

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND ALLAN LEVYE,

Defendant-Appellant.

UNPUBLISHED

January 10, 2008

No. 274833

Wayne Circuit Court

LC No. 06-008264-01

Before: Fitzgerald, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 42 months to 10 years' imprisonment for the assault with intent to do great bodily harm less than murder conviction, one to five years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant's convictions arise out of a non-fatal shooting that occurred between the late evening of July 4, 2006, and early morning hours of July 5, 2006. That evening, JuJuan Payne drove his friends, DiQuan Ferguson and Kerri Haney, to a park to watch a local fireworks display. After the conclusion of the fireworks, the trio drove back to their neighborhood. Suddenly, Payne applied the brakes to avoid hitting a person, later identified as defendant, who had fallen off the back of a truck into the street. Ferguson shouted to the person, who appeared intoxicated, to get out of the way. Neither Ferguson nor Payne knew the person who had fallen into the street; however, Haney had known that person, who she later identified as defendant, for ten years.

Haney recalled at trial that defendant smiled during his verbal exchange with Payne and Ferguson, mumbled words she could not decipher and left the area with the assistance of another person. Ferguson remembered that the person did not respond in any manner, but simply "got out of the street." The three continued on their way, and Haney recalled that Ferguson and Payne continued to express their annoyance at defendant.

Payne parked the car in his driveway and entered his house, leaving Ferguson and Haney in the vehicle. Soon thereafter, a person approached the passenger side of the car and started

shooting a handgun at Ferguson. Ferguson suffered five gunshot wounds, having been shot once in the right leg, three times in the left leg, and once in the stomach.

Defendant argues on appeal that the verdict was against the great weight of the evidence. We disagree. A challenge to the great weight of the evidence requires an examination of the entire body of proofs; accordingly, this Court must determine whether the evidence preponderates so heavily against the verdict that allowing it to stand would result in a miscarriage of justice. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

Where the verdict is against the great weight of the evidence, a new trial may be granted on some or all of the issues. MCR 2.611(A)(1)(e). Where credibility is at issue, and conflicts in the evidence exist, the question of credibility is for the fact-finder to decide. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). “Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.” *Id.* at 647. Reversal is necessary only where the testimony is “inherently implausible” to the extent that it “contradicts indisputable physical facts or law.” *Id.* “Regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.” MCR 2.613(A).

Defendant does not contend that the prosecution failed to prove the elements of the charged crimes; rather, on appeal, he focuses on the credibility of witnesses and alleged inconsistencies in the evidence. Defendant contends that Haney was pressured into identifying defendant as the gunman who shot Ferguson. Further, defendant asserts that Ferguson and Payne had a motive to falsely accuse defendant, originating from their annoyance with defendant earlier in the evening of the shooting.

Although Haney testified at trial that people attempted to pressure her into identifying defendant as Ferguson’s assailant, and her testimony was inconsistent with that given by other witnesses on some points, she did tell the police investigator immediately after the shooting that defendant was the gunman. Further, Haney identified defendant as the shooter under oath at the preliminary examination. Haney also testified at trial that she had known defendant for nine or ten years, and that she knew his address. Although it is true that, at trial, Haney recanted her positive identification of defendant she provided to the police at the hospital, and later at the preliminary examination, it is well settled that questions of credibility or the weight to be assessed to the evidence is properly resolved by the trier of fact. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Further, when the police showed a photograph of defendant to Ferguson, he positively and unequivocally recognized defendant as the man who shot him. Also, Ferguson positively identified defendant in court as both the man who fell off the truck and obstructed the street, and as his assailant. Payne identified defendant as the man who fell off the truck at defendant’s trial as well, testifying that he recalled defendant’s face.

A police officer testified at trial that a streetlight was in operating condition in the immediate area on the night of the incident. Moreover, Payne’s testimony regarding the initial confrontation with defendant was consistent with the testimony of Haney and Ferguson.

The trial court expressly considered the credibility of various witnesses in this case and accorded weight to the eyewitness identification of defendant as Ferguson’s assailant. The trial

court's conclusion that defendant assaulted Ferguson with a firearm with the intent to do great bodily harm by shooting him five times was not contrary to the great weight of the evidence.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael R. Smolenski