

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALBERT E. NORFOLK,

Defendant-Appellant.

UNPUBLISHED

October 21, 2003

No. 241560

Oakland Circuit Court

LC No. 2001-180152-FH

Before: Fitzgerald, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of carrying a concealed weapon (CCW), MCL 750.227, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced, as a habitual offender, second offense, MCL 769.10, to one year to seven and a half years' imprisonment for the CCW conviction, one to six years' imprisonment for the felonious assault conviction, and five years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant's convictions arise from a traffic stop by Detroit police officers. Police officers observed defendant's vehicle swerving to the left and right on the service drive of I-75. Defendant drove onto the freeway and continued to drive erratically. Defendant then exited the freeway at Eight Mile Road. Defendant obeyed a red traffic signal. When the light signal turned green, defendant remained at the traffic light and ate from a carryout container. When the light signal turned green a second time, defendant began to move his vehicle. Defendant continued to "roll" his vehicle for 150 to 200 yards before coming to a stop although the officers had signaled defendant to pull over. After defendant admitted to consuming alcohol, a protective search occurred before sobriety tests were administered. After Officer Daniel Bryant felt a hard object, believed to be a weapon, in defendant's waistband, defendant fled. During the foot pursuit, defendant drew a loaded weapon. Officer Bryant testified that he was able to push defendant over. Defendant, however, rolled to his back and raised his weapon, causing Officer Bryant to shoot defendant in the chest.

Defendant first alleges that the trial court erred by admitting defendant's confession at trial. We disagree. When reviewing a trial court's determination of the voluntariness of a confession, an appellate court engages in de novo review of the entire record. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). While a trial court's factual findings are reviewed under the clearly erroneous standard, *id.*, an appellate court is required to examine the entire

record and make an independent determination of the issue as a question of law. *People v Wells*, 238 Mich App 383, 386; 605 NW2d 374 (1999). The trial judge's resolution of a factual issue is entitled to deference, particularly when the factual issue involves the credibility of witnesses whose testimony is in conflict. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999).

In *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), the Michigan Supreme Court set forth the following list of factors that a trial court should consider in determining whether a statement is voluntary:

[T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. [Citations omitted.]

In the present case, defendant was twenty-eight years old, capable of understanding the English language, both written and spoken, and had prior contacts with the criminal justice system. Defendant alleged that his consumption of alcohol and treatment with morphine at the hospital left him with a "foggy" recollection of what occurred during his interview at the hospital. Defendant denied making a statement to police. However, defendant's surgeon and nurse testified that the determination regarding the level of morphine prescribed took into account defendant's alcohol level, and any side effect would have been drowsiness. The treating nurse testified that defendant cooperated with police, and she did not see any evidence of threats or coercion. Police testified that defendant wanted to have his wounds photographed for future litigation because he insisted that he had been shot in the back, contrary to the medical evidence. The trial court concluded that the testimony given by the police and the medical personnel was credible. Giving deference to the trial court's assessment of the credibility of the witnesses, we cannot conclude that the trial court's denial of the motion to suppress was clearly erroneous. *Farrow, supra; Wells, supra.*

Defendant next alleges that the trial court erred by failing to suppress his confession because it was not preserved on audio or videotape. We disagree. In *People v Fike*, 228 Mich App 178, 183-186; 577 NW2d 903 (1998), this Court rejected a challenge to the admission of statements and a request for a new trial based on the failure to preserve an audio or visual recording of an interview. There was no evidence of material misconduct raised in this case. Where a claim of material misconduct is not established, a mandate for uniform procedure presents an issue for the Michigan Legislature, not an issue for resolution by the court system. *Id.*

Defendant next alleges that there was insufficient evidence to support the intent element of the felonious assault conviction. We disagree. When reviewing a challenge to the sufficiency of the evidence to support a conviction, the appellate court reviews the evidence in a light most favorable to the prosecution. *People v Sherman-Huffman*, 466 Mich 39, 40; 642 NW2d 339 (2002). The Court must consider whether the evidence at trial justified a rational trier of fact in finding that the elements of the crime were proved beyond a reasonable doubt. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). 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 apprehension of an immediate battery. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Evidence of intent may be proven by inference from any fact in evidence, and minimal circumstantial evidence is sufficient because of the difficulty of proving an actor's state of mind. See *McRunels*, *supra*. This Court will not interfere with the trier of fact's assessment of credibility. *Id.*

Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to support the intent requirement of the crime of felonious assault. *Sherman-Huffman*, *supra*. While defendant told police officers that he was merely trying to toss the gun over a fence, police officers testified that defendant was not in a position to do so based on the distance from the fence. Officer Bryant testified that he was placed in fear when defendant raised the gun toward him, causing him to shout to defendant, "don't do it, man." The testimony offered by Officer Bryant indicated a purposeful controlled act in raising his weapon toward the officer. Thus, defendant's challenge to the sufficiency of the evidence is without merit.¹

Defendant next alleges that the trial court abused its discretion by admitting evidence that defendant was on parole. We disagree. The trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 55; 614 NW2d 888 (2000). The probative value of the parole evidence was not substantially outweighed by the danger of unfair prejudice. *Id.* at 72-73. The trial court tailored the ruling to preclude introduction of the underlying facts regarding defendant's parole. Under the circumstances, the admission was not an abuse of discretion. *Id.*

Defendant next alleges that reversal is required because of prosecutorial misconduct during closing argument. However, there was no defense objection to the statements made. Unpreserved claims of error are reviewed for plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is warranted only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or reputation of the proceeding. *Id.* Review of the record reveals that the prosecutor's argument was responsive to the theory raised by the defense and noted that resolution of the parties' theories was premised on the assessment of the credibility of the witnesses. The prosecutor did not suggest personal knowledge of witness credibility, but rather, permissibly argued credibility

¹ Because we conclude that the evidence to support the felonious assault conviction was sufficient, defendant's challenge to the predicate felony for purposes of the felony-firearm conviction is moot.

based on inferences from the evidence. Accordingly, defendant failed to demonstrate plain error affecting substantial rights.

Affirmed.

/s/ Brian K. Zahra

/s/ Karen M. Fort Hood