STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 10, 2012
V	No. 303805 Washtenaw Circuit Court
MARCUS DIONTE CLAYBRON, Defendant-Appellant.	LC No. 10-000799-FC

Before: FITZGERALD, P.J., and MURRAY and GLEICHER, JJ.

PER CURIAM.

The circuit court judge convicted defendant Marcus Dionte Claybron after a bench trial of felonious assault, MCL 750.82, felon in possession of firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, for his role in chasing Veloise Cook with a handgun on the night of April 11, 2010.[1] Defendant's challenges to the sufficiency and weight of the evidence lack merit as two witnesses saw defendant carrying a gun during his pursuit of Cook. Further, neither the prosecution nor the police possessed the video evidence requested by defendant and, therefore, the trial court did not deprive defendant of due process by denying his discovery motion.[2] Accordingly, we affirm.

I. BACKGROUND

Defendant and Cook had long been acquainted as defendant had previously dated Cook's friend. About a year before the charged offenses, defendant's friend Devaughn Thompson shot Cook and Cook's testimony resulted in Thompson's criminal conviction. After the trial,

[1] The court acquitted defendant on charges of assault with intent to murder, MCL 750.83, assault with intent to do great bodily harm less than murder, MCL 750.84, and witness intimidation, MCL 750.122(7)(a).

[2] Defendant also challenges trial counsel's performance in an affidavit submitted to this Court. Defendant's affidavit does not comply with Admin Order 2004-6, Standard 4's requirements for a supplemental appellate *brief* filed personally by a represented criminal defendant. Absent an appellate brief, the issue was not actually raised before this Court and we are precluded from reviewing it.

defendant began harassing Cook, and had broken the windows of her apartment on several occasions. On the night of April 11, 2010, Cook noticed defendant breaking a window at her neighbor's apartment. She left to avoid defendant and went to a friend's home in a nearby apartment complex, Forest Knolls Arbor Manor (Forest Knolls). While standing outside her friend's apartment and talking on her cellular telephone, Cook noticed defendant approaching with a large group of friends. Defendant yelled at Cook, removed a handgun from his pocket, and began to chase her.

The entrance to Forest Knolls is gated with a manned security booth. Security guard Karrie McClain testified that she saw Cook run past the gate and turn a corner with two men in pursuit. Defendant passed and stopped in front of the guard booth. He threw his arms into the air and was holding a gun in one hand. Defendant made a threatening comment to McClain and she telephoned the police. Defendant then ran after Cook.

Cook testified that defendant and his cohorts chased her down the street and she hid behind a garage. She ran back toward Forest Knolls when the men started to approach her hide-out. Cook testified that she heard several gun shots as she ran away. When Cook returned to Forest Knolls, she initially hid in the security booth, but returned to her friend's apartment because she did not feel safe.

Defendant presented two witnesses and testified on his own behalf that he did not possess a gun on the night in question. Defendant and his witnesses also claimed that no one had chased Cook from the complex. Rather, defendant and his witnesses claimed that Cook argued with defendant about money he owed to Cook's neighbor and then hit defendant on the head with an empty glass bottle.

II. EVIDENCE THAT DEFENDANT POSSESSED A WEAPON

Defendant challenges the sufficiency of the evidence presented by the prosecution to support the convicted offenses. He also claims entitlement to a new trial on the ground that his convictions were against the great weight of the evidence. In relation to both claims, defendant only challenges the credibility of the evidence supporting that he possessed a weapon on the night in question.

We review sufficiency of the evidence claims de novo, viewing the evidence "in the light most favorable to the prosecution to determine whether any rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt." *People v Lundy*, 467 Mich 254, 258; 650 NW2d 332 (2002). We must resolve all evidentiary conflicts in the prosecution's favor and accept the fact finder's judgments regarding witness credibility. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). We review a great-weight challenge "to determine if 'the evidence preponderates heavily against the verdict and a serious miscarriage of justice' would occur if the conviction were allowed to stand." *People v Williams*, 294 Mich App 461, 471; ___ NW2d ___ (2011), quoting *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). A difference of opinion over witness credibility cannot support a new trial motion unless the witness testimony "contradicts indisputable physical facts or laws," "is patently incredible or defies physical realities," "is so inherently implausible

that it could not be believed," or is so impeached as to riddle the trial with "uncertainties and discrepancies." *Lemmon*, 456 Mich at 643-644 (quotation marks and citations omitted).

Cook testified that she saw defendant pull a gun from his pocket. Cook described the gun as a black "five rounder," similar in size to a .25 caliber. Cook's testimony was corroborated by McClain, the security guard who was working at Forest Knolls that night. McClain asserted that defendant approached the guard shack and stopped directly in front of her. At that time, McClain saw a small, dark-colored handgun in defendant's right hand. Defendant challenges the credibility of the prosecution witnesses based on discrepancies between their preliminary examination and trial testimonies. However, the small variations between the witnesses' testimonies are insufficient to render the proceedings so uncertain or the trial testimony so incredible that we could interfere to prevent a miscarriage of justice. See *Lemmon*, 456 Mich at 642-644. Moreover, a rational fact finder could review the conflicting stories presented by the defense and prosecution witnesses and adjudge certain witnesses to be more credible than others. We may not reassess the trial court's determination that defendant's witnesses provided incredible testimony. The defense witnesses certainly contradicted the prosecution witnesses' claim that defendant possessed a gun on April 11, 2010. But the court was within its authority to deem the defense witnesses biased.

III. DENIAL OF DISCOVERY MOTION

Prior to trial, defendant filed a discovery motion requesting, among other things, any videotape footage originating from Forest Knolls covering the time of the incident. At the motion hearing, the prosecutor stated, "I don't believe there is any videotape. I certainly don't have any myself. I can look into that, but it's my understanding there is no videotape from the complex." Based on the prosecutor's representations, the trial court denied defendant's discovery request. The court clarified that "if, in fact, [the video footage] exists," the prosecutor would be required to supplement discovery and provide the evidence to defendant.

At trial, McClain testified that there are seven security cameras installed at Forest Knolls, each scanning different areas of the complex. McClain personally inspected the video footage from the night in question from the one camera that could have possibly recorded the events. She testified that the events "unfortunately" were not "caught on video" because the "camera was panning at that time." McClain was uncertain, but believed she had told the investigating officers about the lack of video footage. Former Ypsilanti police officer Matthew Kessler further testified that he investigated the complex's video security footage with McClain at the time but did not take it into evidence because "[t]he incident was not recorded on the system."

By denying his discovery request, defendant argues that the court denied his right to due process and a fair trial. "The right to a fair trial, guaranteed to state criminal defendants by the Due Process Clause of the Fourteenth Amendment, imposes on States certain duties consistent with their sovereign obligation to ensure that justice shall be done in all criminal prosecutions." *Cone v Bell*, 556 US 449, 451; 129 S Ct 1769; 173 L Ed 2d 701 (2009) (quotation marks and citation omitted). A state violates an accused's due process rights when it suppresses evidence favorable to accused. *Id*. However, "[f]or due process purposes, there is a crucial distinction between failing to disclose evidence that has been developed and failing to develop evidence in the first instance." *People v Anstey*, 476 Mich 436, 461; 719 NW2d 579 (2006).

To establish a violation of the due process right to the disclosure of information,

> a defendant must show: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).]

Defendant's claim fails, quite simply, because the prosecution did not possess the security video footage. And there is no record indication that the prosecution avoided gathering the footage to willfully keep exculpatory evidence from defendant. Rather, the security guard viewed the footage and determined that the camera, which pans a designated area, was not pointing in the direction of the incident at the relevant time. By the same token, the video footage was not exculpatory; it would have been equally unhelpful to establish that the crime did not occur. Neither the prosecution nor the police suppressed any evidence favorable to defendant and we discern no due process violation in the court's denial of defendant's discovery request.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Christopher M. Murray
/s/ Elizabeth L. Gleicher