

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

INEZ STONE,

Defendant-Appellant.

UNPUBLISHED

May 21, 2002

No. 229870

Wayne Circuit Court

LC No. 00-001778

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BETTY STONE,

Defendant-Appellant.

No. 229880

Wayne Circuit Court

LC No. 00-001778

Before: Cooper, P.J., and Hood and Kelly, JJ.

PER CURIAM.

In these consolidated appeals, each defendant was convicted by a jury of two counts of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendants were each sentenced to six months' probation for the felonious assault convictions and two years' mandatory imprisonment for the felony-firearm convictions. Defendants appeal as of right. We affirm.

I. Basic Facts and Procedural History

This case arises out of an attempted repossession of an automobile. Kimberly Stone is the daughter of defendant Inez Stone and defendant Betty Stone's sister. Kimberly Stone became delinquent in her automobile payments. As a result of this delinquency, two men from the financing company, Jermaine Robinson and Frank Davis, the complainants herein, went to repossess Kimberly Stone's automobile. Driving an unmarked tow truck and dressed in clothing that would not otherwise identify themselves as individuals engaged in repossessing property, Davis and Robinson appeared at Kimberly Stone's residence. At this time, Kimberly Stone was

in her automobile. Allegedly, Robinson showed Kimberly Stone his badge, identified himself as an individual engaged in the business of repossessing property, and indicated that his purpose was to repossess her automobile. In response, Kimberly Stone put the automobile in reverse and sped away.

Later that morning, Davis observed Kimberly Stone driving the automobile. He called his office and discovered that Inez Stone lived in the area. Accordingly, Davis proceeded to Inez Stone's residence and noticed the automobile parked in the driveway. Thereafter, Davis contacted Robinson and both men appeared at the residence to repossess the automobile.

The testimony adduced at trial regarding the sequence of events from this point forward substantially conflicted. Davis and Robinson claimed that they hooked up the automobile to their tow truck and were in the process of dragging it out of the driveway when Kimberly Stone suddenly came running out of the house, got into the automobile and attempted to get it off of the hoist. At this time, to prevent Kimberly Stone from departing with the automobile again, Robinson used a tool and punctured two of the wheels on the passenger's side. Very quickly thereafter, Inez Stone and Betty Stone appeared on the porch. According to Davis and Robinson, Inez Stone ordered Betty Stone to get her gun. Robinson and Davis indicated that Inez Stone pointed the gun at both of them and threatened to kill them. Thereafter, when Inez Stone noticed that the gun had no bullets, she ordered Betty Stone back into the house to retrieve her other gun. At this point, Robinson claimed that Betty Stone did not hand it to Inez Stone, but instead came down off of the porch and pointed it directly in his face advising, in no uncertain terms, that she would kill both of them. Robinson also testified that Betty Stone pointed the gun at both of them while she threatened to kill them. Both Robinson and Davis testified that they were afraid.

On the contrary, Inez Stone's recollection of the event is drastically different. She indicated that Kimberly Stone came into the house for a couple of seconds to retrieve a pair of pants, went out of the house to her automobile when Robinson came upon her. When she heard Kimberly Stone screaming for her, Inez Stone indicated that she looked out of the window and observed Robinson with an object, which she thought was an ice pick, raised over his head near her daughter. Not aware of the repossession, Inez Stone indicated that she feared for her daughter's life. In response, she grabbed a gun from her closet and proceeded out onto the porch. According to Inez Stone, she never pointed a gun at either Davis or Robinson. A short time thereafter, when she noticed that she grabbed the gun without bullets, she directed Betty Stone to go back into the house and retrieve her other gun. Betty Stone complied and when she came back onto the porch, Inez Stone testified that she handed over the gun and that she neither pointed a gun nor threatened either of the two men.

Testimony adduced at trial indicated that when Inez Stone appeared on the porch, she did not immediately identify herself as a police officer. According to the testimony at trial, Davis and Robinson did not learn of her status as a Detroit Police Officer until they decided to call the police to report the incident.

As a result, defendants were each charged with two counts of felonious assault and possession of a firearm during the commission of a felony. The jury found defendants guilty on all counts.

II. Motion for New Trial

First, defendants argue that the jury's verdict was against the great weight of the evidence. An objection concerning the great weight of the evidence must be raised by a motion for a new trial. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). Although defendants did move for a new trial below, the basis for that motion was not that the jury's verdict was against the great weight of the evidence, but rather on the basis of newly discovered evidence. Accordingly, this issue is not preserved and review is precluded unless defendants demonstrate plain error which affected their substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The elements of felonious assault are (1) a simple assault, (2) aggravated by the use of a weapon, (3) with the present ability or apparent present ability to commit a battery. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). To commit an assault, a defendant must have had the present ability to fulfill the threat through sufficient proximity to the target, but that present ability may be actual or may be apparent if the victim reasonably apprehended an imminent battery. *People v Reeves*, 458 Mich 236, 244; 580 NW2d 433 (1998). Thus, an assault is complete when the circumstances indicate that the defendant, by overt conduct, causes the victim to reasonably believe that the defendant will do what is threatened. *Id.*

Defendants first argue that the verdict was against the great weight of the evidence because Inez Stone was acting in the capacity of an off-duty police officer, and Inez Stone and Betty Stone reasonably believed Kimberly Stone was being attacked. We disagree. Defendants correctly assert that a police officer may make an arrest if a felony is committed in their presence. MCL 764.15; See also *People v Davenport*, 46 Mich App 579, 583; 208 NW2d 562 (1973). However, we find that the trial testimony supports the conclusion that Inez Stone did not act in the capacity of an off-duty police officer nor did she have a reasonable belief that a crime was being committed in her presence.

First, Inez Stone admitted that she did not identify herself as a police officer when she first appeared on the porch. Inez Stone's failure to identify herself as a police officer created a reasonable inference that she was acting in the capacity of a mother protecting her daughter rather than a police officer. Indeed, Inez Stone testified that her natural instinct was to protect her daughter. Criminal intent may be proven indirectly by inference from the conduct of the accused and surrounding circumstances from which intent logically and reasonably follows. *People v Lawton*, 196 Mich App 341, 349-350; 481 NW2d 810 (1993).

Second, expert testimony offered by Sergeant Babb further supported the inference that Inez Stone was not acting in the capacity of an off-duty officer because Inez Stone did not follow proper police procedures applicable to off-duty police officers.

Lastly, regarding Inez Stone's authority to act as an off-duty police officer, testimony at trial indicated that Inez Stone and Betty Stone did not have a reasonable belief that a crime was being committed. Although the victims, Davis and Robinson, did not have company uniforms or a tow truck that was marked with the company insignia, Davis and Robinson indicated that they did have company identification. Indeed, testimony at trial indicated that Davis showed his

identification to Inez Stone who stated, “I don’t care who you are, you’re stealing.” Accordingly, the jury could properly reject Inez Stone’s claim that she was acting under a reasonable belief that a crime was being committed in her presence. *Id.*

Defendants also contend that they are entitled to a new trial because of numerous conflicts in Davis’ and Robinson’s testimony. However, “[c]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.” *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001) citing *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). It is well established that, where there is conflicting evidence, the issue of credibility ordinarily should be left to the trier of fact. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). Accordingly, contrary to defendants’ claims, the jury could properly reject some or all of the testimony. *McCray*, *supra* at 638; *Gadomski*, *supra* at 28.

Defendants also argue that the jury verdict was against the great weight of the evidence because Davis and Robinson were not in apprehension of a battery because they knew that the first gun was unloaded, they wore bulletproof vests and they remained at the house after they achieved their objective to obtain the automobile. However, contrary to defendants’ assertion, Davis and Robinson testified that they were in fear of the black revolver despite later learning that it was unloaded. Davis heard Inez Stone state she was going to kill Davis and Robinson. Both Davis and Robinson testified that they were scared because Inez Stone was pointing the gun in their direction in a swaying motion. Robinson also testified that he was fearful that he might be killed. Despite the fact that Inez Stone had the gun for a short time before she realized that it was unloaded, this short amount of time was sufficient for Davis and Robinson to develop an apprehension of a battery. Lastly, the fact that a weapon is inoperable is not dispositive on the issue to determine whether a victim has a reasonable apprehension of a battery. Generally, an unloaded firearm is a dangerous weapon for the purposes of felonious assault, and a prosecutor need not present proof of the weapon’s operability as an element of the offense. *People v Smith*, 231 Mich App 50, 53; 595 NW2d 755 (1998). After a review of the record, we are satisfied that Davis and Robinson had a reasonable apprehension that defendants intended to carry out their threats and discharge the weapon. *Reeves*, *supra* at 244.

Similarly, our review of the record does not support defendants’ argument that since Davis and Robinson remained in the area, they did not fear an imminent battery. Because Davis and Robinson had a reasonable apprehension that Inez Stone and Betty Stone would use the gun, neither Davis nor Robinson wanted to abandon the other. Further, Kimberly Stone was sitting in the vehicle, and thus, Davis and Robinson could not safely leave the area despite having attached the vehicle to the tow truck. In sum, Davis’ and Robinson’s testimony was not so inherently implausible that the jury’s verdict contravened the great weight of the evidence. *Lemmon*, *supra* at 644. Accordingly, defendants have not established plain error which affected the outcome of the proceedings. *Carines*, *supra* at 763-765.

III. Trial Court’s Remarks to the Venire

Next, defendants claim that the trial court made highly prejudicial statements in front of the entire jury pool which denied defendants a fair and impartial trial. The allegedly prejudicial colloquy between the trial court and a prospective juror was as follows:

[Prospective Juror]: My father is a retired Detroit Police Officer.

THE COURT: So why would that be a factor? I'm trying to understand, why would that be a factor in whether or not . . . you can be a fair and impartial juror?

[Prospective Juror]: Because by him having been a police officer I know that police officers are supposed to be on duty 24 hours a day seven days a week.

THE COURT: Ma'am, that's not true.

[Prospective Juror]: Well, this is how I was raised.

THE COURT: Well, I'm just telling you that that's not what it is. I mean a person who is a police officer is just like any other citizen. They're subject to violation of the law also. Are you suggesting or saying that 24 and 7 means that a police officer cannot be subject to being, violating the law?

[Prospective Juror]: Basically that's how I was raised.

* * *

THE COURT: Ma'am, it's hard for me to imagine . . . that you are a grown mature woman who thinks that a police officer cannot be subject . . . to violating the law. Or that they're on duty, as you say, 24 hours, seven days a week. Okay. . . .

An argument that voir dire was improper is unpreserved for appellate review if the defendant did not object, expressed satisfaction with the jury, and failed to demonstrate prejudice. *People v Bell*, 209 Mich App 273, 278; 530 NW2d 167 (1996). Here, defendants failed to object to the trial court's comments and expressed satisfaction with the jury. Therefore, this issue is unpreserved. An unpreserved constitutional claim of error is reviewed for plain error which affected the defendant's substantial rights. *Carines, supra* at 763-764. A criminal defendant may obtain relief based upon an unpreserved error if the error is plain and affected substantial rights by affecting the outcome of the proceedings. *Id.*

In every prosecutorial or judicial abuse question, the reviewing court must examine the pertinent portion of the record and evaluate the alleged wrongful acts in context. *People v Callington*, 123 Mich App 301, 305; 333 NW2d 260 (1983). This Court reviews prosecutorial or judicial abuse complaints case by case, to determine whether the defendant received a fair and impartial trial. *Id.* A trial court has wide discretion and power in the manner of trial conduct. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). This discretion, however, is not unlimited, and a trial court "pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial." *Paquette, supra* at 350. In ensuring that voir dire effectively serves this function, the trial court has considerable discretion in both the scope and conduct of voir dire. MCR 2.511(D); MCR 6.412(C); See also *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994). What constitutes acceptable and unacceptable voir dire practice "does not lend itself to hard and fast rules." *Id.* at 623. Rather, trial courts must be allowed "wide discretion in the manner they employ to achieve the goal of an impartial jury." *Id.*

Here, the trial court's comments were inherently inappropriate because the comments were disparaging to the prospective juror personally, and reflected on defendants' defenses. Although the trial court was attempting to elicit the prospective juror's true feelings as to whether the juror could remain impartial regarding her feelings concerning off-duty police officers, the trial court inadvertently expressed its own opinion on defendants' theory of the case. Indeed, defendants were arguing that a police officer is always on duty and is required to carry his weapon twenty-four hours a day, seven days a week, which the trial court stated was "not true." Accordingly, we conclude that defendants have established plain error. However, in light of defendants' failure to object to the trial court's comments during voir dire, defendants' expressed satisfaction with the composition of the jury, the trial court's preliminary and final instructions and the specific instruction per Inez Stone's request regarding Inez Stone's authority as an off-duty police officer, defendants have failed to establish that the jury was unduly influenced by the trial court's comments to the prospective juror during voir dire. Accordingly, defendants have failed to establish plain error that was outcome determinative. *Carines*, supra at 763-764.

IV. Sufficiency of Evidence

Defendants argue that there was insufficient evidence to support their convictions for felonious assault. This Court reviews challenges to the sufficiency of the evidence by considering the evidence in a light most favorable to the prosecution to discern whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *Avant*, supra at 505.

Defendants contend that the prosecutor failed to establish the requisite present ability or the apparent present ability to inflict the threatened harm because the gun was unloaded and the victims knew that it was unloaded. Thus, defendants submit that neither victim could reasonably apprehend an imminent battery. We do not find defendants' argument persuasive. Defendants' argument in this regard parallels their argument regarding the great weight of the evidence, and we reject it based on the same facts and for the same reasons we rejected defendants' great weight of the evidence argument.

As a general rule, the prosecution need not establish present proof of operability to set forth a viable prima facie case for felonious assault. *Smith*, supra at 53. Indeed, an assault is complete when the circumstances indicate that the defendant, by overt conduct, causes the victim to reasonably believe that the defendant will carry out the threat. *Reeves*, supra at 244. In the instant case, testimony adduced at trial revealed that defendant Inez Stone pointed a gun at both of the victims, shouted various expletives and threatened to kill them. Certainly, this conduct is sufficient for both Davis and Robinson to "reasonably believe" that defendant Inez Stone would execute the threat and discharge the weapon. Additionally, both Davis and Robinson unequivocally testified that they were afraid. That the first firearm brandished by defendant Inez Stone contained no ammunition was thus inapposite. Indeed, this testimony, considered in a light most favorable to the prosecution, was sufficient for a reasonable juror to find that the elements of felonious assault were proved beyond a reasonable doubt. We find no error.

Affirmed.

/s/ Jessica R. Cooper

/s/ Harold Hood

/s/ Kirsten Frank Kelly