

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY ANTOINE COOK II,

Defendant-Appellant.

UNPUBLISHED

June 17, 2008

No. 276596

Wayne Circuit Court

LC No. 06-010156-01

Before: Zahra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

A jury convicted defendant of felon in possession of a firearm, MCL 750.224f, felonious assault of his ex-wife, Crystal Williams, MCL 750.82, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, malicious destruction of property greater than \$1,000 but less than \$20,000, MCL 750.377a(1)(b)(i), and reckless use of a firearm, MCL 752.863a. He was acquitted of felonious assault of Williams's mother, Darrylin Dickson. The trial court sentenced defendant, as a second habitual offender, MCL 769.10, to five years' probation for the felon in possession of a firearm conviction, two to six years' imprisonment for the felonious assault conviction, five years' probation for the malicious destruction of property conviction, and time served (106 days) for the reckless use of a firearm conviction, all consecutive to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I. Sufficiency of the Evidence

Defendant's first argument on appeal is that the prosecution failed to present legally sufficient evidence to support his felonious assault conviction. We disagree.

A. Standard of Review

This Court reviews sufficiency of the evidence claims de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). Therefore, this Court "must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

B. Analysis

“The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.” *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

Viewing the evidence in a light most favorable to the prosecution, we conclude there was ample evidence for the jury to find beyond a reasonable doubt that defendant committed felonious assault against Williams. Defendant was irate because Williams refused to provide information necessary for the sale of their marital home. Williams, Dickson, Dickson’s husband, Ronald Chappel, and Williams’s sister, Erica Williams, testified that defendant stood in front of Dickson’s home holding a black automatic handgun. Then, he threatened Williams. Erica testified that defendant said, “Bitch, you’re going to pay.” In addition, he told Williams she would “get what’s coming to [her].” Finally, defendant threatened to kill Williams. Moreover, defendant waved his gun toward the porch where Williams and her family stood. Williams testified that she was so scared that she escaped into Dickson’s home to phone 911. Afterward, defendant used the butt of his gun to break the windows in Williams’ pickup truck and shoot her tire. Witnesses heard the gunshot and saw the flash. A shell casing was recovered near the damaged tire. Considering these facts, we conclude that the evidence was sufficient for a reasonable jury to convict defendant of felonious assault.

Defendant’s argument regarding inconsistencies in the witnesses’ testimony is also unpersuasive. Resolution of conflicting evidence and matters of witness credibility are properly left to the trier of fact. *Avant, supra*, p 506. Here, the jury weighed Williams’, Chappel’s, Dickson’s and Erica’s testimony that defendant possessed a gun, against defendant’s and his girlfriend, Natasha Benning’s, testimony to the contrary. The jury also considered that, among the witnesses, only Williams and Chappel recalled defendant’s threats to Williams’s life. Because of the jury’s superior ability to assess witness credibility and because all conflicts in the evidence must be resolved in favor of the prosecution, this Court defers to the jury’s resolutions. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004).

Defendant also contends that the prosecution failed to present legally sufficient evidence that defendant possessed a gun to convict him of felon in possession of a firearm, felony-firearm and reckless use of a firearm. The elements of felon in possession of a firearm are: (1) the defendant possessed a firearm, (2) the defendant was previously convicted of a felony, and (3) less than five years elapsed since the defendant’s discharge from probation. *People v Perkins*, 262 Mich App 267, 270-271; 686 NW2d 237 (2004), *aff’d* 473 Mich 626 (2005); MCL 750.224f. The elements of felony-firearm are: (1) the defendant possessed a firearm, (2) during the commission of, or attempt to commit, a felony. *Avant, supra*, p 505; MCL 750.227b. MCL 752.863a provides, “Any person who shall recklessly or heedlessly or willfully or wantonly use, carry, handle or discharge any firearm without due caution and circumspection for the rights, safety or property of others shall be guilty of a misdemeanor.” MCL 752.863a.

Because we conclude above that there was sufficient evidence to prove that defendant possessed a gun to support his felonious assault conviction, there was also sufficient evidence of

this element to convict defendant of felon in possession of a firearm, felony-firearm and reckless use of a firearm.

II. Motion for a New Trial

Defendant's second argument on appeal is that the trial court abused its discretion in denying his motion for a new trial. In this lower court motion, defendant argued: (1) his convictions for felonious assault, felon in possession of a firearm, felony-firearm and reckless use of a firearm were contrary to the great weight of the evidence; (2) the prosecutor committed several acts of misconduct; and (3) the trial court erred when it ruled that defendant could not impeach Williams regarding her prior Holmes Youthful Trainee Act (HYTA) case. Defendant also argued that these errors cumulatively denied him a fair trial. We disagree.

A. Standard of Review

This Court reviews a trial court's decision to grant or deny a motion for a new trial for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 634; 576 NW2d 129 (1998). Because the alleged prosecutorial misconduct was not preserved by a contemporaneous objection and a request for a curative instruction, appellate review is for plain error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). To find plain error, this Court must decide whether there was error, if it was plain, and if it affected the defendant's substantial rights. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

B. Analysis

A trial court may grant a new trial if a verdict is contrary to the great weight of the evidence. MCR 2.611(A)(1)(e); *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003). The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Id.* A verdict is contrary to the great weight of the evidence only under exceptional circumstances, *Lemmon, supra*, pp 643-644, for example, where “testimony contradicts indisputable facts or laws” (citing *United States v Sanchez*, 969 F2d 1409, 1414 (CA 2, 1992)), where “a witness’s testimony is so patently implausible it could not be believed by a reasonable juror” (citing *People v Garcia*, 978 F2d 746, 748 (Ca 1, 1992)), or “where the witnesses [sic] testimony has been seriously ‘impeached’ and the case marked by ‘uncertainties and discrepancies’” (citing *United States v Martinez*, 763 F2d 1297, 1313 (CA 11, 1985)). “Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.” *Id.* at 647.

Williams, Dickson, Chappel and Erica testified that defendant possessed a gun, which he waved toward the front porch. They also testified that he used the gun to break the windows and shoot the tire on Williams’ pickup truck. Defendant does not argue that this evidence contradicts indisputable facts or laws, nor does he argue that it was implausible or seriously impeached. Rather, defendant argues that the verdict finding him guilty of felonious assault, felon in possession of a firearm, felony-firearm and reckless use of a firearm, on the basis that he possessed a gun, is contrary to the great weight of the evidence because he presented conflicting testimony that he merely possessed a screwdriver. Benning also testified that she did not see defendant with a gun. These inconsistencies do not rise to the level of the “exceptional

circumstances” described in *Lemmon, supra*, p 647. Because conflicting testimony and questions of witness credibility are insufficient grounds for granting a new trial, we conclude that the evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to let the verdict stand. *People v Musser*, 259 Mich App 215, 219; 673 NW2d 800 (2003). Thus, the trial court did not abuse its discretion by denying defendant’s motion for a new trial on the ground that the convictions were contrary to the great weight of the evidence.

In his motion for a new trial, defendant also claimed that the prosecutor improperly argued that defendant’s unspecified prior felony conviction could be used to judge his credibility. During rebuttal, the prosecution stated, “[c]an you use the fact that the defendant is by stipulation a convicted felon, and use that to assess credibility, sure. But does that have to sway you about credibility, no.”

Generally, prosecutors are afforded great latitude in their closing arguments. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 434; 597 NW2d 843 (1999).

“MRE 609 provides, in pertinent part:

(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross examination, and

(1) the crime contained an element of dishonesty or false statement, or

(2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.” [*People v Parcha*, 227 Mich App 236, 241; 575 NW2d 316 (1997), citing MRE 609.]

In *People v McBride*, 413 Mich 341, 344-345; 319 NW2d 535 (1982), the defendant filed a pretrial motion to exclude any reference to his prior felony conviction. *Id.*, p 343. The trial court ruled that the prosecutor could question the defendant regarding whether he had past felony convictions, but could not identify the specific offenses. *Id.* The defendant chose not to testify. The Supreme Court held that it was error “to rule that impeachment by virtue of a prior unspecified felony would be permissible.” *Id.*, p 435. It also noted, “[w]ithout knowledge of the nature of the felony, the trier of fact has no probative evidence to consider, merely an amorphous suggestion that defendant’s past is blameworthy.” *Id.*, citing *People v Garth*, 93 Mich App 308, 318; 287 NW2d 216 (1979).

Following *McBride*, the prosecutor was not permitted to argue to the jury that defendant's credibility could be impeached by the unspecified felony to which the parties stipulated. Furthermore, according to his PSIR, defendant has no past convictions containing an element of dishonesty, false statement, or theft. Therefore, none of these convictions, even if specified at trial, would have been admissible for impeachment purposes. Thus, while we agree with the prosecution that the prosecutor's remark was amorphous, the record reflects that prosecutor's remark was nonetheless improper.

However, we conclude that the prosecutor's argument did not affect defendant's substantial rights. Sufficient evidence supports defendant's convictions. Further, the remark was amorphous, not repeated and stated without objection. Given that the trial court instructed the jury that the attorneys' arguments did not constitute evidence, defendant failed to establish plain error affecting substantial rights.

Defendant also argued that the prosecutor improperly bolstered or vouched for his witnesses. A "prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). However, a prosecutor may not improperly vouch for the defendant's guilt by using the prestige of his office. *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995). Also:

the prosecutor's comments must be considered in light of defense counsel's comments. An otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument. [*People v Watson*, 245 Mich App 572, 593; 629 NW2d 411 (2001).]

In his closing argument, the prosecutor stated:

. . . the reason I am arguing to you is that what they are saying is the truth, is because they were quite honest up there, when they told you from their individual perspective, what they were able to see and what they were not able to see. And even though those things different [sic] in a slight way, fundamentally they were the same.

However, the prosecutor also specifically noted that it is the jury's responsibility to find a witness's testimony "credible complete, in part, or none at all." He repeatedly urged the jury to consider the witnesses' credibility and natural inconsistencies in testimony based on differing vantage points and perspectives. He noted that testimony from Williams, Chappel, Dickson and Erica differed because they stood in different locations and experienced different emotions during the assault. In light of these differences, where credibility was a central issue in the instant case, the prosecutor's argument that the witnesses were honest was not improper.

Defendant also claimed that the prosecutor improperly argued, in his rebuttal argument, that his witnesses' testimony was "not fabricated" Specifically, he stated:

Or in going back to this other point, is the testimony from four different people, from four different points of view, with various degrees of consistency, is that consistent; is that testimony that is not fabricated, absolutely.

Once more, credibility was a central issue in the instant case. Therefore, his argument that inconsistent witness testimony did not equate to fabrication was not improper. Moreover, the prosecutor's statement should be considered in the context of defendant's trial counsel's closing argument. Defense counsel alleged that the witnesses on the porch "warp[ed] their perception of the fact in order to convince you there is a gun there." Consequently, because the prosecutor's remark regarding fabrication was made in response to defense counsel's argument, it is not an error affecting defendant's substantial rights. *Watson, supra*, p 593. Once again, the trial court's instructions to the jury that the attorneys' arguments did not constitute evidence were also sufficient to cure any prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

Also in his motion for a new trial, defendant claimed that he was denied the constitutional right of confrontation because the trial court excluded evidence of Williams's past HYTA case. Subject to certain limitations, a witness may be impeached by evidence of prior convictions involving dishonesty, false statement, or theft. *Parcha, supra*, p 241. However, pursuant to MCL 762.14, this Court has ruled that the status of youthful trainee shall not be deemed to be a conviction of crime. *People v Crutchfield*, 62 Mich App 149, 153; 233 NW2d 507 (1975). This Court also noted:

"We hold that in the examination or cross-examination of any witness, no inquiry may be made regarding prior arrests or charges against such witness which did not result in conviction; neither may such witness be examined with reference to higher original charges which have not resulted in conviction, whether by plea or trial." [*Id.*, citing *People v Falkner*, 389 Mich 682, 695; 209 NW2d 193 (1973).]

Consequently, we conclude that the trial court correctly excluded Williams's HYTA case and the underlying charge of embezzlement because they did not result in a conviction.

Finally, in his motion for a new trial, defendant claimed that the cumulative effect of errors at trial, including convictions contrary to the great weight of the evidence, prosecutorial misconduct and the exclusion of Williams's HYTA case, require a new trial. To make such a determination, only actual errors are aggregated to determine their cumulative effect. *Bahoda, supra*, p 292 n 64. Only the prosecutor's reference to defendant's unspecified felony conviction was improper and this error was not prejudicial. Therefore, this error does not aggregate with defendant's other claims of error to require reversal or a new trial.

III. Resentencing

Defendant's third argument on appeal is that he is entitled to resentencing because: (1) the trial court improperly scored OV 12 and OV 13, (2) the trial court failed to assess his ability to pay when it assessed attorney fees, and (3) his sentence constitutes cruel and unusual punishment. We disagree.

In scoring OV 12, the court is required to score ten points where “[t]wo contemporaneous felonious criminal acts involving crimes against a person were committed.” MCL 777.42(1)(b). A contemporaneous felonious criminal act is one that “occurred within 24 hours of the sentencing offense” and “has not and will not result in a separate conviction.” MCL 777.42(2)(a)(i) and MCL 777.42(2)(a)(ii).

The trial court correctly scored ten points for OV 12 because, under a preponderance of the evidence, *Drohan, supra*, 475 Mich 142-143, defendant committed two contemporaneous crimes, felonious assault against Dickson and Chappel. Defendant was acquitted of felonious assault of Dickson and not charged for the offense against Chappel, so these crimes have not and will not result in a conviction under MCL 777.42(2)(a)(ii). The trial court noted that it was surprised that the jury did not find defendant guilty of felonious assault against Dickson. It also noted, “the jury could have found everyone that was on that porch were victims of assault with a dangerous weapon.” Specifically, defendant possessed a black automatic gun, which he waved toward the porch where Dickson and Chappel stood. Chappel testified that he was shocked and thought defendant was crazy. Dickson testified that she feared defendant would shoot at Williams, the house or “anything.” She ordered her family to go inside for protection. We conclude that the circumstances surrounding defendant’s use of his gun demonstrated an apparent present ability to commit a battery on Dickson and Chappel. Therefore, the trial court did not abuse its discretion in its scoring of OV 12.

In scoring OV 13, the court is required to score five points where “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against property.” MCL 777.43(1)(f). Additionally, the court is required to score ten points where “[t]he offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of section 7401(2)(a)(i) to (iii) or section 7403(2)(a)(i) to (iii).” MCL 777.43(1)(c). Furthermore, “all crimes within a five-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.” *People v Price*, 477 Mich 1, 5 n 2; 723 NW2d 201 (2006).

The prosecutor conceded at the hearing on defendant’s motion for re-sentencing and on appeal that defendant had not committed three or more crimes against property in the past five years and that the trial court incorrectly scored five points to OV 13 under MCL 777.43(1)(f). However, at the hearing and on appeal, the prosecution maintains that defendant should have been scored ten points under OV 13. An erroneous scoring of the guidelines range does not require resentencing if the trial court would have imposed the same sentence regardless of the error. *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003). Here, at the hearing on defendant’s motion for re-sentencing the trial court specifically found “in regard to the offense of assault with a dangerous weapon[,] that Crystal Williams was put in fear of injury by the defendant.” The trial court supported its finding by citing to evidence presented at trial that defendant stood in front of Dickson’s home and waved a black automatic gun toward the porch where seven people stood. Although defendant was not charged with or convicted of felonious assault against as to four of those people, the trial court’s finding that defendant’s acts against Williams constituted an offense under MCL 777.43(1)(c) support that conclusion that upon re-sentencing, it would score ten points for OV 13. An addition of five points in defendant’s total offense variable score, a change from 35 to 40 points, would not change the minimum sentencing guidelines range of 10 to 28 months. MCL 777.67; MCL 777.21(3). Defendant’s minimum

sentence of 24 months is within the appropriate minimum sentencing guidelines range regardless of whether OV 13 was incorrectly scored at five points. We conclude that resentencing is not required. *Mutchie, supra*, 468 Mich 51-52.

Defendant challenges the assessment of attorney fees. However, at the motion for resentencing, held after defendant's appeal was filed, defense counsel advised the trial court that his argument regarding the failure to assess defendant's ability to pay attorney fees was mistaken because defendant's trial counsel was retained. Instead, counsel requested that the PSIR, which recommended attorney fees, be corrected. Consequently, the trial court ordered this correction of the PSIR. An issue is moot when an event occurs that renders it impossible for the reviewing court to fashion a remedy. *People v Cathey*, 261 Mich App 506, 510; 681 NW2d 661 (2004). Thus, defendant's abandoned challenge to the assessment of attorney fees is moot.

Finally, defendant argues that he is entitled to resentencing because his sentence constitutes cruel and unusual punishment where the Michigan Department of Corrections (MDOC) did not properly provide for his epilepsy. Specifically, defendant claims that he received a top bunk, suffered a seizure, fell and sustained injuries to his head and back. Defendant fails to cite authority or facts from the record to support the proposition that resentencing is an appropriate remedy in this case. Specifically, defendant alleges that the MDOC allegedly failed to accommodate his epilepsy in the past, but he does not allege that the MDOC is currently unable to accommodate his special needs. Consequently, defendant's request for resentencing, namely an order of probation to substitute his two to six year prison term for felonious assault, is abandoned on appeal. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). Therefore, this Court need not address it. *Id.*

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen