

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARYL LAMAR BELCHER,

Defendant-Appellant.

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UNPUBLISHED

January 25, 2005

No. 250681

Wayne Circuit Court

LC No. 03-005444-01

Before: Gage, P.J., and Meter and Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions for felonious assault, MCL 750.82, possession of a firearm during the commission of a felony, MCL 750.227b, and domestic violence, MCL 750.81. Defendant was sentenced to two years in prison for the felony-firearm conviction and received suspended sentences for the felonious assault and domestic violence convictions. We affirm.

Defendant's first issue on appeal is that the trial court erred when it allowed the complainant's preliminary examination testimony to be read into the record at trial without the prosecutor exercising due diligence to locate the complainant. We disagree.

This Court reviews a trial court's determination that the prosecution exercised due diligence in attempting to locate a witness for trial for an abuse of discretion. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). "The trial court's determination will not be disturbed on appeal unless a clear abuse of discretion is shown." *Id.*

A defendant has a constitutional right to be confronted with the witnesses against him. *People v Conner*, 182 Mich App 674, 680; 452 NW2d 877 (1990). However, former testimony may be used by the prosecution consistent with this constitutional right as long as the witness is "unavailable" for trial and as long as there was a prior opportunity for cross-examination. *Crawford v Washington*, 541 US 36; 124 S Ct 1354, 1374; 158 L Ed 2d 177 (2004). A declarant is unavailable if the declarant "is absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." *People v James*, 192 Mich App 568, 571; 481 NW2d 715 (1992), quoting MRE 804(a)(5). The test for due diligence is "one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts

were made to procure the testimony, not whether more stringent efforts would have produced it.” *Bean, supra*, 457 Mich 684.

The record in the instant case establishes that the complainant was unavailable for trial and that the prosecution exercised reasonable efforts constituting due diligence in attempting to secure the complainant’s presence. The complainant was willing to, and did in fact, testify at the preliminary examination. Sometime after the preliminary examination the complainant received a subpoena by mail and spoke with the prosecutor, acknowledging receipt of the subpoena and confirming her future attendance at trial. About a week before trial, the prosecutor again contacted the complainant and was reassured that the complainant would be there for trial the following week. Additionally, the complainant was personally served with a subpoena two days before the trial began. The complainant gave the prosecution no indication that she would not be in attendance at the start of the trial. It was not until the day of trial that the prosecution became aware that the complainant would be unavailable. Even then, the prosecution made telephone calls to the witness’s last known number and sent an officer to her last known address several times. The prosecutor was told that the complainant was not at home when the prosecutor telephoned. Also, the officer spoke to several people about the complainant’s whereabouts, to no avail. Therefore, the prosecution used several available means to procure the complainant’s attendance. Defendant cites several examples of possible methods of locating the complainant that were not used by the prosecution. However, it is not necessary that authorities exhaust all avenues for locating a witness. The prosecution had a duty only to exercise a reasonable, good faith effort in locating the witness. *People v Briseno*, 211 Mich App 11, 16; 535 NW2d 559 (1995).

Defendant also contends that the complainant’s preliminary examination testimony was not subject to cross-examination. However, defendant had an opportunity and motive to develop the preliminary examination testimony of the complainant on cross-examination. In fact, defendant took that opportunity to develop the complainant’s testimony. Therefore, defendant’s argument is without merit.

Defendant’s second issue on appeal is that the prosecution failed to present sufficient evidence to support his felonious assault and felony-firearm convictions.<sup>1</sup> We disagree.

An insufficiency of the evidence claim is reviewed de novo by this Court. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). On review, the Court, viewing the evidence in the light most favorable to the prosecution, must determine whether a rational trier of fact could find that the prosecution proved all the elements of the crime beyond a reasonable doubt. *People v Bulmer*, 256 Mich App 33, 36; 662 NW2d 117 (2003). Circumstantial evidence and reasonable inferences drawn therefrom can be sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

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<sup>1</sup> Defendant does not challenge on appeal the sufficiency of the evidence regarding his domestic violence conviction.

“Felonious assault is defined as a simple assault aggravated by the use of a weapon.” *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993). To support a conviction for felonious assault the prosecution must prove the following: “(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable fear or apprehension of an immediate battery.” *People v Wardlaw*, 190 Mich App 318, 319; 475 NW2d 387 (1991). “A simple assault is either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery.” *People v Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996).

The evidence established that defendant pulled a shotgun on the complainant after an argument and told her that he was going to shoot her. The complainant was afraid and decided to grab the gun. She removed a shell from the gun and ran out of the home. As she left the home, defendant told her that he would shoot her if she went to a neighbor’s home. The complainant called the police from a pay phone two blocks away. When the police arrived a short time later, the police noticed that the complainant was shaking and very nervous and that she was talking very fast. Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence present to convict defendant of felonious assault.

Defendant contends that the complainant’s testimony was not credible and that defendant’s testimony established that he did not point a shotgun at her. However, “[a]n appellate court will defer to the trial court’s resolution of factual issues, especially where it involves the credibility of witnesses.” *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997). Therefore, defendant’s contention regarding the complainant’s credibility is without merit.

In order to prove that a defendant is guilty of felony-firearm, the prosecution must prove beyond a reasonable doubt that the defendant (1) had a firearm in his or her possession (2) during the time he or she commits or attempts to commit a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Possession of a weapon may be actual or constructive and may be proved by circumstantial evidence. *People v Hill*, 433 Mich 464, 469-470; 446 NW2d 140 (1989).

In the instant case, the evidence established that defendant pulled a shotgun on the complainant after the two argued. He threatened to shoot her with the weapon, which made the complainant afraid. Additionally, police overheard defendant in his cell block laugh and state that police had walked “right past” his “heater” (i.e., gun) while looking for it in his home. A rational trier of fact, viewing this evidence in the light most favorable to the prosecution, could find beyond a reasonable doubt that defendant possessed a firearm during the commission of a felony. Defendant again contends that the complainant’s testimony regarding the incident was not credible; however, credibility of witnesses is a matter for the trier of fact to ascertain. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). This court does not resolve credibility issues anew. *Id.* The trial court found the complainant’s testimony to be credible, and it is not within the province of this Court to overturn that finding.

Affirmed.

/s/ Hilda R. Gage  
/s/ Patrick M. Meter  
/s/ Karen M. Fort Hood