STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 14, 2000
v	No. 216116 Wayne Circuit Court
GREGORY KELLY, Defendant-Appellant.	LC No. 97-008096

Before: Jansen, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction for attempted larceny in a building, MCL 750.92; MSA 28.287; MCL 750.360; MSA 28.592. The trial court sentenced defendant to one year probation. We affirm.

On August 26, 1997, defendant was driving a cab in Detroit. Sometime between 11:00 p.m. on August 26, 1997, and 3:00 a.m. on August 27, 1997, defendant picked up complainant. The two men spent the rest of the evening and early morning together. Between 6:00 a.m. and 7:00 a.m. on August 27, 1997, defendant accompanied complainant to complainant's apartment. Shortly thereafter, defendant left complainant's apartment. According to complainant, when defendant left, he took complainant's dual cassette CD player and cellular phone without permission. On that basis, the trial court found defendant guilty of attempted larceny in a building.

Defendant's first issue on appeal involves a separate lower court case, No. 98-001419. In that case, defendant was charged with carrying a concealed weapon (CCW), MCL 750.227(2); MSA 28.424(2). On appeal, defendant contends that his purported guilty plea in No. 98-001419 was taken improperly. This issue, however, is not properly before this Court.

The Court of Appeals only has jurisdiction over a lower court proceeding for which an appeal has been filed, and not over a case which has not been appealed. *People v Anderson*, 209 Mich App 527, 538; 531 NW2d 780 (1995); MCR 7.203(A)(1). In *Anderson*, the defendant argued that the sentences he received in a *separate* lower court case violated the principle of proportionality. *Id.* This Court held:

> We do not have jurisdiction to decide this issue. The order appealed from in this case involves only lower court number 92-114972-FC. In that case, defendant was convicted of first-degree murder, assault with intent to commit murder, and two counts of felony-firearm. Thus, we have jurisdiction only to decide any issues relating to the order appealed from in the lower court number 92-114972-FC, and not issues arising out of a different lower court case. MCR 7.203(A)(1). [*Id.*]

Similarly, in the present case, the order that defendant appeals involved only lower court number 97-008096, wherein the court convicted defendant of attempted larceny in a building. Therefore, this Court has jurisdiction only to decide issues relating to the order appealed from in lower court case number 97-008096, and not issues arising out of a different lower court case, specifically 98-001419. Therefore, we lack jurisdiction to decide this issue.

Defendant next contends that the verdict was against the great weight of the evidence. We disagree. "A trial judge . . . may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998).

To be found guilty of an attempt, the evidence must show that defendant intended to commit a specific crime, and engaged in an overt act beyond preparation in furtherance of committing that crime. *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993). The elements of larceny in a building are:

> [1] an actual or constructive taking of goods or property; [2] a carrying away or asportation; [3] the carrying away must be with a felonious intent; [4] the goods or property must be the personal property of another; [5] the taking must be without the consent and against the will of the owner; and [6] the taking must occur with in [sic] the confines of the building[.] [*People v Sykes*, 229 Mich App 254, 278; 582 NW2d 197 (1998).]

Defendant claims that the great weight of all the evidence presented at trial overcame complainant's testimony, and that without complainant's unreliable testimony, the elements of attempted larceny in a building cannot be satisfied. Defendant's argument is without merit.

This Court greatly disfavors "trial motions based solely on the weight of the evidence regarding witness credibility." *Lemmon*, *supra* at 639. The trier of fact is in a far better position than this Court to evaluate the witness' "tonal quality, volume, speech patterns, and demeanor" during testimony. *Lemmon*, *supra* at 646. Judging a witness' credibility should be left with the trier of fact. *Id.* This Court will only review a credibility determination if the evidence that the trier of fact relied on was completely lacking in probative value, "contradicted indisputable physical facts or defied physical realities." *Id*. Beyond such extenuating circumstances, resolution of credibility issues is within the exclusive province of the trier of fact. *People v DeLisle*, 202 Mich App 658, 662; 509 NW2d 885 (1993).

The defendant in *People v Gadomski*, 232 Mich App 24, 27; 592 NW2d 75 (1998), challenged the credibility of a sexual assault victim's testimony. The victim's testimony

provided strong support for the defendant's conviction and directly contradicted the defendant's accounting of the event in question. *Id.* at 27. This Court held that it had no authority to make credibility determinations on appeal and that the jury had the power to decide for itself which evidence to rely on. *Id.* at 28. This Court therefore held that the trial court did not abuse its discretion in denying the defendant's motion for a new trial. *Id.*

Defendant, in the instant case, raises the same argument as did the defendant in *Gadomski*. As proof of complainant's lack of credibility, defendant points to discrepancies in complainant's testimony. Complainant gave contradictory testimony regarding the time at which the two men first met. He further testified that he had been to defendant's mother's house, but not to defendant's own home. This contradicted complainant's statement to the investigating officer that complainant and defendant had been to defendant's home on the night in question. Defendant also argues that complainant's accounting of the night in question was irrational, as strangers would not spend an entire night together as complainant described.

The court properly resolved these ambiguities. Neither the exact time when complainant and defendant met, nor which house they visited that night, was relevant. The pertinent evidence for purposes of defendant's conviction was that the men visited a house together, that they eventually traveled together to complainant's apartment, and that defendant took complainant's CD player and cellular phone from complainant's apartment without consent.

The trial court reached each of these determinations after considering the demeanor and mannerisms of each witness during their respective testimony. The court had within its discretion, despite the discrepancies in complainant's testimony, to find complainant more credible than defendant. Therefore, the verdict was not against the great weight of the evidence.

Affirmed.

/s/ Kathleen Jansen
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell