

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERON DEMARLO ROBINSON,

Defendant-Appellant.

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UNPUBLISHED

February 4, 2010

No. 288636

Saginaw Circuit Court

LC No. 08-030618-FH

Before: Beckering, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession of marijuana, MCL 333.7403(2)(d),<sup>1</sup> and witness bribing/intimidating/interfering, (witness tampering), MCL 750.122(7)(a). For the reasons set forth in this opinion, we reverse defendant's conviction of witness tampering and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

A witness maintained that she saw defendant throw a baggie of what turned out to be marijuana over a fence at the campus of Saginaw Valley State University, apparently to hinder discovery of it by police. At trial, the witness related a conversation she had with defendant the next day, which formed the basis of the witness tampering charge.

*Q.* (After the witness testified that she received a phone call) Okay.

*A.* And I said who is this. And he goes this is Deron. I was like immediately--it was kind of like, okay.

*Q.* How did that make you feel?

*A.* I was like, I don't know why he is calling me.

*Q.* Were you scared?

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<sup>1</sup> Defendant was initially charged with possession with intent to deliver marijuana. He was acquitted of this greater charge.

A. A little bit. I mean I knew he probably wasn't very happy. He said, I know what you told the police. He is like, but you have the wrong person. And I was like, I didn't tell the police anything, I don't know what you're talking about. He was like, they told me everything, they told me everything. You don't need to lie to me, you just need to tell them that I am the wrong person. I wasn't even there. I was in court in Detroit. I was like Deron, I know what I saw, I know who you are. But I was like, if you really think I have the wrong person, that is something you are going to have to go to the cops about. I have nothing to do with that except for when I gave my statement. He just continued to say, it wasn't me, it wasn't me. You need to tell them, it wasn't me. And I finally just hung up the phone.

\* \* \*

Q. I mean, how did it make you feel that he is calling you?

A. Well, I figured, you know, he is really mad, he's obviously mad enough to call me. And I didn't really--I was like, how did he--you know--

Q. Did he sound mad?

A. He wasn't rude or he wasn't--he didn't sound angry, he just kept pleading to me, you know, you have to tell them you have the wrong person. He was never--he didn't threaten me in any way or--.

During cross-examination, the witness was again questioned about this conversation.

Q. Okay. Now I would like to go to the next day when you received a phone call from Mr. Robinson. Mr. Robinson--you mentioned Mr. Robinson never threatened you?

A. No, he did not.

Q. He never promised you anything, like you if say you tell--if you say--he didn't promise you any money or anything else?

A. No, he did not.

Q. Made no promises to you?

A. No.

Q. In fact, you said he didn't sound angry?

A. More of just a pleading, like please tell them, you know. He didn't sound mad, no.

Q. In fact, he was insisting it was not him?

A. Not him.

Q. And that he wanted you to tell the police that it was not him?

A. Yes.

Defendant argues that the jury's verdict of guilty of the charge of witness intimidation was against the great weight of the evidence, and that he is entitled to a new trial on that charge.<sup>2</sup>

We review a trial court's decision on a motion for a new trial on the ground that the verdict was against the great weight of the evidence for an abuse of discretion. See *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998). Concurrent questions of statutory interpretation are reviewed de novo. See *People v Koonce*, 466 Mich 515, 518; 648 NW2d 153 (2002).

A motion for a new trial based on a claim that the verdict was against the great weight of the evidence should be granted only when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *Lemmon*, 456 Mich at 639, 642; *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). If there is conflicting evidence, the question of credibility ordinarily should be left for the factfinder. *Lemmon*, 456 Mich at 642-643; *Unger*, 278 Mich App at 232. "The hurdle that a judge must clear in order to overrule a jury and grant a new trial 'is unquestionably among the highest in our law.'" *Unger*, 278 Mich App at 232, quoting *People v Plummer*, 229 Mich App 293, 306; 581 NW2d 753 (1998) (quotation marks and citation omitted).

Defendant was charged with witness tampering under a specific theory that he threatened or intimidated the witness. MCL 750.122(3), which governs this portion of the witness tampering statute, provides:

(3) A person shall not do any of the following *by threat or intimidation*:

(a) Discourage or attempt to discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.

(b) Influence or attempt to influence testimony at a present or future official proceeding.

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<sup>2</sup> Defendant appears to cite authority that involves claims of insufficient evidence. However, given defendant's question presented and because defendant requests only a new trial in his conclusion and relief requested, we will treat defendant's claim as one arguing that the verdict was against the great weight of the evidence.

(c) Encourage or attempt to encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding. [emphasis added.]

The prosecution presented no evidence to support its theory that defendant used threats or intimidation to try to influence the witness' statements or testimony. The plain language of this portion of the statute requires the use of threats or intimidation to accomplish the prohibited actions. The witness unequivocally testified that defendant did not threaten her. While intimidation might be shown without an overt threat in certain circumstances, the witness' testimony does not support a finding that this was the case here. Defendant did not sound angry, instead he was pleading with the purported victim to tell the police that it was not him. At most, the witness' testimony could support a finding that she was initially frightened when she found out that defendant was calling her, and that she assumed he would have been mad when he called. However, the language she used to describe defendant's actions when she actually spoke with him is inherently inconsistent with a finding of threat or intimidation.

Defendant arguably could have been charged with witness tampering under MCL 750.122(6), which provides the more general prohibition that "[a] person shall not willfully impede, interfere with, prevent, or obstruct or attempt to willfully impede, interfere with, prevent, or obstruct the ability of a witness to attend, testify, or provide information in or for a present or future official proceeding." However, he was not charged under this theory or this subsection. In addition, the jury instructions in the charged offense referred only to the use of threat or intimidation. This Court has held that the fact that the "Legislature chose *not* to place all these different types of tampering in the same subsection suggests that the Legislature considered them to be distinct." *People v Green*, 255 Mich App 426, 438; 661 NW2d (2003) (Analyzing defendant's conduct in light of an alleged violation of MCL 750.122(6) [emphasis in original]). Reviewing the whole record presented, we find that the evidence presented did not support the crime charged. The trial court should have granted defendant's motion for a new trial on the ground that the verdict of guilty of witness tampering was against the great weight of the evidence.

Defendant's conviction of witness tampering is reversed, and this case is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering  
/s/ Jane E. Markey  
/s/ Stephen L. Borrello