

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES R. SMITH,

Defendant-Appellant.

UNPUBLISHED
February 11, 2003

No. 236331
Wayne Circuit Court
LC No. 00-010190-01

Before: Murphy, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of two counts of felonious assault. MCL 750.82. Defendant was sentenced to five years' probation with the first year to be served in jail and a provision for work release. We affirm.

At about 3:40 a.m. on June 1, 2000, two Detroit police officers on routine patrol came upon a car parked in the middle of a street in a residential neighborhood. Defendant was sitting on the ground next to the left rear tire letting the air out of the tire. When the officers approached, defendant had his back to them and was unresponsive to their questions. Defendant moved from the left rear tire to the left front tire and began letting the air out of that tire using a knife with a three-and-a-half inch blade on the tire's valve. Defendant continued to be unresponsive to the officers' questions and to their demands that he put the knife down.

Defendant jumped up from his position by the left front tire and swung his knife at the officers in a threatening manner. In response, the officers drew their weapons and continued to order defendant to put the knife down. When defendant refused to comply, they called for backup. One officer sprayed defendant with mace, with no effect, but defendant finally threw his knife on the grass. Reinforcements arrived and defendant, who was very combative, had to be physically subdued. Both original officers on the scene testified that defendant's actions with the knife put them in fear of their safety.

Defendant, his mother and his girlfriend all testified in his behalf. All three admitted that defendant was letting the air out of the tires and that, after first ignoring the officers, he responded to them with profanity, but denied that defendant threatened the officers with his knife. Defendant acknowledged that the police officers "annoyed" him with their questions, but claimed that when he was told to put down his knife, he complied. Defendant denied any intent to harm the officers and that he resisted arrest.

On appeal, defendant essentially challenges the factual findings of the trial court and argues that the evidence was insufficient to sustain a conviction of felonious assault under MCL 750.82.¹ Our review of the record convinces us otherwise. We must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the offense were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

The elements of felonious assault are: (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable danger of an immediate battery. *People v Avant*, 235 Mich App 499, 504; 597 NW2d 864 (1999).

There is no question that defendant had a dangerous weapon, the knife described by the officers as having a blade three-and-one-half inches long, satisfying the second element of the offense of felonious assault. Defendant testified that at the time of the incident he was angry with his girlfriend and that he became annoyed by the presence and demands of the police officers. Defendant was verbally abusive towards the officers and both officers testified that he made a threatening swing at them with the knife while they were within steps of him, causing them to draw their weapons and placing them in fear, satisfying the first and third elements of the offense of felonious assault. While defendant and his witnesses disputed the first and third elements, the trial court heard the testimony and determined its credibility, concluding that the testimony of the police officers was more credible. On appeal we will not make that determination anew. MCR 2.613(C); *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997). The trial court did not clearly err in making factual determinations and the evidence was sufficient to sustain defendant's convictions.

Affirmed.

/s/ William B. Murphy

/s/ Mark J. Cavanagh

/s/ Janet T. Neff

¹ Defendant also argues that the verdict was against the great weight of the evidence. However, because he did not move for a new trial, this issue is not preserved and we decline to address it. MCR 2.611(A)(1)(e); *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). In any event, it is without merit.