

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
November 15, 2012

v

KENNETH BLAIR,

No. 305837
Wayne Circuit Court
LC No. 11-002653-FC

Defendant-Appellant.

Before: MURPHY, C.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

Following a bench trial, defendant appeals his convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, felonious assault, MCL 750.82, and carrying or possessing a firearm when committing or attempting to commit a felony (felony-firearm), MCL 750.227b. We affirm.

Defendant's convictions arose out of an altercation that caused a serious brain injury to Jason Andary. On the day of the altercation, Andary and some other people were at a house with defendant. Defendant believed Andary had stolen drugs from him, and the two began to scuffle. A third man entered the scuffle; shortly thereafter a fourth man, Shawn Urieff, was called in to splash water on Andary, who was unconscious. At trial, Urieff testified that after he splashed water on Andary, defendant pointed a pistol at Andary and ordered Andary to leave. Urieff further testified that Andary jumped or was pushed out of a closed window. Andary was hospitalized for more than a month and could not recall the details of the altercation.

On appeal, defendant first argues that the trial evidence was insufficient to convict him of the felonious assault and felony-firearm charges. This Court reviews de novo this challenge to the sufficiency of the evidence. *People v Kissner*, 292 Mich App 526, 533; 808 NW2d 522 (2011). We view the evidence "in the light most favorable to the prosecution," to determine "whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Hardiman*, 466 Mich 417, 421, 428; 646 NW2d 158 (2002). The prosecution must prove all essential elements of the offense beyond a reasonable doubt, and "[c]ircumstantial evidence and reasonable inferences arising therefrom may be used to prove the elements of a crime." *People v Brantley*, 296 Mich App 546, ___; ___ NW2d ___ (2012), slip op at 1. Witness credibility and weight of the evidence determinations are reserved for the factfinder, and

conflicts in evidence are resolved in favor of the prosecutor. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009).

“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.” MCL 750.82; *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The elements of felony-firearm are (1) defendant possessed a firearm (2) while committing or attempting to commit a felony. MCL 750.227b; *People v Johnson*, 293 Mich App 79, 82-83; 808 NW2d 815 (2011). Whether defendant possessed a firearm is a question for the trier of fact. *Id.* at 83. A firearm is defined as “a weapon from which a dangerous projectile may be propelled by an explosive, or by gas or air. Firearm does not include a smooth bore rifle or handgun designed and manufactured exclusively for propelling by a spring, or by gas or air, BB’s not exceeding .177 caliber.” MCL 750.222(d).

Defendant contends the trial evidence was insufficient on the weapon element of felonious assault and on the firearm element of felony-firearm. We disagree. Urieff’s testimony was sufficient to establish the weapon/firearm element of both offenses. Urieff specifically testified that defendant had a Glock pistol, and that defendant pointed a pistol at Andary. Although Urieff’s other testimony was somewhat confused with regard to whether defendant possessed a pellet gun, the trial court indicated that it found Urieff’s testimony credible regarding whether defendant pointed a weapon at Andary. The trial court also specifically found that defendant had a handgun. Questions of witness credibility and weight of the evidence are for the trier of fact, not the appellate courts. See *Harrison*, 283 Mich App at 378. Viewing the evidence in the light most favorable to the prosecution and allowing for reasonable inferences based on Urieff’s testimony, there was sufficient evidence for the trial court to find that defendant assaulted Andary with a firearm.

Second, defendant argues that the verdict was against the great weight of the evidence. “The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.” *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). A trial court must look at the evidence as a whole to make this determination. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). In this case, the evidence, taken as a whole, does not preponderate so heavily against the verdict that allowing the verdict to stand would result in a miscarriage of justice.

Defendant argues that Urieff’s testimony was not credible, and that the other evidence indicated defendant had only a pellet gun. Again, questions of witness credibility are for the trier of fact, and conflicts in the testimony generally do not warrant reversal. *People v Lacalamita*, 286 Mich App 467, 469-470; 780 NW2d 311 (2009). The trial court’s verdict indicates that it found Urieff’s testimony credible and that it disbelieved the conflicting testimony. Therefore, viewing the evidence as a whole and bearing in mind the trial court’s credibility determinations, we conclude the weight of the evidence does not preponderate so heavily against the verdict such that allowing the verdict to stand would constitute a miscarriage of justice.

Defendant also requests, if this Court reverses or vacates his convictions, that this Court remand the case for resentencing regarding the assault with intent to do great bodily harm less than murder conviction in order to reduce his current prior record variable of his sentencing guidelines to zero, which would reduce his guidelines range from 10 to 28 months to 5 to 28 months. This issue is not properly before the Court because defendant did not raise this argument in his statement of questions presented. *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009). In any event, having concluded that the evidence was sufficient to sustain defendant's convictions, we need not consider defendant's request concerning remand.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ William C. Whitbeck