

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENYA DESHEL HORNE,

Defendant-Appellant.

UNPUBLISHED

June 12, 2007

No. 269788

Wayne Circuit Court

LC No. 05-012650-01

Before: Davis, P.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right her bench trial convictions of assault with a dangerous weapon, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Regina Kersey was in her car at the drive-through window of a restaurant with her 13-year-old daughter and two younger children. When Kersey started to back up her car to place her order, defendant, who was driving the car behind Kersey, shouted that she would beat Kersey if she hit defendant's car. Kersey replied that she saw defendant, and the two exchanged heated words. During the exchange, defendant left her car and told Kersey that she had her "heater." Kersey believed that this meant that defendant possessed a gun. Kersey called the police on her cell phone. Defendant drove her car out the side driveway of the restaurant. As Kersey waited for her food, she saw defendant drive past the restaurant. Kersey received her food and started to drive away, but saw defendant on foot approaching the restaurant and waiving what Kersey believed was a gun. Kersey told her children to get down and drove off past defendant. Defendant was laughing and waiving the barrel of the gun at her. Kersey went home, dropped off her children, and returned to the restaurant where she spoke with the police. Later, she identified defendant at the scene.¹

A police officer responding to the restaurant saw a car matching the description of defendant's car, and was approached by Kersey while questioning the occupants of the car. The

¹ The testimony of Kersey's 13-year old daughter was substantially similar to that of her mother.

officer ultimately discovered a handgun in a purse in the trunk of the car. It was unloaded; however the officer also found 12 rounds of ammunition in the purse. The officer testified that Kersey told him that she saw defendant retrieve the gun from the trunk before she confronted Kersey with the weapon. The trial court found defendant, who had been charged with four counts of felonious assault, guilty only of the charge of assaulting Kersey because the prosecutor had not presented evidence that defendant's actions placed the children in fear of harm.

Defendant first argues that the evidence was insufficient to support the assault conviction because the prosecutor failed to produce evidence that defendant had a handgun when she threatened Kersey. We disagree.

We review a defendant's allegations of insufficiency of the evidence de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *Id.* However, we do not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1202 (1992). Satisfactory proof of the elements of the crime can be shown by circumstantial evidence and reasonable inferences arising therefrom. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). "It is for the trier of fact to determine what inferences can be fairly drawn from the evidence and the weight to be accorded to those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of felonious assault are: (1) an assault; (2) with a dangerous weapon; (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).

We find that the evidence presented by the prosecution was sufficient to support the convictions.² Kersey testified that defendant threateningly waived an object at her that looked like a handgun shortly after she told Kersey that she possessed such a weapon. This evidence, when coupled with the fact that defendant had a handgun in her purse in the trunk, was sufficient to establish that defendant used a weapon in the assault. Defendant maintains that the testimony could just as easily support a finding that she threatened Kersey with a cell phone or other object. However, defendant does not point to any evidence to suggest that she did in fact use such an object. Moreover, the prosecutor was not required to disprove defendant's assertion that she did not threaten Kersey with the gun she possessed, but with another object. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). When viewed in a light most favorable to the prosecution, the evidence presented was sufficient to support the convictions. *Carines*, *supra* at 757.

² Defendant claims that the evidence was insufficient to support her felony-firearm conviction based on her claim of insufficient evidence of the underlying assault.

Defendant next argues that the trial court impermissibly considered hearsay testimony from the arresting officer that Kersey told him that defendant retrieved the handgun from the trunk before she threatened Kersey with it. Defendant further argues that trial counsel's failure to object to this testimony constituted ineffective assistance.

Defendant did not object to the introduction of this testimony; therefore, this issue is unpreserved, and we review it using the plain error doctrine. See *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). To show that reversal is warranted, defendant "must demonstrate plain error that was outcome determinative." *Id.*

As to defendant's concurrent claim that counsel was ineffective, our review is limited to mistakes apparent on the record, because defendant failed to move for a *Ginther*³ hearing or a new trial on this ground. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Rodgers, supra* at 714. Defendant must further demonstrate a reasonable probability that but for counsel's error, the result of the proceedings would have been different, and the attendant proceedings were fundamentally unfair or unreliable. *Id.* Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *Id.*

We find that defendant cannot demonstrate that outcome-determinative plain error occurred in the introduction of the officer's testimony. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). In general, hearsay statements are not admissible at trial. MRE 802; *People v Watkins*, 438 Mich 627, 632; 475 NW2d 727 (1991) (Cavanagh, J.). However, as defendant admits, the introduction of the officer's testimony was admissible for a purpose other than its truth, i.e., to show why he decided to search the trunk. Therefore, defendant cannot show that the admission of this evidence was plainly erroneous. Evidence that is admissible for one purpose is not inadmissible because its use for a different purpose is precluded. See *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000).

We note that the trial court used the statement in its holding that Kersey was put in fear of an imminent battery when defendant confronted her with a handgun. This use of the statement implies a belief in its truth, that defendant did take a gun from the trunk at some point during the argument. The trial court's use of the statement was not plainly erroneous, however, because the truth of the statement is not a necessary predicate for its use to judge what Kersey believed to be true. If the object had not actually been a handgun, Kersey may well have been convinced that it was, given defendant's actions.

Moreover, even were we to conclude that the trial court improperly used Kersey's statement for the truth of the matter asserted, we would find that any error was not outcome determinative. Even without this statement, the prosecutor presented sufficient evidence of each

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

of the elements of felonious assault to support defendant's conviction for this crime and felony-firearm. Both the witnesses' testimony and the physical presence of the handgun support a finding that defendant possessed a weapon and threatened Kersey with it. Even had the trial court not used the challenged statement as evidence of Kersey's state of mind, it could have determined through her erratic driving and her orders to her children to duck down that she feared an immediate battery. We hold that defendant cannot show that she is entitled to relief, either due to the improper use of hearsay testimony, or because of any alleged ineffective assistance of trial counsel in failing to object to the introduction of the officer's testimony.

Affirmed.

/s/ Alton T. Davis
/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio