Having reviewed the remarks in context, we conclude that our failure to consider the issue would not result in a miscarriage of justice. The remark was made as the prosecutor was reviewing the testimony and credibility of each witness called at trial. While the challenged remark does seem to imply that

defendant carries the burden of proof on the issue, we are not convinced that this isolated remark had such an effect on the minds of the jury. It is true that the trial court did not instruct the jury the prosecution bears the burden of “prov[ing] beyond a reasonable doubt that the defendant did not act in self-defense.” CJI2d 7.20. However, the court did instruct the jury that the prosecution had to establish defendant’s guilt beyond a reasonable doubt. Further, the trial court instructed the jury that “[t]he Defendant is not required to prove his innocence or to do anything,” and that “[i]f a person acts in lawful defense of another, his actions are excused, and he’s not guilty of any crime.” Taken together, these instructions sufficiently “covered the required instruction as to the defense of self-defense.” *People v Brown*, 34 Mich App 45, 47; 190 NW2d 701 (1971).² Accordingly, we conclude that reversal is not required.

We also reject defendant’s assertion that he was denied the effective assistance of counsel. Defendant argues that his counsel’s ineffective assistance is evidenced by counsel’s failure to stop the prosecution from shifting the burden of proof on the issue of lawful self-defense. However, we are satisfied that the overall instructions did not have this effect, and therefore defendant has not shown the required prejudice. See *Strickland v Washington*, 466 US 668, 692; 104 S Ct 2052; 80 L Ed 2d 674 (1984) (noting that “any deficiencies in counsel’s performance must be prejudicial to defendant in order to constitute ineffective assistance”).

Next, defendant argues that his convictions for feloniously assaulting Jeffrey is not supported by sufficient evidence. We disagree. “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 Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996) (quoting *People v Malkowski*, 198 Mich App 610, 614; 499 NW2d 450 [1993]). Defendant argues that because the victim did not testify that he was afraid of defendant when defendant pointed a gun at him, the prosecution failed to present sufficient evidence to show that Jeffrey was in reasonable apprehension of an imminent battery.³

“When reviewing the sufficiency of the evidence in a criminal case, this Court views the evidence in a light most favorable to the prosecution to determine whether a rational factfinder could have found the essential elements of the crime proved beyond a reasonable doubt.” *People v Reeves*, 222 Mich App 32, 34; 564 NW2d 476 (1997), lv gtd 456 Mich 899 (1997). “Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime.” *Id.* (quoting *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 [1993]). Jeffrey testified that at some point during the altercation inside the trailer, defendant pointed a revolver at Jeffrey’s chest. Jeffrey testified that a few minutes earlier defendant had threatened to kill everyone who had harmed his granddaughter. When asked what his response was to having the gun pointed at him, Jeffrey testified that he just froze. I “don’t want to get shot,” he continued, “so it’s best to do what you’re told.” We believe that based upon this evidence, a reasonable factfinder could conclude that Jeffrey had been placed in reasonable apprehension of an imminent battery.

Defendant also argues that because he had the lawful intent of defending his granddaughter, his conviction for carrying a dangerous weapon with unlawful intent is not supported by sufficient evidence. However, we conclude that the jury could have reasonably found that defendant went to the trailer

intending to do more than just defend his granddaughter. We conclude that defendant's argument is without merit.⁴

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Helene N. White

/s/ John W. Fitzgerald

¹ Defendant estimated the drive took somewhere between forty-five to sixty minutes.

² We also point out that the record does not indicate that defendant raised an objection to the trial court's failure to give CJI2d 7.20.

³ Defendant does not argue on appeal that the prosecution failed to establish the first and second elements of the offense. Further, defendant does not argue that he did not have the requisite specific intent. Defendant's focus is solely on the issue of Jeffrey's response to defendant's act of pointing a gun at Jeffrey.

⁴ Defendant argues that, if we concluded that the verdict was against the great weight of the evidence or that his convictions were not supported by sufficient evidence, we should vacate his felony-firearm conviction because, just like a police officer, he was legally able to carry a firearm in defense of another. Without addressing the merits of this argument, because we have determined that the verdict was not against the great weight of the evidence and that his convictions are supported by sufficient evidence, we decline to consider this issue.