STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v AMAR GERALD FOUNTAIN, Defendant-Appellant.	UNPUBLISHED February 14, 2008 No. 273482 Wayne Circuit Court LC No. 06-006496-01

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

PER CURIAM.

Following a bench trial, defendant was convicted of discharging a firearm at a dwelling or occupied building, MCL 750.234b, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court imposed sentences of five years' probation for the shooting offense, and two years' imprisonment for felony-firearm. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. Facts

The prosecutor's theory of the case was that several teenaged girls were having a birthday party, and were joined by some young men who were members of rival gangs. Tensions rose, then defendant appeared and joined the fracas, himself and a companion discharging a shotgun and a handgun, wounding several persons.

In addition to the charges of which defendant was convicted, defendant faced several assault charges. The trial court dismissed some of those charges, and acquitted defendant of the others.

On appeal, defendant argues that the trial court should have granted a post-trial motion for a new trial on the ground that the verdict was against the great weight of the evidence, and that the court erred in refusing a requested missing witness instruction.

II. Weight of the Evidence

"The standard of appellate review regarding a trial judge's decision to grant or deny a motion for a new trial is 'entrusted to the discretion of the trial court and that decision will not be disturbed on appeal without a showing of an abuse of discretion . . . .'" *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998), quoting *People v Hampton*, 407 Mich 354, 373; 285 NW2d 284 (1979). A trial court's findings of fact in a bench trial are reviewed for clear error. See MCR 2.613(C); *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991). "A finding is clearly erroneous if, after a review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *Id.*

Defendant emphasizes that only a single eyewitness placed him at the scene of the crime, that that witness's testimony was inconsistent at times, and that the evidence indicated that that witness had gang affiliation antagonistic to defendant. The trial court evaluated that witness's account as follows:

> He said that he was outside in the driveway and a car went by . . . .
>
> > . . . He heard shots that were fired. He didn't see where the shots were going. He said he saw the defendant shooting the gun, but he didn't see where the defendant was shooting the gun.
> >
> > He ran inside. As he's running the van pulled back and the defendant got out in front of the house. He went to the back, he saw the defendant at some point go to the side of the house. He was crouched down, but he saw the defendant shooting into the house.
> >
> > There were a lot of discrepancies in his testimony. He was impeached numerous times by the defense lawyer about prior testimony.
> >
> > In This Court's opinion . . . not all of his testimony was credible. Very little of it was credible, but The Court did find parts of it to be credible.

The trial court thus well anticipated defendant's argument that the witness who identified him as the shooter had credibility problems. But, as the court recognized, it, serving as the factfinder, was entitled to believe just part of that witness's testimony.

"[I]t is well settled that this Court may not attempt to resolve credibility questions anew." *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). It is not this Court's purpose to entertain plausible alternative interpretations of the evidence; the test is whether the trial court's findings were clearly erroneous. MCR 2.613(C); *Gistover*, *supra*. Despite defendant's protestations to the contrary, what he presents on appeal is a classic credibility contest, not a situation where testimony upon which the verdict depended was plainly and patently incredible, or in defiance of uncontestable physical realities. See *Lemmon*, *supra* at 643-644. Accordingly, we "leave the test of credibility where our system reposed it—in the trier of the facts." *Sloan v Kramer-Orloff Co*, 371 Mich 403, 411; 124 NW2d 255 (1963).

The accounts of a single witness can suffice to establish proof of a defendant's guilt beyond a reasonable doubt. See *People v Newby*, 66 Mich App 400, 405; 239 NW2d 387 (1976); *People v Jelks*, 33 Mich App 425, 432; 190 NW2d 291 (1971). Even where eyewitness identification of a defendant is less than positive, the question remains one for the factfinder. See *People v Abernathy*, 39 Mich App 5, 7; 197 NW2d 106 (1972).

For these reasons, we conclude that the trial court's decision to deny the motion for a directed verdict predicated on the great weight of the evidence did not lie outside a principled range of outcomes, and so did not constitute an abuse of discretion. See *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

III. Missing Witness Instruction

Three res gestae[1] witnesses endorsed for trial failed to appear. The trial court conducted a due diligence hearing on the matter, at which the officer who served subpoenas on those witnesses testified that he had done so the day before. The court observed that there was no reason to doubt that the witnesses would appear as ordered, and thus that there was due diligence, but offered to issue bench warrants and then to continue proceedings the following day. Defense counsel asked the court instead to give itself an adverse inference instruction.[2] The court declined, reminding defense counsel that the court stood prepared to issue a bench warrant for those witnesses.

A trial court's decision concerning the remedy for the failure to produce endorsed res gestae witnesses is reviewed for an abuse of discretion. See *People v Burwick*, 450 Mich 281, 298; 537 NW2d 813 (1995).

Defendant argues that the due diligence hearing was faulty, because the trial court's conclusions that the late-served subpoenas were sufficient in the absence of indications that the witnesses would resist prevented the defense from inquiring into the prosecution's efforts to produce those witnesses. However, defense counsel dutifully cross-examined the officer who served the subpoenas, and the record gives no indication that defense counsel sought to make further inquiry but was actually prevented from doing so.

Moreover, the trial court repeatedly offered to use its authority to compel the presence and participation of those witnesses, but defense counsel declined the offer.

---

[1] A res gestae witness is "[a]n eyewitness to some event in the continuum of the criminal transaction and one whose testimony will aid in developing a full disclosure of the facts surrounding the alleged commission of the charged offense." Black's Law Dictionary (6th ed, 1990), p 1305, citing *People v Baskin*, 145 Mich App 526, [530-531]; 378 NW2d 535 (1985).

[2] See CJI2d 5.12, which advises the jury that the witness in question "is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case."

Because the trial court offered to issue bench warrants, and delay the proceedings as necessary, to secure the witnesses of which defendant here makes issue, the court did not abuse its discretion in eschewing any adverse inference in connection with the missing witnesses. In declining the court's offer, the defense effectively waived those witnesses. We agree with the trial court that no adverse inference was proper under those circumstances.

Affirmed.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra