

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BARTOLO FITCHETT,

Defendant-Appellant.

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UNPUBLISHED

September 16, 2008

No. 277063

Saginaw Circuit Court

LC No. 06-028169-FH

Before: Schuette, P.J., and Zahra and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm, MCL 750.84, felon in possession of a firearm, MCL 750.224f, carrying a firearm with unlawful intent, MCL 750.226, and two counts of 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 150 months to 20 years for the assault conviction, and four to ten years each for the felon in possession and carrying a firearm with unlawful intent convictions, to be served consecutive to two concurrent two-year prison terms for the felony-firearm convictions. He appeals as of right. We affirm defendant's convictions, but remand for resentencing. We decide this appeal without oral argument under MCR 7.214(E).

**I. FACTS**

At trial, Edward Esparza and Jacob Gorsuch both testified that defendant shot at Esparza. Esparza testified that the gunshot grazed his back, in the shoulder area, and he produced a jacket that contained several holes in the hood area that he attributed to the bullet. Esparza testified that a t-shirt he was wearing was not damaged. A .25 caliber shell casing was found in the area. Defendant admitted being involved in a confrontation with Esparza in which he struck Esparza in the shoulder with a cane, but he denied shooting Esparza and claimed that Esparza fabricated "the whole incident about a gun."

**II. WEIGHT OF THE EVIDENCE**

Defendant first argues that the jury's verdict is against the great weight of the evidence because Esparza's account is "preposterous." Defendant asserts that Esparza's shoulder injury could not have been caused by a gunshot, but was consistent with him having been struck by a cane. Defendant additionally asserts that Esparza's testimony that a single bullet caused multiple

holes in the jacket and none in Esparza's t-shirt defies logic. Thus, defendant contends that Esparza, who was evasive in his testimony, was not credible, whereas defendant's testimony was credible. We disagree.

We review 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, 648 n 27; 576 NW2d 129 (1998). 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. *Lemmon, supra* at 642-643. 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 is seriously impeached and the case marked by uncertainties and discrepancies. *Id.* at 643-644.

The jacket and the photographs of Esparza's injury are not inconsistent with Esparza's and Gorsuch's accounts of the shooting. Contrary to what defendant argues, the photograph of the injury does not refute the testimony that the injury was caused by a bullet, or clearly demonstrate that the injury could only have been caused by a cane. Further, an examination of the jacket does not show that the witness accounts were implausible. The jacket consists of a water-resistant, nylon-type exterior with a cotton-type lining, and it has a hood. It contains three holes in close proximity in the back right shoulder area of the exterior jacket near the top shoulder seam. It also has another hole in the interior lining underneath, which appears to correspond to one of the holes in the shoulder area. Approximately five inches from the cluster of holes on the shoulder, toward the center of the jacket, is another larger hole in the exterior of the jacket. The lining underneath contains a hole in approximately the same area. The exterior part of the hood has two large holes on the right half; the lining of the hood has no visible damage. The holes in the jacket essentially form a linear pattern. The gap between the cluster of three holes in the shoulder area, which corresponds to one hole in the lining, and the hole near the back center, which corresponds to the second hole in the lining, is consistent with the area of Esparza's grazing injury depicted in the photographs. The holes in the hood appear to line up on top of the holes in the center back. The absence of holes in the lining of the hood and the presence of only one hole in the lining underneath the cluster of three holes in the shoulder may be attributable to the manner in which the hood was configured at the time of the damage. The pattern and its consistency with the injury corroborate Esparza's and Gorsuch's account.

Esparza's testimony that the bullet that produced the grazing wound depicted in the photographs did not damage the t-shirt he was wearing is more difficult to reconcile with the damage to the jacket and the injury depicted in the photographs. But this discrepancy is not so significant that it wholly undermines the credibility of Esparza and Gorsuch. Under the circumstances, the trial court did not abuse its discretion in denying defendant's motion for new trial.

### III. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that trial counsel was ineffective for failing to impeach Gorsuch with evidence that he had been convicted of a theft offense and had been charged with filing a false police report. We disagree.

Defendant relies on documentation showing that Gorsuch was convicted of misdemeanor larceny from a vacant building, MCL 750.359, which is punishable by imprisonment for not more than a year. Under MRE 609(2), however, a prior conviction for a crime containing an element of theft is admissible for impeachment only if the crime is punishable by imprisonment in excess of one year. Thus, the misdemeanor conviction was not admissible for impeachment.

Evidence that Gorsuch was *charged* with filing a false report of a felony also was not admissible under MRE 609. Evidence of charges against a witness that did not lead to conviction is inadmissible, except to show bias. *People v Layher*, 464 Mich 756, 766-769; 631 NW2d 281 (2001). Defendant asserts that the circumstances of the incident involving Gorsuch were “nearly identical . . . [He] had engaged in some type of criminal behavior. Rather than wait for the victim to report him, Gorsuch made a false report claiming that he was the victim, not the perpetrator.” However, defendant did not provide any factual support for these assertions. He had the burden of establishing the factual predicate of his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Under the circumstances, defendant has not shown that he was denied the effective assistance of counsel or that an evidentiary hearing on this issue is warranted.

#### IV. SENTENCING

Finally, defendant argues that the trial court improperly departed from the sentencing guidelines range without providing substantial and compelling reasons for a departure. We agree.

At sentencing, the sentencing information report was corrected to rescore one of the offense variables, resulting in a sentencing guidelines range of 29 to 114 months for defendant’s assault with intent to do great bodily harm conviction. The trial court sentenced defendant to 12-1/2 to 20 years’ imprisonment for that conviction without providing any reasons for a departure.

A trial court must sentence a defendant within the appropriate guidelines range unless it states substantial and compelling reasons for a departure from that range. MCL 769.34(3). In this case, it appears that the trial court erroneously believed that it was imposing a sentence within the appropriate guidelines range. Regardless, the court failed to provide substantial and compelling reasons to justify a departure from the guidelines. Accordingly, we remand for resentencing. On remand, the trial court shall sentence defendant within the appropriate guidelines range or state on the record a substantial and compelling reason for a departure from that range in accordance with MCL 769.34(3) and *People v Babcock*, 469 Mich 247, 258-261; 666 NW2d 231 (2003).

We affirm defendant’s convictions, but remand for resentencing. We do not retain jurisdiction.

/s/ Bill Schuette  
/s/ Brian K. Zahra  
/s/ Donald S. Owens