STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 15, 2014
v	No. 315401 Wayne Circuit Court
ALEX MICHAEL TILTON, Defendant-Appellant.	LC No. 12-008957-FC

Before: BECKERING, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. On appeal, he challenges the trial court's denial of his motion for a new trial, claiming that the verdict was against the great weight of the evidence. Although inartfully articulated, the trial court correctly determined that it could not interfere with the jury's resolution of this credibility contest. We affirm.

I. BACKGROUND

In the early morning hours of September 2, 2012, Devilyn Humphrey was shot in the foot while on Wormer Street in Detroit. Humphrey and his girlfriend testified that defendant fired several shots at them after Humphrey asked defendant to repay an outstanding debt. Defendant presented the testimony of several witnesses averring that defendant fired in self defense after Humphrey and a large crowd ambushed him while defendant sat on the front porch of his family's home. The defense witnesses claimed that Humphrey shot first and threw a log through the home's front window. In support of the defense theory, defendant played several 911 audiotapes for the jury, during which callers sought assistance because "a mob of people" were on defendant's front porch, shots had been fired, and "somebody" tried to break windows at defendant's home. The parties agreed that the police arrived on the scene before the shooting and ordered Humphrey to leave the area, but that he returned after the police had gone.

Ultimately, the jury acquitted defendant of assault with intent to commit great bodily harm less than murder, but convicted him of the lesser offense of felonious assault, as well as felony-firearm. Defendant thereafter sought a new trial, arguing that his conviction was against the great weight of the evidence. In support of his motion, defendant claimed that "[t]he *undisputed* relevant facts" included that the victim was the aggressor and came to defendant's

home uninvited in the middle of the night to collect a debt. (Emphasis in original.) Defendant continued that although Humphrey claimed a police officer searched his person and found no gun, the prosecution presented no police testimony in this regard. He also noted the various phone calls to 911 from his home during the incident, pleading for assistance. The fact that Humphrey suffered a single gunshot wound to his foot after the myriad threats he levied was consistent with defendant's theory of self defense, defendant argued.

The prosecutor responded that the facts were actually "highly disputed" at trial, resulting in a close credibility contest. Citing *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998), the prosecutor argued that the victim's testimony about the events of September 2, 2012, was not so implausible that the jury could not rely upon it to support a conviction.

The trial court agreed with defendant to the extent that it would not have entered a conviction based on the proffered evidence. However, the court found itself constrained to deny the motion:

> Okay, here's my problem. I think that the jury found against the great weight of the evidence. I'm not prepared, however, to order a new trial because I, I think I'm without authority to do that based on cases that the prosecutor cites and some experiences of my colleagues on this bench.
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> . . . [F]or whatever it's worth from my point of view, that I think the jury found against the great weight of the evidence and then the matter can go to appeal.
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> * * *
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> I do agree with you that the jury found against the great weight of the evidence but I think that that's gratuitous. I don't think that that's a, an appellate issue for the trial court, but you can take that comment to the Court of Appeals as well.
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> * * *
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> And let me say, I have never, I don't think I've ever been presented with this issue and I don't think that, that it's within my purview to set aside the verdict and to bring the matter to a new trial. I just have never had a jury find so improperly in my experience on the bench. So, the motion to set aside the verdict and for a new trial is at this point denied and then the lawyers know where we'll be going in the future.

II. ANALYSIS

Defendant first contends that the trial court misunderstood its role in the posttrial process and therefore mistakenly believed it did not have the power to grant a new trial. This is a misinterpretation of the trial court's ruling. Rather, taken in context, the court's statements reveal an understanding of its limited ability to review a jury verdict, especially in regard to the jury's assessment of witness credibility.

Defendant argues in the alternative that the trial court abused its discretion in denying his motion for a new trial because his convictions were against the great weight of the evidence. We review a trial court's resolution of a new trial motion for an abuse of discretion. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008).

A verdict is against the great weight of the evidence "only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *Lemmon*, 456 Mich at 627; *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). When ruling on a motion for new trial based on the weight of the evidence, the trial court may not sit as a "thirteenth juror" and rethink the jury's verdict. *Lemmon*, 456 Mich at 639-640. Conflicting testimony or the questionable credibility of a witness "are not sufficient grounds for granting a new trial." *Id.* at 643 (quotation marks and citation omitted). Rather, "exceptional circumstances" must be shown before the trial court may supplant its ruling for that of the jury. *Unger*, 278 Mich App at 232. Exceptional circumstances include situations where the testimony is so impeached that it is "deprived of all probative value"; "the testimony contradicts indisputable physical facts or laws"; the "testimony is patently incredible or defies physical realities"; "a witness's testimony is material and is so inherently implausible that it could not be believed by a reasonable juror"; and "where the witness'[s] testimony has been seriously impeached and the case marked by uncertainties and discrepancies." *Lemmon*, 456 Mich at 643-644 (quotations marks and citations omitted). After applying these tests, the court must consider if there is "a real concern that an innocent person may have been convicted or that it would be manifest injustice to allow the guilty verdict to stand." *Id.* at 644 (quotation marks and citation omitted).

Although the trial court would not have convicted defendant based on the record evidence, defendant did not overcome the extremely high burden necessary to warrant a new trial based on the weight of the evidence. To support defendant's convictions of felony-firearm and felonious assault, the prosecution was required to prove beyond a reasonable doubt that defendant possessed a firearm that he used to assault Humphrey and that defendant acted with intent to injure Humphrey or place him in reasonable apprehension of an immediate battery. See *People v Johnson*, 293 Mich App 79, 82; 808 NW2d 815 (2011) (outlining the elements of felony-firearm); *People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007) (defining the elements of felonious assault).

The evidence at trial did not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. Defendant does not deny that he possessed a gun and that he shot at Humphrey. Rather, he accuses Humphrey of instigating the events. However, the prosecutor presented evidence from which the jury could conclude that defendant was at fault.

Humphrey and his girlfriend testified that they were not in the neighborhood at such a late hour to engage in a scuffle, but to collect their son from a babysitter's house after seeing a late movie. They denied being present with a large group, claiming to be walking alone. Humphrey admitted that he approached defendant to collect the debt, but denied being hostile. Rather, Humphrey described that upon his request for the money, defendant and "a couple more other guys came out shooting." Humphrey described that the police arrived and searched him, but found no weapon. Humphrey denied returning to defendant's house and testified that

defendant shot him as he tried to walk out of the area. Humphrey testified that he turned his head to look back toward defendant's house and clearly saw defendant in the light shining through a window. He testified that he witnessed defendant lower himself to the ground and aim his weapon in Humphrey's direction.

The investigating officers testified that they saw no broken window or bullet holes at defendant's house and that no one directed them to view such damage. Even in the light of day, the evidence technician saw no broken windows or exterior damage to defendant's home. Around defendant's porch, the evidence technician found live .22 caliber bullets and 12-gauge shotgun shells. Weapons using both types of bullets were found inside defendant's home. They found no other evidence of ammunition discharged at the site.

The testimony of defendant's witnesses and even the content of their 911 calls tended to contradict the physical evidence found at the scene. Defendant's witnesses claimed that Humphrey threw a log through a window at the house and that he or his compatriots fired shots toward the house. Defendant's mother claimed to have found a bullet in a clock in the front room of the house. This is inconsistent with the investigating officers' testimony that no broken window or bullet holes were present in the home.

Other evidence presented by defendant went simply to the credibility of the witnesses. Defendant presented the testimony of family and friends that Humphrey came to defendant's home with a large crowd, threatening defendant and his family. There was no physical evidence for or against defendant's theory. Accordingly, the jury was left to decide who to believe—Humphrey and his girlfriend or defendant and his witnesses. The jury gave greater weight to the victims' testimony and neither the trial court nor this Court may interfere with that assessment.

While both defendant's and the prosecution's theories were supported by testimony, the evidence presented at trial did not preponderate so heavily against the verdict that allowing the verdict to stand would constitute a miscarriage of justice. Because "issues of witness credibility are for the trier of fact[,]" the jurors were entitled to choose whichever witnesses they wanted to believe. *Unger*, 278 Mich App at 232. Therefore, the trial court acted within its discretion in denying defendant's motion for a new trial.

We affirm.

/s/ Jane M. Beckering
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher