

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MICHAEL BLANCH, JR.,

Defendant-Appellee.

UNPUBLISHED

June 17, 2008

No. 277356

Wayne Circuit Court

LC No. 06-013795-01

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

PER CURIAM.

The prosecution appeals as of right the trial court's order of acquittal, entered following the trial court's grant of defendant's motion for directed verdict. Defendant was charged with possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and two counts of felonious assault, MCL 750.82. We reverse and remand for retrial.

The prosecution contends that retrial is not barred by the prohibition against double jeopardy as no judicial acquittal has been entered. We agree. This court reviews a trial court's grant of a motion for directed verdict de novo, asking whether the evidence that has been presented prior to the motion, when viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the elements of the charged offense were proven beyond a reasonable doubt. *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999).

Defendant was charged with two counts of felonious assault and one count of felony-firearm after an altercation with Chet Pitts. At trial, Pitts testified that he was arguing with defendant about money when defendant punched him in the face, produced a firearm and proceeded to hit him with the weapon. Defendant and his brother, Mariano Blanch, each testified that while a physical confrontation did occur, no weapon was ever used.

After the defense rested it moved for a directed verdict. The trial court recited the proper standard to be applied to a directed verdict motion. The trial court then began to recite the various pieces of testimony from the course of the three-day trial. The court emphasized that the only evidence of a firearm was from Pitts, defendant and Mariano each denied a gun was used and the police failed to recover a gun. The court stated that it had to look at the sufficiency of the evidence and the "credibility of the evidence as it relates to that weapon." The court then appeared to engage in an analysis of Pitts's credibility, particularly stressing Pitts' testimony that he was not Geneva Blanch's boyfriend while acknowledging that the two were sexually intimate.

The court stated that his testimony about his relationship was “very muddy.” Next, the court began to analyze Pitts’ testimony regarding the contested \$7,000. The court concluded that, based on the testimony, defendant could not have owed Pitts any money. According to the court, defendant used the funds to purchase supplies for a house that he agreed to improve for Pitts. The court then stated, “I think even in the light most favorable to the People, a rational trier of fact could not be persuaded beyond a reasonable doubt that there was a weapon used here. And therefore, the Court directs a verdict of acquittal on all counts.”

In *People v Mehall*, 454 Mich 1; 557 NW2d 110 (1997), the Michigan Supreme Court iterated that while a directed verdict of acquittal cannot be appealed, a trial court’s characterization of its order as an acquittal is not dispositive. *Mehall, supra* at 5. Rather, the proper inquiry is whether the trial court determined that the evidence was “legally insufficient to sustain a conviction.” *Id.* at 6. The Court stated, “it is not permissible for a trial court to determine the credibility of witnesses in deciding a motion for a directed verdict of acquittal, no matter how inconsistent or vague that testimony might be.” *Id.* The Court concluded, “by concentrating on the complainant, and disregarding her testimony as unbelievable, the visiting judge failed altogether to rule on the sufficiency of the prosecution’s proofs. Thus, there was no acquittal, regardless of how the trial court characterized its decision, and a retrial is not precluded under the Double Jeopardy Clauses of the federal and state constitutions.” *Id.* at 6-7.

In order to maintain a conviction for felonious assault, the prosecution must establish that the accused committed an assault with a dangerous weapon. *People v Walls*, 265 Mich App 642, 645-646; 697 NW2d 535 (2005). To secure a conviction for felony-firearm, the prosecution must prove that the defendant possessed a firearm during the commission, or attempted commission, of a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The trial court, after both sides presented evidence, determined that a rational trier of fact could not conclude that a weapon was used during the alleged assault and subsequently granted defendant’s motion. However, to reach this conclusion the trial court discounted Pitts’ testimony. While Pitts’ testimony was somewhat incredible, particularly when he testified that he was able to leap a six-foot tall picket fence moments after a severe beating, he did testify that defendant assaulted him while brandishing a handgun. Viewed in the light most favorable to the prosecution, sufficient evidence was presented to support convictions of felonious assault and felony-firearm. Here, the trial court, perceiving inconsistencies in Pitts’ testimony regarding his relationship with Geneva and the money defendant allegedly owed him, determined Pitts was not credible. In making such a determination, the trial court departed from its role. If the jury concluded that Pitts was not credible, it had the option of entering a verdict in favor of defendant. The trial court, however, did not have a similar option. Defendant was not judicially acquitted and can, as a result, be retried.

Reversed and remanded for retrial. We do not retain jurisdiction.

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