STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEANDER PHILLIP TAYLOR,

Defendant-Appellant.

UNPUBLISHED
October 23, 2008

No. 274171
Wayne Circuit Court
LC No. 06-004417-01

Before: Servitto, P.J., and Donofrio and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to serve a term of imprisonment of two years for the felony-firearm conviction, to be served consecutively to a term of 240 to 400 months for the assault conviction, habitual offender second, MCL 769.10. Defendant appeals as of right. We affirm.

I. Facts

This case arises from a shooting that took place in Detroit on the evening of March 22, 2006. Four young men, who had been playing basketball, were walking toward a gas station when an individual left a parked car and demanded money from one of them. A struggle ensued, and the individual produced a firearm and shot the person he accosted, first in the arm and then twice in the chest or abdomen.

Defendant presented an alibi defense, and also an eyewitness who testified that he had observed the confrontation as a bystander, and that the assailant was lighter skinned than defendant.

On appeal, defendant, through appellate counsel, argues that he was denied a fair trial by perjured identification testimony, that the evidence was not sufficient to support the verdict, and that the trial court erred in allowing certain bad-acts evidence. Defendant, in his Standard 4 brief, challenges the trial court's scoring of an offense variable under the sentencing guidelines.

II. Perjury

Of the witnesses who identified defendant as the assailant, only one knew defendant from events preceding the incident in question. That witness testified that defendant was a friend of her boyfriend. She further testified that she lived near where the incident in question took place, and that on the afternoon of the day in question, she had gone outside to pay a cab driver and noticed several boys playing basketball, and also saw defendant in a parked car. The witness stated that after going inside for approximately ten minutes, she heard several gunshots.

This witness, however, later offered a statement recanting her testimony, asserting that she had been coerced by the police to so testify. This Court remanded this case to the trial court for an evidentiary hearing on the matter. At that hearing, the witness confirmed that she lived near where the shooting took place, and had heard gunshots, but that she never saw any of the persons involved. The witness added that drug sales were taking place in her house, and that the police made clear that they were aware of that, and threatened her with imprisonment if she did not say what they wanted her to say in connection with the incident in question.

The trial court concluded as follows:

> I tried to do an analysis without [the recanting witness's] testimony. Just struck it. And saw if there was anything about striking it that would make it more likely that a different conclusion would be more reasonable, a different conclusion would be reached; and then I used it with the changes that she had testified to, and I went back and looked at the reasoning behind my identification for my belief of the identifying people and the analysis that I went through and . . . redid it. . . .
>
> . . . I'm of the conclusion that [the recanting witness's] testimony, as it stood during the hearing, and even without it, it was just another reason that supported the identification. It didn't form the basis, in my mind, of proof beyond a reasonable doubt; but just was another thing I thought that, in my mind at the time, that I believed that the finding—I should not be disturbed it provide [sic] beyond a reasonable doubt that it was [defendant] who was the one who committed the crime.

The court thus clearly indicated that it would have arrived at the guilty verdict in the first instance without the identification testimony of that witness.

Because the verdict was reaffirmed without recourse to the challenged testimony, any error in the use of perjured such testimony was cured. No appellate relief is warranted.

III. Sufficiency of the Evidence

Appellate counsel styles the question presented as a challenge to the sufficiency to the evidence, and presents the standard of review that applies to such challenges, but in fact argues the issue in part by pointing to evidence favorable to defendant, and disparaging the credibility of certain prosecution witnesses. Because appellate counsel is calling for review of all the evidence including credibility determinations, not just review of the evidence in the light most favorable to the prosecution, what appellate counsel is really asserting is that the verdict was contrary to the great weight of the evidence. See generally *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). In fact, 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.*

Because defendant has plausibly challenged the testimony of the witness who later recanted, inducing this Court to grant a motion to remand, and the trial court to re-evaluate its findings without that testimony, for purposes of this appeal we will likewise evaluate the evidentiary basis for the verdict without reference to that witness's trial testimony.

That evidence includes the repeated and unequivocal in-court identifications of defendant as the assailant from three of the young men involved in the brawl. One witness recounted picking defendant out of a photographic lineup with a degree of certainty he described at the time as eight out of ten, but then added that he was more certain of his identification of defendant at trial because he remembered his ears.

This testimony formed a solid basis for the trial court's conclusion that defendant was the assailant. Although the witnesses were not entirely consistent in all the particulars throughout the investigation, even where the witnesses' 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).

The trial court noted the apparent lack of any incentive for any witness to misidentify defendant. The court further noted that the witnesses identifying defendant had a better look at him at the time in question than did the bystander who opined that defendant was not the assailant.

For these reasons, we are not left with a definite and firm conviction that the trial court erred in concluding that defendant was the assailant in question. See *Gistover, supra*.

IV. Bad Acts

A witness testified that, late in the day of the shooting in question, he had gone to the home of the mother of some of defendant's children to work on her sink, then was watching a basketball game on television when defendant appeared and started arguing with the woman, and then "hauled off and shot" the witness. Appellate counsel argues that, because this testimony bore but little on the facts at issue while presenting defendant in a bad light, it denied him a fair trial. We disagree.

Evidence of bad acts apart from those charged is admissible if it is offered for a proper purpose, if it is relevant, and if its probative value is not substantially outweighed by unfair prejudice. *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998), citing *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993). See also MRE 404(b)(1). A proper purpose is one other than establishing the defendant's character to show his or her propensity to commit the offense. *VanderVliet, supra* at 74.

In this case, the prosecution had hoped to show that the same gun was used in both shooting incidents, but eventually conceded that the investigation proved otherwise. The prosecution served notice of the intent to introduce bad acts evidence, see MRE 404(b)(2), but

the record does not indicate whether the matter was ever argued or ruled upon. In any event, if this evidence had the potential to prejudice defendant by showing him to be quick to resort to gun violence, the evidence also tended to disassociate the two events by showing that different guns were used. Because the evidence thus provided some ammunition for the defense, defendant did not suffer unfair prejudice from its admission.

We have little concern that the trial court, sitting as trier of fact, made the legal error of using the challenged evidence as evidence proving defendant's mere propensity to shoot people. Indeed, the court's comments in rendering its verdict make clear that it did not:

> [W]hat you all want to do with [the later shooting victim's] testimony is fine with me, but it's just out there. I can't fit him into this equation in any way, shape, or form; . . . I can see it if the caliber of the bullet matched the other caliber bullets and was fired from the same gun that the markings to say, "Yes. [Defendant] was here, and then he was there, and the did both of these." But it's just too hard to do it. So we [still] have that issue of identification.

For these reasons, we reject this claim of error.

V. Offense Variable 9

Under the sentencing guidelines, offense variable 9 concerns numbers of victims. MCL 777.39. In this case, the trial court assessed ten points for that variable, which is the amount prescribed by subsection (1)(c) where "2 to 9 victims . . . were placed in danger of physical injury or death." Defendant, in his Standard 4 brief, argues that this variable should not have been scored at all, because there was only one victim. We disagree.

"This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

The evidence indicated that the assailant shot one of the victim's companions, striking him in his side, once the scuffle broke out. Defendant was in fact charged with two counts of assault with intent to murder in the matter. However, the trial court acquitted defendant of the charge in connection with that other victim, on the ground that the intent element was not satisfied.

Defendant argues that his acquittal of the charge in connection with that second shooting victim precluded the court from regarding that victim as a second victim connected with the instant crime. Defendant misapprehends the law.

"A sentencing court is allowed to consider the facts underlying uncharged offenses, pending charges, and *acquittals*." *People v Coulter*, 205 Mich App 453, 456; 517 NW2d 827 (1994) (emphasis added). Further, the scoring of the guidelines need not be consistent with the verdict. See *People v Williams*, 191 Mich App 269, 276; 477 NW2d 877 (1991). Accordingly, a scoring decision should not be reversed if any evidence exists to support the score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Because there was evidence of a

second shooting victim in this case, the trial court correctly assessed ten points for offense variable 9.

Affirmed.

/s/ Deborah A. Servitto
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood