

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MOSES BERNARD MCEWAN,

Defendant-Appellant.

UNPUBLISHED
October 13, 1998

No. 202907
Recorder's Court
LC No. 94-002402

Before: Smolenski, P.J., and McDonald and Saad, JJ.

PER CURIAM.

Defendant was charged with armed robbery, MCL 750.529; MSA 28.797, assault with intent to murder, MCL 750.83; MSA 28.278, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and habitual offender third offense, MCL 769.11; MSA 28.1083. Following a bench trial, the court convicted defendant of larceny from the person, MCL 750.357; MSA 28.589, assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and felony-firearm, MCL 750.227b; MSA 28.424(2). Defendant pleaded guilty habitual offender, third offense. The trial court sua sponte granted a new trial based upon a letter written by defendant after his conviction. This Court reversed, *People v McEwan*, 214 Mich App 690; 543 NW2d 367 (1995). Defendant was sentenced as a third habitual offender to a term of four to twenty years' imprisonment to run consecutively to a five year term for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

I

Defendant argues that the verdict was against the great weight of the evidence. We disagree. "A new trial based upon the weight of the evidence should be granted only where evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). The prosecution's case centered on the victim's identification of defendant as the man who shot him. In opposition, defendant's girlfriend testified that defendant was with her at the time of the shooting. The trial court stated that it believed the testimony of the victim, and found that defendant was present on the scene despite the alibi testimony.

The lower court performed its function as the trier of fact and resolved credibility issues in favor of the victim. *People v Pena*, 224 Mich App 650, 659; 569 NW2d 871 (1997). As the evidence does not weigh heavily against the verdict but hinges on the trier of fact's assessment of credibility, the verdict was not against the great weight of the evidence.

II

Defendant also claims that he was denied a fair trial by the failure of the prosecutor to present a res gestae witness. This issue is not preserved for review unless the defendant raises the issue below in a motion for post-trial evidentiary hearing or in a motion for new trial. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996). Such motions were never filed in the lower court. Accordingly, we decline consideration of this issue.

Affirmed.

/s/ Michael R. Smolenski

/s/ Gary R. McDonald

/s/ Henry William Saad