

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 24, 2013

v

LORENZO EUGENE REED,

Defendant-Appellant.

No. 306762
Wayne Circuit Court
LC No. 11-005494-FH

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

Defendant, Lorenzo Eugene Reed, appeals as of right his jury-trial convictions of carrying a concealed weapon (CCW), MCL 750.227; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. The trial court sentenced defendant to five years' imprisonment for the felony-firearm conviction and to two years' probation for the CCW and felon-in-possession convictions. We affirm.

I. BASIC FACTS

At about 2:45 a.m. on May 7, 2011, Detroit police officers Calvin Lewis and Eric Smith were driving a marked scout car near the intersection of Joy Road and Mark Twain Street, a residential area, when they saw defendant and another male walking eastbound on Joy Road. The officers approached alongside the individuals with their scout car, and Officer Lewis shined a flashlight on them to make sure that "they were not youths" violating the city's curfew. The officers remained in the scout car and did not say anything to the individuals. As Officer Lewis shined his flashlight, defendant looked in the officers' direction and began to run away. When defendant started to run, Officer Lewis noticed that defendant was holding his waistband, which signified to Officer Lewis that defendant was possibly armed. The officers then exited the scout car and pursued defendant, while the other individual ran in the opposite direction. During the pursuit, Officer Lewis saw defendant reach into his waistband, toss a weapon onto Mark Twain Street, and run behind an abandoned building. In response, Officer Lewis diverted his attention to recovery of the weapon while Officer Smith pursued and apprehended defendant.

II. MOTION TO SUPPRESS THE FIREARM

Defendant first argues that the trial court erred by denying his motion to suppress evidence of the gun he was seen throwing onto the street. According to defendant, the officers' warrantless stop of him, i.e., approach of him with the flashlight, to determine whether he was violating the city's curfew violated his rights under the United States and Michigan Constitutions. We disagree.

We review for clear error a trial court's factual findings at a suppression hearing and de novo its legal conclusions. *People v Cohen*, 294 Mich App 70, 74; 816 NW2d 474 (2011). A trial court's factual findings are clearly erroneous if, after a review of the entire record, we are left with a definite and firm conviction that a mistake has been made. *People v McSwain*, 259 Mich App 654, 682; 676 NW2d 236 (2003).

"The United States Constitution and the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures." *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005), citing US Const, Am IV; Const 1963, art 1, § 11. "Under certain circumstances, a police officer may approach and temporarily detain a person for the purpose of investigating possible criminal behavior even though there is no probable cause to support an arrest." *Id.* at 32, citing *Terry v Ohio*, 392 US 1, 22; 88 S Ct 1868; 20 L Ed 2d 889 (1968). "A brief detention does not violate the Fourth Amendment if the officer has a reasonably articulable suspicion that criminal activity is afoot." *Id.* (citations omitted). "The totality of the circumstances as understood and interpreted by law enforcement officers, not legal scholars, must yield a particular suspicion that the individual being investigated has been, is, or is about to be engaged in criminal activity." *People v Nelson*, 443 Mich 626, 632; 505 NW2d 266 (1993) (internal citation omitted); see also *Terry*, 392 US at 21 ("[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."). "Of course, not every encounter between a police officer and a citizen requires this level of constitutional justification. A 'seizure' within the meaning of the Fourth Amendment occurs only if, in view of all the circumstances, a reasonable person would have believed that he was not free to leave." *Jenkins*, 472 Mich at 32 (citation omitted). Stated differently, "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry*, 392 US at 19 n 16.

In *Jenkins*, 472 Mich at 28-29, 33-35, our Supreme Court determined that police officers had not seized a defendant within the meaning of the Fourth Amendment by initially encountering the defendant outside of a house party and asking him general questions about the party, whether he lived in the housing complex, and for identification. In *Jenkins*, officers were dispatched to a party in a housing complex in a high crime area after receiving a complaint. *Jenkins*, 472 Mich at 28. Upon arrival, the officers saw a group of 15 to 20 people talking loudly and drinking; the defendant and another man were sitting on the stairs leading up to one of the housing units. *Id.* One of the officers approached the defendant, asked him general questions about the party, whether he lived in the housing complex, and for identification. *Id.* When the defendant gave the officer his state identification card and the officer started to place a call to the Law Enforcement Information Network (LEIN), the defendant became obviously nervous, made furtive gestures toward a large pocket on his pants, and began to walk away toward individuals

who were inviting him into their homes. *Id.* at 28-29. The officer began to walk alongside the defendant, encouraging him to stop and wait for the results of the LEIN inquiry; when the defendant did not stop, the officer placed his hand on the defendant's back and told him that he could not leave. *Id.* at 29. The LEIN inquiry revealed an outstanding warrant for the defendant's arrest, and when the officer arrested the defendant, a gun fell from the defendant's waistband. *Id.*

The trial court suppressed the evidence found by the officer, concluding that the officer did not have reasonable suspicion for an investigatory stop. *Id.* at 30. Our Supreme Court disagreed. *Id.* at 35. The Court concluded that the officer's initial conversation with the defendant and his request for identification was not a seizure implicating the Fourth Amendment, emphasizing that the officer had not told the defendant to remain where he was or that he was required to answer his questions at that juncture. *Id.* at 33-34. The Court explained that a seizure did not occur until the officer "followed [the] defendant as he tried to walk away, orally discouraged him from leaving, and, finally, put a hand on his back and told him to wait for the results of the LEIN inquiry." *Id.* at 34. The Court concluded that, by that point, the officer had reasonable suspicion to make an investigatory stop given, among other things, the defendant's nervous behavior, the gesture toward his pocket, his attempt to walk away while the officer still had his identification card, and the invitations the defendant was receiving to enter people's homes for protection from further questioning. *Id.* at 34-35.

In the present case, the officers did not seize defendant when they approached alongside him in their scout car and used the flashlight. Similar to the defendant in *Jenkins*, defendant was not told at this juncture to remain where he was or that he was required to answer questions. See *id.* at 33-34. In fact, no words were exchanged at all. Officers Lewis and Smith did not in any way restrain defendant's liberty through physical force or a show of authority by merely shining a flashlight. See *Terry*, 392 US at 19 n 16. Indeed, the actions of Officers Lewis and Smith were much less inquisitive than the officer's initial interaction with the defendant in *Jenkins*. "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place." *Florida v Royer*, 460 US 491, 497; 103 S Ct 1319; 75 L Ed 2d 229 (1983). The officers' approach of defendant and use of the flashlight was simply not a seizure. "If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed." *Id.* at 498.

Accordingly, defendant has not demonstrated that the trial court erred by denying his motion to suppress.

III. GREAT WEIGHT OF THE EVIDENCE

Defendant next argues that the jury's verdict with respect to each conviction was against the great weight of the evidence. We disagree.

A claim that a jury verdict is against the great weight of the evidence must first be raised in a motion for a new trial; however, because defendant did not do so, our review is limited to plain error affecting defendant's substantial rights. See *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

A verdict is against the great weight of the evidence when “the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.” *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). The ultimate arbiter of witness credibility is the trier of fact. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). “Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial.” *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). However, our Supreme Court has recognized several exceptions to this rule: “if the testimony contradicts indisputable physical facts or laws, where testimony is patently incredible or defies physical realities, where a witness’s testimony is material and is so inherently implausible that it could not be believed by a reasonable juror, or where the witnesses [sic] testimony has been seriously impeached and the case marked by uncertainties and discrepancies.” *People v Lemmon*, 456 Mich 625, 643-644; 576 NW2d 129 (1998) (internal citations omitted).

The crux of defendant’s argument is that he “was never seen with a gun in his possession” and that Officers Lewis and Smith simply “found a gun in the street.” Defendant emphasizes that his cousin, who was walking next to him at the time of the incident and testified at trial that defendant did not have a gun, certainly would have seen a gun in defendant’s possession if defendant in fact had such a gun. At trial, the prosecution offered both direct and circumstantial evidence that contradicts this argument. Specifically, both Officers Lewis and Smith observed defendant flee, holding his waistband with his right hand, and toss an object onto the street. Officer Lewis testified that he saw that the object was a gun. Further, Officer Lewis quickly recovered the gun from the same immediate area where he saw defendant throw it. A mere conflict between the testimony of defendant’s cousin and the testimony of Officers Lewis and Smith does not demonstrate that the jury’s verdict was against the great weight of the evidence. See *Unger*, 278 Mich App at 232. The prosecution’s evidence did not contradict physical facts or laws and was not seriously impeached or so inherently implausible that it could not be believed by a reasonable juror. See *Lemmon*, 456 Mich at 643-644. Therefore, defendant has not demonstrated plain error affecting his substantial rights. See *Musser*, 259 Mich App at 218.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering