STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 12, 2009
v	No. 282939 Wayne Circuit Court
KENNETH WILLIAM YOUNG, Defendant-Appellant.	LC No. 07-009761-FH

Before: Borrello, P.J., and Murphy and M.J. Kelly, JJ

PER CURIAM.

Defendant appeals as of right his bench trial conviction of first-degree home invasion, MCL 750.110a(2). Defendant was sentenced as a habitual offender, second offense, MCL 769.10, to 100 months to 30 years' imprisonment, with credit for 298 days. For the reasons set forth in this opinion, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In the early morning hours of February 10, 2007, Quiana Sherman was watching television at her Detroit residence when she heard someone trying to kick in her back door. As she heard the sounds of shattering glass, she moved toward the kitchen from where the sound was emanating, with a 12-gauge shotgun. When she opened the door that separated the kitchen from the house, the intruder, in her words, "was right there." The intruder saw Sherman and ran toward the back window. Sherman fired her gun at the intruder. Sherman testified that she could see defendant's fuzzy hair and big, dirty coat. Sherman thought she heard male voices in an alley that adjoins her house, this led her outside where she saw the intruder jumping the fence. She then fired a second shot into the air with the hopes of stopping the intruder. She returned to her home and called the police.

Prior to the arrival of the police, Sherman looked out a window and saw the intruder lying on the ground in a field. When the police arrived they found defendant lying in the center of a vacant lot near Sherman's home.

At trial, Sherman identified defendant as the man who had entered her kitchen. She then testified that she had made eye contact with him while he was in the house. After being reminded by the assistant prosecutor that she testified at the preliminary examination that she did not see the intruder's face, Sherman acknowledged the inconsistency. She then testified about the color and description of the intruder's coat, again varying her testimony from the preliminary

examination. Two police officers also testified as to the color and style of the clothing worn by the intruder that night with varying descriptions provided by the officers as to the color and amount of clothing worn by the intruder.

In addition, a brown glove was found in the back window of Sherman's house which matched a glove found in the chain link fence found near where defendant was lying when he was found.

Following a bench trial, defendant was found guilty of first-degree home invasion, MCL 750.110a(2). He immediately moved for a new trial asserting that the verdict was against the great weight of the evidence. The trial court denied defendant's motion and this appeal ensued.

I. Great Weight of the Evidence.

Defendant argues that the trial court should have granted his motion for a new trial because the verdict was against the great weight of the evidence. We review the trial court's factual findings for clear error. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (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. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). Defendant's arguments on appeal relate to the credibility and weight of the evidence identifying him as the perpetrator. Defendant argues that Quiana Sherman was not a credible witness because her description of the clothes the intruder was wearing changed from the preliminary examination and her description of the clothes the intruder was wearing was not the same as the description of what defendant was wearing when he was found. In addition, Sherman was not a credible witness because at trial she testified that she saw the intruder's face inside her house, but at the preliminary examination, she testified that she only saw the intruder's face outside her house. Defendant further asserts that although Sherman testified that she fired a shot in the house, no blood, buckshot, or slugs were found around the window or inside the house. And, there was no blood on the path from the house to where he was found. Defendant additionally asserts that there was testimony, which indicated that defendant was an innocent bystander and that another man was the intruder.

Predicated on the theory that appellate courts should not act as the thirteenth juror in reviewing issues of credibility, our Supreme Court in *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998), made clear that questions surrounding the credibility of a witness are not sufficient grounds for granting a new trial, when it stated: "We align ourselves with those appellate courts holding that, absent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility 'for the constitutionally guaranteed jury determination thereof.' We reiterate the observation in *Anderson v Conterio*, 303 Mich 75, 79; 5 NW2d 572 (1942), that, when testimony is in direct conflict and testimony supporting the verdict has been impeached, if 'it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it, the credibility of witnesses is for the jury.'" (internal citation omitted.)

Although there was some conflicting testimony regarding what Sherman thought the intruder was wearing and what defendant was found wearing and whether Sherman saw defendant's face while he was in her home, that conflicting testimony does not preponderate so heavily against the verdict that it would be a miscarriage of justice to let the verdict stand. *McCray*, *supra*.

Defendant also asserts that although Sherman testified that she fired a shot in the house, no blood, buckshot or slugs were found around the window or inside the house. Additionally he argues that there was no blood on the path from the house to where he was found. Defendant further asserts that there was testimony which indicated that defendant was an innocent bystander and that another man was the intruder. Specifically, defendant argues that Sherman testified that she thought she heard male voices outside. Defendant argues that because he wrote a letter to the trial court in advance of sentencing explaining that he was merely cutting through the vacant lot on the way to his girlfriend's house when a woman with a shotgun came from behind Sherman's house and shot him, this letter should be given some evidentiary weight. However, this evidence, or lack thereof, directly relates to the credibility of the victim. On such matters, we defer to the trial court's opportunity to hear the witnesses and assess their credibility. *Kochoian v Allstate Ins Co*, 168 Mich App 1, 11; 423 NW2d 913 (1988). However, we note that Sherman's testimony did not contradict indisputable physical facts or laws and was not potently incredible, inherently implausible or seriously impeached such that it could not be believed. *Lemmon*, *supra* at 643-644. Additionally, the trial court noted that the reason there may have not been blood inside the house or a trail of blood from the house to defendant was because defendant was wearing so many coats. Thus, the blood may not have shown up until defendant collapsed to the ground. This finding was reasonable and not clearly erroneous. *Cress*, *supra*. Although there may have been some credibility issues, and even some evidence that might suggest that another man was the intruder, there was substantial evidence to support defendant's identity as the perpetrator and thus support the verdict. Sherman testified that she saw defendant's face. She shot at the intruder with a shotgun after he entered her home without permission and while she was in her home. Sherman subsequently saw the intruder jump over a fence and she saw him lying on the ground near where he had jumped the fence. Defendant was found lying on the ground 50 feet from Sherman's home, bleeding from a gunshot wound. A brown glove was found in the back window of Sherman's house. The matching brown glove was found in the chain link fence, right next to where defendant was found. Defendant has therefore failed to demonstrate any clear error in the trial court's factual findings. Rather, examination of the evidence provided at trial leads us to conclude that the verdict rendered by the trial court was supported by the great weight of the evidence that defendant was the intruder and that the elements of MCL 750.110a(2) were proven beyond a reasonable doubt. Thus, we cannot find that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *McCray*, *supra.*

II. Motion for New Trial.

We review the trial court's denial of defendant's motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). A mere difference in judicial opinion does not establish an abuse of discretion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 228; 600 NW2d 638 (1999).

MCL 770.1 states:

> The judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs. Additionally, MCR 6.431(B) and (C) provide:

> (B) Reasons for Granting. On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice. The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record.
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> (C) Trial Without Jury. If the court tried the case without a jury, it may, on granting a new trial and with the defendant's consent, vacate any judgment it has entered, take additional testimony, amend its findings of fact and conclusions of law, and order the entry of a new judgment.

MCL § 769.26 states:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

After reviewing all of the above-cited statutes and court rules, our Supreme Court in *Lemmon*, *supra*, stated:

> Adding flesh to what is a more refined articulation of the formula that '[i]n general, conflicting testimony or a question as to the credibility of a witness are not sufficient grounds for granting a new trial,' *United States v Garcia*, 978 F2d 746, 748 (CA1, 1992), quoting with approval *United States v Kuzniar*, 881 F2d 466, 470 (CA7, 1989), federal circuit courts have carved out a very narrow exception to the rule that the trial court may not take the testimony away from the jury. *Id.* at 470-471. Defining the exception, the federal courts have developed several tests that would allow application of the exception; for example, if the testimony contradicts indisputable physical facts or laws,' *id.*, '[w]here testimony is patently incredible or defies physical realities," *United States v Sanchez*, 969 F2d 1409, 1414 (CA2, 1992), '[w]here a witness's testimony is material and is so inherently implausible that it could not be believed by a reasonable juror,' *Garcia*, *supra* at 748, or where the witnesses testimony has been seriously "impeached" and the case marked by "uncertainties and discrepancies.' *United States v Martinez*, 763 F2d 1297, 1313 (CA11, 1985). *Id.* at 643-644.

For the reasons stated in this opinion, *infra*, the evidence complained of as the basis for a new trial was not "inherently implausible" such that "it could not be believed by a reasonable juror." *Id.* Additionally, we accord substantial deference to the trial court's determination that the verdict was not against the great weight of the evidence. *Arrington v Detroit Osteopathic Hosp Corp (On Remand)*, 196 Mich App 544, 560; 493 NW2d 492 (1992). Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial regarding the weight of the evidence at trial.

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Michael J. Kelly