

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEANGELO GREEN,

Defendant-Appellant.

UNPUBLISHED

June 28, 2002

No. 230902

Wayne Circuit Court

LC No. 00-003008

Before: Zahra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant was charged with armed robbery, MCL 750.529, carjacking, MCL 750.529a, extortion, MCL 750.213, and possession of a firearm during the commission of a felony, MCL 750.227b. After a bench trial, defendant was convicted only of armed robbery. Defendant was sentenced to a prison term of six to twenty years. Defendant appeals as of right. We affirm defendant's conviction, but remand for resentencing.

This case originates from allegations by Russell Bondon that he was robbed at gunpoint of his wallet, which contained credit cards, cash and an ATM card. Bondon also claimed that the robbers took a 1994 Cadillac from his possession and that they later attempted to extort money from him in exchange for the car.

I

On appeal, defendant first argues that the prosecution failed to present sufficient evidence to support his conviction. When reviewing a sufficiency of the evidence challenge, this Court reviews the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the elements of the crime were proven beyond a reasonable doubt. *People v Harmon* 248 Mich App 522, 524; 640 NW2d 314 (2001); *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992).

The elements of armed robbery are: (1) an assault, and (2) a felonious taking of property from the victim's presence or person, while (3) the defendant is armed with a weapon described in the statute. *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993). Giving the required deference to the trial court's determinations of credibility, *People v Cress*, __ Mich App __; __ NW2d __ (Docket no. 225855, issued 2/26/02) slip op p 21; see MCR 2.613(C)(3), the

evidence in this case was sufficient to allow the judge to conclude beyond a reasonable doubt that defendant committed the charged crime. Bondon testified at trial that defendant robbed him of his wallet, cash, ATM card, credit cards and keys, and that defendant left the scene in the Cadillac Bondon possessed. Bondon testified that someone held a metal object to his head, which he believed was a gun, and that he determined defendant possessed a revolver. Based on this evidence, a rational trier of fact could find, beyond a reasonable doubt, that while in the victim's presence and armed with a gun, or with an article used or fashioned in such a way as to lead a reasonable person to believe that it was a dangerous weapon, defendant assaulted Bondon and took his property. MCL 750.529; *Allen, supra*.

II

Defendant also argues that the trial court abused its discretion by denying his motion for a new trial or judgment of acquittal because the verdict was against the great weight of the evidence. Such motions are not favored and should be granted only when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *People v Lemmon*, 456 Mich 625, 639-642; 576 NW2d 129 (1998). A trial court's decision on a motion for new trial will not be reversed absent an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

Defendant asserts that his conviction was based entirely on Bondon's uncorroborated testimony, which was inherently unreliable because Bondon had suffered a closed head injury that affected his memory, and because his version of the events was inconsistent. "[W]hen reviewing a trial court's decision regarding a motion for a new trial based on the great weight of the evidence, this Court will not attempt to resolve credibility issues anew." *People v Daoust*, 228 Mich App 1, 17; 577 NW2d 179 (1998).

Significantly, many of the inconsistencies focused on by defendant relate to the circumstances surrounding the alleged taking of the Cadillac.¹ Given Bondon's unequivocal testimony that defendant assaulted him with a handgun and took his wallet and its contents, defendant's conviction for armed robbery based on *that* taking was not against the great of the evidence.² Therefore, the trial court acted within its discretion in determining that a new trial was not warranted on this basis.

III

¹ Some evidence introduced at trial supported the finding that the car was not actually taken with force, but instead was merely used as collateral for a loan given to Bondon by defendant.

² Insofar as discrepancies related to the taking of the Cadillac and the number of perpetrators Bondon told police were involved in the robbery call into question Bondon's trial testimony regarding the events, such discrepancies do not result in the evidence preponderating heavily against the verdict. *Lemmon, supra*. As noted, the trial court is granted significant deference with respect to credibility determinations. *Daoust, supra*; see MCR 2.613(C). Moreover, several aspects of Bondon's trial testimony were corroborated by the police reports and the testimony of Lori Dodsworth.

Defendant next argues that the trial court made insufficient findings of fact to support his convictions. Factual findings in a bench trial are sufficient “so long as it appears that the trial court was aware of the issues in the case and correctly applied the law.” *People v Armstrong*, 175 Mich App 181, 185, 437 NW2d 343 (1989).

Defendant contends that the trial court’s findings indicate a failure by the court to recognize inconsistencies in Bondon’s testimony. As discussed, much of the inconsistencies noted by defendant involved the circumstances surrounding the taking of the Cadillac. Bondon clearly testified that defendant took his wallet while threatening him with a handgun. The trial court resolved any discrepancies in Bondon’s testimony, determining that the testimony supported a finding of armed robbery. Again, the trial court is vested with the duty to assess the credibility of the witnesses. *Cress, supra*; see MCR 2.613(C)(3). Overall, the court’s findings were supported by the evidence and it is apparent that the court correctly applied the law in its resolution of the issues. *Armstrong, supra*.

IV

Defendant further argues that the trial court erred in denying his motion for a new trial based on newly discovered evidence. To justify a new trial on the basis of newly discovered evidence, the moving party must show that: (1) the evidence itself, and not merely its materiality, is newly discovered; (2) the evidence is not cumulative; (3) including the new evidence on retrial would probably cause a different result; and (4) the party could not with reasonable diligence have discovered and produced the evidence at trial. *Cress, supra*, slip op at 10.

Defendant sought to admit the testimony of an alleged coconspirator, who had exercised his right not to testify at trial. At the time of defendant’s motion for new trial, the witness had recently been acquitted of all charges related to the incident. Defendant claimed the witness could offer exculpatory evidence, in the form of corroborating testimony regarding the use of the Cadillac as collateral for a loan defendant made to Bondon.

We conclude that the trial court properly denied defendant’s motion based on the alleged newly discovered evidence. Defendant failed to offer any showing as to the actual existence of new evidence. Specifically, defendant offered no proof that the proposed witness had, in fact, agreed to testify or proof of the subject of the testimony. Defendant simply made vague assertions in regard to the existence of new and exculpatory evidence without making any showing in support by affidavit, testimony or otherwise. Moreover, defendant failed to show that the proposed witness’ testimony would have probably rendered a different result if admitted on retrial. Bondon clearly testified that defendant assaulted him with a gun and took his wallet. Testimony surrounding the taking of the Cadillac would have no bearing on defendant’s taking of the wallet. See *Cress, supra*.

V

Finally, defendant argues that the trial court erred in sentencing him based on improperly scored sentencing guidelines.³ The statutory sentencing guidelines apply to this case because the

³ This issue was preserved below given that defendant objected at the sentencing hearing to the
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crime was committed after January 1, 1999. MCL 769.34(1) and (2). Under those guidelines, we must affirm a sentence within the guidelines range absent an error in scoring the sentencing guidelines or inaccurate information relied on in determining defendant's sentence. MCL 769.34(10); see *People v Thenghkam*, 240 Mich App 29, 70; 610 NW2d 571 (2000).

Here, the trial court utilized a guidelines range of 81 to 135 months. At sentencing, the court stated: "I've had an opportunity to take a look at least what was prepared for the court and the rage [sic] is 81 to 135." The court obtained that range from the probation agent's recommendation within the presentence investigation report. Significantly, our review of the record establishes that the guidelines range suggested by the agent and used by the court was based on inaccurate information.

The lower court file contains three different sentencing information reports. One report bears defendant's name and includes a guideline range of 51 to 85 months. That report is dated March 24, 2000, but does not appear to have been signed by the trial judge. A second sentencing information report contained in the lower court file is signed by the trial judge, but is otherwise illegible. The third sentencing information report bears a different docket number and the name of a different defendant. This report is dated March 24, 2000 and does not appear to have been signed by the trial judge. This third report is the only report in defendant's lower court file that includes a guidelines range of 81 to 135 months, which, as noted, is the range ultimately used by the trial court when sentencing defendant. The probation agent's presentence investigation report does not reference any other basis for its determination of the recommended 81-to 135-month range. Under these circumstances, it is evident that defendant was sentenced based on a guidelines range calculated in connection with a different defendant. Thus, the information on which defendant was sentenced was inaccurate and defendant's sentence must be vacated. MCL 769.34(10); see *Thenghkam*, *supra*.⁴ We remand this case for resentencing in accordance with a properly scored guidelines range for this defendant.⁵

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scoring of the offense variables, which produced the guidelines range used by the trial court. MCR 6.429(C); see *People v McGuffey*, __ Mich App __; __ NW2d __ (Docket No. 227957, issued 4/30/02), slip op p 5.

⁴ That conclusion is not altered by the fact that defendant was sentenced to a six-year minimum sentence, which is below the 81-month minimum specified by the guidelines range used by the trial court and within the 51-to 85-month range included on the report that actually bears defendant's name. By all indications, the court sentenced defendant while relying on a guidelines range that was calculated for a different defendant, a result that we cannot let stand. See *Thenghkam*, *supra*.

⁵ If the trial court finds substantial and compelling reasons for departing from the calculated guidelines range, the court must express such reasons in accordance with MCL 769.34(3).

We affirm defendant's conviction, but remand for resentencing. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ Mark J. Cavanagh

/s/ Helene N. White