STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARNELL D. ANDERSON,

Defendant-Appellant.

UNPUBLISHED
December 14, 2004

No. 243341
Wayne Circuit Court
LC No. 01-012943-01

Before: Markey, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of armed robbery, MCL 750.529, two counts of assault with intent to murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to serve terms of imprisonment of two years for felony-firearm, consecutive to and followed by concurrent terms of eighteen to forty years each for the two counts respectively of armed robbery and assault, and two to five years for felon in possession. Defendant appeals as of right. We affirm. This case is being decided without oral argument under MCR 7.214(E)

I. Sufficiency or Great Weight of the Evidence

Defendant argues that the evidence was insufficient to support his convictions, and, alternatively, that the verdict was against the great weight of the evidence. We disagree. The question whether the evidence, viewed in the light most favorable to the prosecution, was sufficient to prove defendant's guilt beyond a reasonable doubt is a question of law, calling for review de novo. See *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776, aff'd 466 Mich 39 (2000). We review for an abuse of discretion a trial court's denial of a motion for a new trial on the ground that the verdict was against the great weight of the evidence. *People v Stiller*, 242 Mich App 38, 49; 617 NW2d 697 (2000). 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 Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

The complaining witnesses both identified defendant unequivocally, and testified that, while they were in their car leaving a party store, defendant brandished a gun, threatened to kill them, and demanded their valuables. One complainant refused to cooperate, doubting at the time that the gun was functional, but the other surrendered possessions belonging to both victims.

The complainants further recounted chasing defendant in their car for a time as he fled the scene, in response to which he fired several shots at them.

Defendant challenges the sufficiency of the evidence to prove both that an armed robbery took place against the complainant who had refused to surrender her property, and that defendant was correctly identified as the assailant. The armed robbery statute targets persons who "assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property" while "armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon . . . ." MCL 750.529. Defendant argues that the complainant was not fearful, did not surrender her property, and did not think the gun was real. In fact, that witness described the gun as "dirty and rusty," causing her to doubt that it worked, not that it was real. That defendant later fired the gun indicates that it was indeed a dangerous weapon; the statute criminalizes use of such instrumentality, not just causing the victim to fear such a thing. And an offender need not succeed in instilling fear of an imminent battery, but need only *intend* to cause that fear. *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979). The testimony of both complainants that defendant threatened to kill them clearly supports the assault element. Even if defendant failed to persuade Green that his gun worked while taking her property, he must have succeeded in doing so when he shot at the complainants in order to end their hot pursuit.

Concerning the identification of defendant as the assailant, defendant protests that the trial court credited "unbelievable and inconsistent testimony" of the complaining witnesses. However, credibility is a matter for the trier of fact to ascertain. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). The complainants' unequivocal identification of defendant as their assailant at trial was sufficient to support the trial court's conclusion to that effect. See *People v Abernathy*, 39 Mich App 5, 7; 197 NW2d 106 (1972). Defendant's argument in this regard is merely an invitation to review the evidence de novo and come to a conclusion different from that of the trial court, an invitation we must decline. *Vaughan, supra*.

Defendant substantially reiterates his sufficiency arguments in asserting that the verdict was against the great weight of the evidence. But defendant admits that that he is mainly challenging the trial court's credibility determinations, and he fails to point to prosecution testimony that was "patently incredible" or that "defies physical realities." *People v Lemmon*, 456 Mich 625, 643-644; 576 NW2d 129 (1998) (internal quotation marks and citations omitted).

II. Res Gestae Witness

Defendant argues that he was denied a fair trial because the prosecutor failed to endorse as a witness a man who came from the party store while the crimes were in progress. We disagree. Defendant reports that a defense investigator interviewed the store's employees, all of whom denied knowledge of the incident, and thus argues that those employees could have testified that it did not occur as described by the complainants. However, we think it quite a stretch to transform no knowledge of the incident into potential testimony to rebut the complainants' specific accounts.

Moreover, "[t]he prosecutor's duty to produce res gestae witnesses has been replaced with an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request." *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813

(1995), citing MCL 767.40a. Defendant did not request assistance from the prosecution in locating this witness. MCL 767.40a(5). Further, neither party in a criminal proceeding "has an affirmative duty to search for evidence to aid the other's case." *Burwick, supra* at 289 n 10. Instead, the statutory duty is "to share the evidence that is discovered in fulfilling the prosecutor's and defense counsel's duties to their respective clients," excepting privileged information. *Id.* The prosecutor thus did not have the duty in this matter that defendant implies.

Defendant additionally alleges that defense counsel's failure to locate and call that witness constituted ineffective assistance of counsel, and argues that the trial court abused its discretion in declining to convene an evidentiary hearing on the matter. See *People v Mischley*, 164 Mich App 478, 482; 417 NW2d 537 (1987). We disagree.

"In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Regarding the latter, the defendant must show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel's poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Because defendant cannot point to a witness who would provide exculpatory information, and it is not apparent that any testimony from a person who came upon the incident in question would have been more favorable to the defense than to the prosecution, defendant fails to rebut the strong presumption that defense counsel's choice of theories or witnesses was sound trial strategy. *People v Caballero*, 184 Mich App 636, 640, 642, 459 NW2d 80 (1990); *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988). Because defendant's allegations do not rise to the level of a "cognizable claim" that defense counsel "did not investigate potentially meritorious defenses," or that "potential defenses suggested by defendant were not considered," the trial court did not abuse its discretion by declining to hold an evidentiary hearing in the matter. *People v Kimble*, 109 Mich App 659, 663; 311 NW2d 446 (1981).

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens