

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROY OSBORNE BETTERLY,

Defendant-Appellant.

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UNPUBLISHED

March 23, 1999

No. 206880

Huron Circuit Court

LC No. 97-003929 FH

Before: Murphy, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant was convicted of carrying a concealed weapon (“CCW”), MCL 750.227; MSA 28.424, felonious assault, MCL 750.82; MSA 28.277, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and felon in possession, MCL 750.224f; MSA 28.421(6). Defendant was sentenced to thirty to sixty months in prison for the CCW conviction, thirty to forty-eight months in prison for the felonious assault conviction and thirty to sixty months for the felon in possession conviction. These three sentences are to be served concurrently, but consecutively to the mandatory two years imposed for the felony-firearm conviction. In this appeal as of right, defendant challenges the felonious assault conviction and the proportionality of his sentence. We affirm.

Defendant first argues that there was insufficient evidence to support his conviction for felonious assault because the victim testified that he was not placed in fear by defendant’s actions. In determining whether sufficient evidence has been presented to sustain a conviction, this Court must review the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). To prove that a defendant is guilty of felonious assault, the prosecution must show an assault with the use of a “gun, revolver, pistol . . . .” MCL 750.82; MSA 28.277. “Criminal assault” is defined as an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Sanford*, 402 Mich 460, 479; 265 NW2d 1 (1978). In *Sanford*, the Court specifically rejected a definition of assault that required a showing that the victim was placed in fear of immediate harm. *Id.* at 475, 479.

The testimony at trial established that defendant held a loaded gun which he pointed at the victim and then fired. The bullet missed the victim but broke a window behind him. The intentional discharge of a firearm at someone within range is an assault. *People v Johnson*, 54 Mich App 303, 304; 220 NW2d 705 (1974). Taken in the light most favorable to the prosecution, a reasonable trier of fact could find beyond a reasonable doubt that defendant was guilty of felonious assault. *Jolly, supra* at 466.

Further, defendant's minimum sentence of thirty months for the CCW conviction was not an abuse of discretion. If a sentence violates the principle of proportionality, it will constitute an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Although defendant's sentence for carrying a concealed weapon departed from the sentencing guidelines, "the key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range." *Id.* at 661. In this case, the sentencing judge spoke at length about defendant, his history and his crimes. In light of the serious nature of the crimes and defendant's background, the sentence imposed was proportionate.

Affirmed.

/s/ William B. Murphy

/s/ Hilda R. Gage

/s/ Brian K. Zahra