

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR LEE WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

October 7, 2004

No. 247606

Wayne Circuit Court

LC No. 02-013244

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b, entered after a bench trial. We affirm.

Complainant testified that defendant pointed a gun at her and another woman. The gun fired, and a bullet struck complainant in the leg. The trial court found defendant guilty of one count of felonious assault,¹ reckless discharge of a firearm, MCL 752.861,² and felony-firearm.

When reviewing a challenge to the sufficiency of the evidence in a bench trial, we view the evidence presented in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. The trier of fact may make reasonable inferences from direct or circumstantial evidence in the record. *People v Petrella*, 424 Mich 221, 268-270, 275; 380 NW2d 11 (1985); *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990). A trial court's findings of fact are reviewed for clear error. MCR 2.613(C).

We review a claim of instructional error de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

¹ The trial court dismissed the second count of felonious assault pertaining to the other woman based on the woman's failure to appear at trial.

² The trial court dismissed this conviction at sentencing.

The elements of felonious assault are: (1) an assault; (2) with a dangerous weapon; and (3) with the intent to place the victim in reasonable apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). An assault is an attempt to commit a battery or an unlawful act that places another person in reasonable apprehension of receiving an immediate battery. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). The intent to place a victim in fear of receiving an immediate battery can be inferred from the circumstances. *People v Lawton*, 196 Mich App 341, 349-350; 492 NW2d 810 (1992). To commit the offense of reckless discharge of a firearm, a firearm must be discharged carelessly, recklessly, or negligently and resulting in death or injury. *People v Lowery*, 258 Mich App 167, 174; 673 NW2d 107 (2003); MCL 752.861.

We affirm defendant's convictions. A cognate lesser offense is one that shares some common elements with, and is of the same nature as, the greater offense but also has elements not found in the greater offense. *Lowery, supra* at 173. All the elements of a necessarily included lesser offense are contained within those of the greater offense. *Id.* It is impossible to commit the greater offense without first committing the lesser offense. *Id.* An instruction on a cognate lesser offense is not permitted. *People v Cornell*, 466 Mich 335, 359; 646 NW2d 127 (2002). A person can commit felonious assault without using a firearm, whereas the offense of reckless discharge of a firearm by definition involves the use of a firearm. The offense of reckless discharge of a firearm is not a necessarily included lesser offense of felonious assault, and the trial court was not permitted to instruct itself on that offense. *Id.* The evidence, viewed in a light most favorable to the prosecution, supported defendant's convictions of felonious assault and felony-firearm. *Petrella, supra; Davis, supra; Lawton, supra; MCL 750.227b.*

Affirmed.

/s/ Stephen L. Borrello
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood