

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY CHATMAN,

Defendant-Appellant.

UNPUBLISHED
December 1, 2005

No. 256615
Wayne Circuit Court
LC No. 03-013529-01

Before: Whitbeck, C.J., and Saad and O’Connell, JJ.

PER CURIAM.

The jury convicted defendant of armed robbery, MCL 750.529, and the trial court sentenced him to fifteen to thirty years in prison. We affirm.

I.

Defendant says that his conviction was contrary to the great weight of the evidence. We disagree.

Because defendant failed to preserve this issue for appeal, *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997), we review to determine if there is plain error that affected defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Under *Carines*, this Court should reverse only if the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines*, *supra*, p 763; *People v Rodriguez*, 251 Mich App 10, 24; 650 NW2d 96 (2002).

“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.” *Musser*, *supra*, pp 218-219. “Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.” *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). “[U]nless it can be said that directly contradictory testimony was so far impeached that it ‘was deprived of all probative value or that the jury could not believe it,’ or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury’s determination.” *Id.* at 645-646, quoting *Sloan v Kramer-Orloff Co*, 371 Mich 403, 410; 124 NW2d 255 (1963).

The elements of armed robbery are: (1) an assault, and (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a specified weapon or any article used or fashioned in a manner to lead the person assaulted to reasonably believe it to be a dangerous weapon. *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004); MCL 750.529.

Here, the description the victim gave on the night of the incident differed slightly from the description she gave two days later in a written statement. The victim testified that defendant pushed her up against the outside door of a neighborhood store, pulled out a gun, put the gun against her chest, demanded her purse, and left the scene with her purse. Further, the victim saw defendant again as she was driving away from the store, and testified that she saw defendant's face and recognized him because she had seen him at the neighborhood store on numerous prior occasions.

It is neither material nor relevant that, at the time of his arrest, defendant was not wearing the same clothes the victim described immediately after the robbery because defendant was arrested the day after the crime. Furthermore, defendant could have shaved his full beard into a goatee and the victim's discrepancy in her description of defendant's height and weight could be explained by the stress of the situation. The victim also viewed a photo line-up a few days after the incident and pointed directly to defendant as the perpetrator. Moreover, at trial, the victim gave un rebutted identification testimony that defendant was the man who robbed her. Therefore, we conclude that the victim's testimony had sufficient probative value so that the jury could believe her identification of defendant as the man who robbed her. *Lemmon, supra*, pp 645-646. Thus, we conclude that defendant's verdict should stand. *Musser, supra*, pp 218-219.

II.

Defendant also claims that the trial court abused its discretion when it scored ten points for offense variable twelve (OV12). We agree, but conclude that the error was harmless because the correct score would have resulted in the same recommended sentencing range.

Defendant correctly asserts that MCL 777.42(2)(b) provides that possession of a firearm during the commission of a felony should not be considered in scoring OV12. MCL 777.42(2)(b). Thus, the trial judge erred when he scored ten points for OV12 because he should have scored OV12 at under MCL 777.42(1)(e). If the trial judge had scored five points for OV12, defendant's OV score would have been twenty-five points instead of thirty points. However, defendant's OV level would have remained "II," and thus, defendant's minimum sentence range would have remained the same. MCL 777.62. Accordingly, the trial judge's scoring error was harmless, and we need not remand for resentencing. If the guidelines were incorrectly scored but the correct score would not change the guidelines recommended range, remand for resentencing is not required. *People v Houston*, 261 Mich App 463, 473; 683 NW2d 192 (2004).

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Peter D. O'Connell