

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL BRUCE CURB,

Defendant-Appellant.

UNPUBLISHED

July 1, 2008

No. 277878

Wayne Circuit Court

LC No. 06-010995-01

Before: Meter, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to do great bodily harm, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 120 to 180 months for the assault conviction and 40 to 60 months for the felon in possession conviction, to be served consecutive to a two-year prison term for the felony-firearm conviction. We affirm.

Defendant's convictions arise from the shooting of Latrelle "Babyboy" Howard. At the time of the shooting, defendant was dating the mother of Howard's child. Howard testified that defendant became hostile after Howard repeatedly asked him for information so that Howard could contact the child's mother. Howard saw defendant fire a black handgun at him from approximately six feet away. Howard was shot twice in the left knee. Howard's brother, Lloyd, and their friend Eric Bestur also testified that they saw defendant shoot Howard. Howard saw defendant's uncle with an AK-47 on the porch of a nearby home. Bestur and Lloyd Howard also testified that defendant's uncle was near defendant at the time of the shooting. A defense witness, the girlfriend of defendant's uncle, testified that as Howard pulled a gun, defendant grabbed it with his left hand and it discharged.

The police recovered spent nine-millimeter casings from the area of the shooting, and 40-caliber casings from defendant's uncle's house two houses away. The police also seized a nine-millimeter handgun and an assault rifle from defendant's uncle's home. Gunshot residue tests were positive for both Howard and defendant. At his sentencing, defendant stated that his uncle shot Howard.

Defendant first argues that the trial court abused its discretion by denying his motion for a new trial on the ground that the verdict was against the great weight of the evidence. He notes

contradictions in the testimony of the prosecution witnesses and the positive gunshot residue test results on Howard. He also points out that Howard's medical records refer to a "40 caliber" single entrance wound, whereas defendant purportedly had a nine-millimeter pistol and his uncle had an AK-47. In addition, following the trial, two individuals testified at the motion hearing that they overheard a conversation involving the Howard brothers that resulted in the impression that they were not being truthful.

A new trial may be granted on some or all of the issues if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). Absent exceptional circumstances, the issue of credibility should be left for the trier of fact. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). Exceptional circumstances that may justify a new trial include testimony that is patently incredible or so inherently implausible that it could not be believed by a reasonable juror, testimony in defiance of physical realities, or witness testimony that was seriously impeached and the case marked by uncertainties and discrepancies. *Id.*, pp 643-644. This Court reviews the trial court's decision to grant or deny a motion for a new trial for an abuse of discretion. *Id.*, p 648 n 27.

In the present case, the discrepancies and flaws in the prosecution's case were brought to the attention of the jury, which nevertheless convicted defendant. The evidence was not patently incredible, inherently implausible, or in defiance of physical realities. The question of credibility thus belonged to the trier of fact. *Id.*, pp 646-647. The trial court did not abuse its discretion in denying the motion.

Defendant also argues that he was deprived of due process when the trial court repeatedly instructed the jury on alternate counts in an order other than from the most serious to the least serious offense.

The amended information listed the counts in the following order: assault with intent to murder, felon in possession of a firearm, felony-firearm, felonious assault, and assault with intent to do great bodily harm less than murder. The trial court instructed the jury regarding the elements of the offenses in this order. After the court instructed the jury and conferred with counsel at a sidebar conference, the court stated that it had reviewed the instructions with counsel before delivering them. The court asked if counsel was satisfied with the instructions, and defense counsel answered affirmatively. By this affirmative expression of satisfaction, defendant waived appellate review of this issue. *People v Matuszak*, 263 Mich App 42, 48, 57; 687 NW2d 342 (2004).

Defendant also argues that trial counsel was ineffective for failing to object to the order of the instructions concerning the charged offenses.

"To prove that counsel has been ineffective, defendant must show that his counsel's performance was deficient, and that there is a reasonable probability that but for that deficient performance, the result of the trial would have been different." *Matuszak*, *supra*, pp 57-58. Defendant argues that from the fact that the jury convicted him of the last offense shown on the verdict form, one can infer that the jury intended to find him guilty of the least serious offense. However, the jury received proper instructions regarding the elements of assault with intent to murder, assault with intent to do great bodily harm, and felonious assault. There is no reasonable probability that the jury's verdict would have been different had the order of the instructions

been changed. We are not persuaded that the order, rather than the substance of the charges, produced the verdict. Because defendant has not shown prejudice, we reject his claim that counsel was ineffective.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael R. Smolenski
/s/ Deborah A. Servitto