

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LUTHER BURRAGE,

Defendant-Appellant.

UNPUBLISHED

May 18, 2010

No. 290306

Genesee Circuit Court

LC No. 07-021623-FC

Before: CAVANAGH, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for assault with intent to do great bodily harm less than murder, MCL 750.84, intentionally discharging a firearm at a dwelling or occupied structure, MCL 750.234b, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

On August 24, 2007, Devon Thompson was shot in the right shoulder area. Prior to the shooting, defendant had called and spoken with Thompson's girlfriend, Jojuana Smith—defendant's former girlfriend and the mother of defendant's son—on the house telephone. When defendant called Smith a second time, Thompson answered the telephone and then hung up on defendant. Defendant called two times after that, and neither Thompson nor Smith answered the telephone. Shortly thereafter, Thompson and Smith heard someone at the open living room window. When they approached the window, Thompson saw defendant. After Thompson heard defendant utter Thompson's name and an expletive, Thompson saw and heard a gunshot. Thompson felt the bullet enter his right shoulder area and exit through his back.

After defendant was found guilty by a jury, he filed a motion for a new trial. Defendant argued that he had been denied a fair trial because one of the jurors, Jade Young, committed misconduct. Young failed to disclose that she had previously been involved in a confrontation with defendant's purported girlfriend, Christine Isaacs, who was an alibi witness. That confrontation was allegedly about Isaacs' friend having an affair with Young's husband. Thus, defendant argued, because of this undisclosed animosity between Young and his alibi witness, there was a strong possibility that Young was biased against him which prejudiced his right to a fair trial. The trial court denied the motion, holding that (1) Young did not indicate during voir dire that she could not be fair and impartial, and (2) defendant failed to show actual prejudice because he had other alibi witnesses. Defendant appealed to this Court and filed a motion to

remand related to his request for a new trial. We granted the motion, remanding the matter for an evidentiary hearing and allowing defendant to file a motion for a new trial. *People v Burrage*, unpublished order of the Court of Appeals, entered September 1, 2009 (Docket No. 290306). Thereafter, defendant filed a motion for a new trial upon remand premised on the grounds of juror misconduct and that the verdict was against the great weight of the evidence.

An evidentiary hearing was conducted. Young testified that she had gone to high school with Isaacs but, before the trial, she had not seen Isaacs since ninth or tenth grade. She did not recognize Isaacs' name, and only recognized Isaacs when she took the witness stand during the trial. Young did not advise the court about her recognition of Isaacs because Young thought there was a difference between recognizing someone and knowing someone. Young did not know anything about Isaacs, and did not know her on a first and last name basis. Young did not believe that recognizing Isaacs had anything to do with her decision or responsibilities as a juror in defendant's case. Young testified that her recognition did not mean anything to her because she did not interact with Isaacs in high school. During her deliberations, Young stated, she did not consider the fact that she knew Isaacs from high school. And, with regard to the purported affair between Young's husband and Isaacs' friend, it did not happen. There was no affair. Young's husband had been in Iraq for the last couple of years and then had been in Missouri until May of 2008.

The jury foreperson in defendant's case testified that he did not see Young interact with any of the other jurors by herself and had no particular recollection of what Young said during deliberations.

Isaacs testified that her friend, Shankia Burnett, was sleeping with Young's husband. And, in 2002, Isaacs had to break up a words-only fight between Young and Burnett at Burnett's house regarding Young's husband. Isaacs called 911 because Young had a stick in her hand.

Burnett testified that she had an intimate relationship with Young's husband that had been off and on over the past seven to eight years. In August of 2007, she spent a week with him at Six Flags amusement park. Burnett testified that Isaacs was present during a confrontation between herself and Young that occurred in 2002 when Young showed up at Burnett's house and had words with Burnett.

After the witnesses were presented, the trial court permitted argument on defendant's claim that the verdict was against the great weight of the evidence. Defendant argued that there was not a reliable identification of him as the shooter. The prosecution argued that the evidence, including the victim's testimony, the 911 call, and the photographs of the scene all supported the verdict and showed that the great weight of the evidence was against defendant. Thereafter, the trial court rejected defendant's claim that the verdict was against the great weight of the evidence, holding that the case involved a classic conflict in testimony that was properly within the province of the jury. The trial court also rejected defendant's juror misconduct claim on the ground that the presumption of partiality had not been overcome by defendant. Defendant had not established that he was actually prejudiced by the juror's presence on the jury, i.e., that Young was not impartial.

On appeal, defendant first argues that the trial court abused its discretion when it denied his motion for a new trial based on juror misconduct. We disagree. This Court reviews for an

abuse of discretion the trial court's decision on a motion for a new trial and for clear error its findings of fact. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). An abuse of discretion occurs when the result is outside the range of principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

MCR 6.431(B) provides, “[o]n 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.” *People v Brown*, 279 Mich App 116, 144-145; 755 NW2d 664 (2008); see, also, MCL 770.1¹. A criminal defendant has the right to be tried by a fair and impartial jury. US Const, Am VI; Const 1963, art 1, § 20; see, also, *Miller*, 482 Mich at 547. The defendant must show actual prejudice resulted from the presence of the juror to justify a new trial. *Id.* at 548-549. A juror’s failure to reveal relevant information is prejudicial if the defendant was denied an impartial jury. *Id.* at 548-549, 561. Jurors are presumed to be impartial, and the burden is on the defendant to establish that a juror was not impartial or at least impartiality is in reasonable doubt. *Id.* at 550.

In this case, we agree with the trial court that the evidence presented by defendant at the evidentiary hearing did not overcome the presumption of impartiality. As the trial court held, the connection between Young and defendant was too attenuated. Defendant’s argument, that Young was not impartial because defendant’s girlfriend’s friend, Burnett, was allegedly having an affair with Young’s husband and that Isaacs was allegedly involved in breaking up a fight between Burnett and Young about six years earlier, is not persuasive. Further, Young testified at the evidentiary hearing that she did not recognize Isaacs, defendant’s girlfriend, until she actually saw Isaacs on the witness stand. Young also stated that her husband was not having an affair with Burnett. The jury foreman testified that Young did not bring up the affair during jury deliberations and did not attempt to persuade other jurors that defendant was guilty. And, although Isaacs and Burnett both testified that Young knew of the affair and that she was biased because of the affair, the trial court found the credibility of both Isaacs and Burnett questionable. The trial court may evaluate each witness’ credibility in deciding a motion for a new trial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003). Accordingly, defendant has failed to show actual prejudice resulted from Young being a juror in this case and it was not an abuse of discretion for the trial court to deny defendant’s motion for a new trial based on juror misconduct.

Defendant’s claim that his attorney was ineffective for failing to request an evidentiary hearing when he filed the initial motion for a new trial in the trial court is also without merit. It is not reasonably probable that the outcome of the trial would have been different had defendant’s attorney made the request because the trial court properly denied defendant’s motion for a new trial based on juror misconduct after the evidentiary hearing was completed. See *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994).

¹ MCL 770.1 provides, “[t]he 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.”

Next, defendant argues that there was insufficient evidence to support his convictions because the identification of defendant as the shooter was questionable. We disagree. When reviewing a claim of insufficient evidence, this Court reviews the record de novo in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). In reviewing the sufficiency of the evidence, this Court “must not interfere with the jury’s role as the sole judge of the facts.” *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005).

Identity is an essential element of every crime. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). The prosecution must present sufficient evidence to prove beyond a reasonable doubt that the defendant committed the crimes alleged. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967).

Considering the evidence in the light most favorable to the prosecution, we conclude that the evidence was sufficient for the jury to find beyond a reasonable doubt that defendant was the shooter. Thompson testified that approximately two weeks before the shooting, he and defendant were involved in a confrontation related to Thompson disciplining defendant’s son. Thompson and Smith both testified that on the night of the shooting defendant called their home four times. Smith answered defendant’s first phone call, Thompson answered defendant’s second phone call and hung up on defendant, and then neither Thompson nor Smith answered the last two calls from defendant. Thompson testified that he recognized defendant’s voice and saw defendant’s face through the front room window immediately before he was shot. Trooper David Stokes, Officer Christopher Mark, Sergeant Jay Parker, and Cynthia Ferguson-Williams all testified that Thompson stated that defendant shot him. Additionally, Smith initially told the 911 operator, Stokes, Mark, and Parker that defendant shot Thompson, although Smith retracted her statements at trial. Although defendant presented contradictory evidence through three witnesses, it was for the trier of fact to determine the credibility of the proofs presented. See *People v Lemmon*, 456 Mich 625, 642-43; 576 NW2d 129 (1998); *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). The jury heard the evidence and determined each witness’ credibility. Considering the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude beyond a reasonable doubt that defendant shot Thompson.

Finally, defendant argues that the verdict was against the great weight of the evidence and the trial court abused its discretion when it denied his motion for a new trial on this basis. We disagree. This Court reviews the trial court’s decision on a motion for a new trial for an abuse of discretion. *Miller*, 482 Mich at 544. An abuse of discretion occurs when the result is outside the range of principled outcomes. *Blackston*, 481 Mich at 460.

The test to determine whether a verdict is against the great weight of the evidence 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). That is, the verdict “does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence.” *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993) (internal quotations omitted.) Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial. *Unger*, 278 Mich App at 232. Usually, issues of witness credibility are for the trier of fact to resolve. *Id.*

The trial court did not abuse its discretion in rejecting defendant's claim that the verdict was against the great weight of the evidence. This case centered on the conflicting testimony of the prosecution's and defendant's witnesses. The prosecution offered Thompson who testified that he saw and heard defendant outside the front room window immediately before he was shot. The prosecution also produced several officers who testified that, on the night of the shooting, Thompson and Smith both told them that defendant shot Thompson. In contrast, defendant offered two alibi witnesses who testified that defendant was at his house when the shooting occurred. Further, Smith retracted the statements she made during her 911 call, testifying that she only assumed defendant was the shooter on that night because he was the last person she spoke with on the telephone. Smith also testified that it was very dark outside on the night of the shooting because there were no outside lights on her home. The jury resolved the issues of witness credibility in favor of the prosecution. We cannot conclude that the evidence preponderated so heavily against the verdict that it would be a miscarriage of justice to allow it to stand; thus, the trial court did not abuse its discretion in rejecting this argument.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder