

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH INGRAM,

Defendant-Appellant.

UNPUBLISHED

August 10, 2006

No. 257335

Wayne Circuit Court

LC No. 04-003600-01

Before: Davis, P.J., and Cooper and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his waiver trial convictions for felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to six months to four years' imprisonment for the felonious assault conviction and two years' imprisonment for the felony-firearm conviction, the sentences to run consecutively. We affirm defendant's convictions but remand for resentencing.

Defendant first challenges whether sufficient evidence was presented to support his convictions. We view the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). Questions of credibility and intent should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Considering the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient to infer intent. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004).

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. *Avant, supra* at 505. An assault may be established by showing either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). Battery is an intentional, unconsented, and harmful or offensive touching of another person or of something closely connected to the person. *Starks, supra* at 234. The elements of felony-firearm are that defendant possessed a firearm during the commission of, or the attempt to commit a felony. *Avant, supra* at 505.

In this case, the victim testified that defendant fired a gun at her while they were arguing. The gun was pointed at her knees and ankles. She was stunned when defendant fired the gun, and she did not consent to the being shot at. The victim's mother also witnessed the shooting. Deferring to the trial court's superior position to judge witness credibility, and viewing the evidence in a light most favorable to the prosecution, we conclude that sufficient evidence was presented for a rational trier of fact to conclude that defendant was guilty of felonious assault and felony-firearm beyond a reasonable doubt.

Defendant next argues that the trial court erred in denying his motion for dismissal on the basis of the prosecution's failure to file a witness list. We review a trial court's decision regarding the appropriate remedy for discovery violations for an abuse of discretion. *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification for the ruling made. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). When determining the remedy for discovery violations, the trial court must balance the interests of the courts, the public and the parties in light of all relevant circumstances. *Banks, supra* at 252. The relevant circumstances include the causes of noncompliance and showings of actual prejudice by the objecting party. *People v Davie (After Remand)*, 225 Mich App 592, 598; 571 NW2d 229 (1997). The exclusion of otherwise admissible evidence is an extremely severe sanction that should be limited to egregious cases. *People v Taylor*, 159 Mich App 468, 483; 406 NW2d 859 (1987).

In this case, the prosecution had no excuse for failing to produce the witness list. Kenya Mount's name was on the witness list, but not listed on any of the discovery materials given to defendant. The trial court chose to exclude Mount from testifying because his testimony would be an unfair surprise. On appeal, defendant argues that the trial court's decision did not go far enough and that he was prejudiced because he could have interviewed Mount and possibly learned exculpatory evidence if he had been provided with the witness list. Defendant's argument, however, ignores the fact that defendant himself testified that Mount was at the scene of the incident. Defendant was always aware that Mount existed and possessed information regarding the incident. Defendant could have interviewed defendant regardless whether the prosecution was going to call him as a witness or not.

Mount's testimony would have been a surprise that prejudiced defendant and the trial court did not abuse its discretion in excluding the testimony. By excluding the testimony, the trial court removed all prejudice suffered by defendant and allowed the trial to go forward. The trial court's decision properly balanced the interests of the courts, the public and the parties in light of all relevant circumstances and thus we conclude that the trial court did not abuse its discretion.

Defendant finally argues that he is entitled to resentencing because the trial court improperly departed from the sentencing guidelines. This issue is limited to defendant's felonious assault sentence; defendant does not challenge his mandatory two-year consecutive sentence for felony firearm. The application of the statutory guidelines is reviewed de novo on appeal. *People v Cook*, 254 Mich App 635, 638; 658 NW2d 184 (2003).

The trial court must impose a minimum sentence within the guidelines range unless a departure is permitted. MCL 769.34(2). The guidelines in this case set a minimum range of zero

to nine months. MCL 777.16d; MCL 777.67. When the upper limit of the applicable guidelines range is 18 months or less, “the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.” MCL 769.34(4)(a). An intermediate sanction does not include a prison sentence. MCL 769.31(b); *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002).

Under the statutory scheme, following the guidelines in this case would call for a local sanction followed by the mandatory two-year sentence for felony firearm. The trial court here exceeded the guidelines by imposing a prison sentence without stating a substantial and compelling reason for doing so. The trial court may not have realized that it was departing from the guidelines or it may have failed to articulate its reasons for departing. While there may be substantial and compelling reasons for exceeding the guidelines, a court of review may not affirm a sentence on that basis where the trial court did not articulate reasons for departing. *People v Johnigan*, 265 Mich App 463, 477-478; 696 NW2d 724 (2005). The remedy for this situation is to remand the case to the trial court for resentencing. *People v Hendrick*, 472 Mich 555, 564; 697 NW2d 511 (2005); *Johnigan*, *supra* at 478.

Affirmed in part, reversed in part and remanded for resentencing. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ Jessica R. Cooper
/s/ Stephen L. Borrello