STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD D. WERNER,

Defendant-Appellant.

UNPUBLISHED
August 20, 1996

No. 177973
LC No. 93-009350

Before: Jansen, P.J., and Reilly and M.E. Kobza,* JJ.

PER CURIAM.

Following a bench trial in the Detroit Recorder's Court, defendant was convicted of felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was thereafter sentenced to the mandatory two years' imprisonment for felony-firearm, to be served consecutively with a two-year term of probation for felonious assault. Defendant appeals as of right. We affirm.

On appeal, defendant raises three issues. He first claims that there was insufficient evidence to support his conviction of felonious assault. He also claims that if his felonious assault conviction is reversed, then his conviction of felony-firearm must be reversed. Last, he argues that his term of probation cannot run consecutively to his prison term for felony-firearm.

Defendant first contends that there was insufficient evidence to support his conviction of felonious assault. When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), modified 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 apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; ___ NW2d ___ (1996).

* Circuit judge, sitting on the Court of Appeals by assignment.

Taken in a light most favorable to the prosecution, the complainant, Gregory Papastergion, testified that he was washing his car in his brother's driveway when defendant, who lived next door, yelled at complainant to "get off [my] grass you fat elephant." Complainant told defendant to "go to hell" and did not get off the grass. Defendant then went onto his front porch and threw two eggs at complainant. Neither egg hit the complainant. Complainant then told defendant that he "couldn't hit the side of a barn." Defendant then drew a rifle from his right side, aimed at complainant's chest, and pulled the trigger. There was only a click and no bullet was discharged. Complainant then ran behind his car and defendant fired a second time. A bullet was discharged and struck the ground near complainant. There were other witnesses to events, including complainant's nine-year-old nephew and two of defendant's neighbors. All of the witnesses essentially corroborated the complainant's testimony. Further, defendant, in his police statement, admitted that he fired the rifle into the ground, but claimed that it was not at the complainant.

Defendant contends that the prosecution failed to prove beyond a reasonable doubt that he intended to injure or place the victim in reasonable apprehension of an immediate battery. There was sufficient circumstantial evidence to prove this element beyond a reasonable doubt. Here, defendant twice pulled the trigger of his rifle after he and complainant exchanged words. Accordingly, a rational trier of fact could reasonably infer that defendant intended to injure or place the complainant in reasonable apprehension of an immediate battery. *Id.*, pp 53-54.

Because we find that there was sufficient evidence to support defendant's conviction of felonious assault, we also find that there was sufficient evidence to support his conviction of felony-firearm. *Id.*, p 53.

Last, defendant argues that his two-year term of probation cannot run consecutively to his prison term for felony-firearm. The felony-firearm statute provides in relevant part:

> (2) A term of imprisonment prescribed by this section is in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony. [MCL 750.227b; MSA 28.424(2)].

Defendant argues that this statutory provision does not authorize consecutive sentences if the sentence imposed for the underlying felony was probation because probation is not a term of imprisonment.

Under MCL 750.227b(2); MSA 28.424(2)(2), the two-year term of imprisonment mandated for a felony-firearm conviction must be "in addition to the sentence imposed for the conviction of the [underlying] felony." Probation is an actual sentence. *People v Cannon*, 206 Mich App 653, 657; 522 NW2d 716 (1994). Therefore, the two-year term of imprisonment mandated for the felony-firearm conviction must be in addition to the *sentence* imposed for the conviction of the underlying

felony. The trial court did not err in sentencing defendant to consecutive terms of two years' imprisonment followed by two years' probation.

The fact that §227b(2) also states that the two-year term of imprisonment shall be served consecutively with and preceding any term of *imprisonment* imposed for the underlying felony does not mean that defendant is entitled to concurrent sentences in this case. Were we to apply defendant's reasoning to this case, he would have to serve his two-year term of imprisonment simultaneously with his two-year term of probation. It would be impossible for defendant to serve both a term of imprisonment and a term of probation at the same time. Because statutes are to be read to avoid absurd or unreasonable consequences, *People v Weatherford*, 193 Mich App 115, 119; 483 NW2d 924 (1992), we conclude that the sentences are required to run consecutively in this case.

Affirmed.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Michael Eugene Kobza