STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 30, 2010
v	No. 291682 Washtenaw Circuit Court
JAQUWANNE TERRIL RUTLEY, Defendant-Appellant.	LC No. 08-000671-FC

Before: BORRELLO, P.J., and JANSEN and BANDSTRA, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial conviction of assault with intent to rob while armed, MCL 750.89, assault with a dangerous weapon (felonious assault), MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent prison terms of 6 to 20 years for the assault-with-intent-to-rob conviction and 2 to 4 years for the felonious assault conviction. He was also sentenced to a consecutive two-year term for the felony-firearm conviction. We affirm.

While on his way home from an Ypsilanti bar, the complainant encountered defendant and defendant's two companions walking on the opposite side of the street. One of the three asked the complainant for a lighter, and the complainant eventually walked across the street and gave one of the men his lighter. The complainant was asked if he wanted some marijuana, and he responded that he did not use the drug. At this point, one of the men produced a chrome pistol and demanded that the complainant surrender his valuables. A struggle ensued, during which the complainant was struck several times with the pistol. He ultimately escaped and contacted police. The three suspects were eventually located and apprehended. Defendant was one of the three. During questioning, defendant admitted that he had struck the complainant with the gun.

I

Defendant first raises three preserved challenges concerning the nature and sufficiency of the evidence adduced at trial.

Defendant argues that his conviction for assault with intent to rob while armed was not supported by sufficient evidence. Specially, defendant argues that the prosecution did not prove beyond a reasonable doubt that he acted with an intent to rob. See *People v Cotton*, 191 Mich

App 377, 391; 478 NW2d 681 (1991). "'An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient.'" *People v Gonzalez*, 256 Mich App 212, 226; 663 NW2d 499 (2003), quoting *People v Fetterley*, 229 Mich App 511, 517; 583 NW2d 199 (1998).

The premise of defendant's challenge to the sufficiency of the evidence—indeed the premise of each of his disputes concerning the evidence—is that the testimony of the complainant and that of one of defendant's companions was so incredible that the jury was not justified in finding him guilty of the crime. Defendant essentially asks us to disregard longstanding precedent and to invade the jury's province by independently assessing and weighing on appeal the credibility of the testimony produced at trial. This we may not do. The trier of fact is in a position superior to this Court with respect to evaluating witness credibility. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). The trier of fact is also charged with the responsibility of "determin[ing] what inferences may be fairly drawn from the evidence and . . . determin[ing] the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). We will not second-guess the jury's credibility determinations on appeal. See *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich. 1201 (1992).

Defendant's argument that the court erred by denying his motion for a new trial is likewise without merit. Defendant's assertion that there was insufficient credible evidence of guilt is again an attack on the credibility of the witnesses. In essence, defendant argues that because the witnesses (particularly the complainant and defendant's accomplice) were not worthy of belief, the evidence was insufficient to support his conviction and he should have been granted a new trial. "Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial." *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). Indeed, our Supreme Court has stated that "unless 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." *People v Lemmon*, 456 Mich 625, 645-646; 576 NW2d 129 (1998) (citation omitted). In the instant case, the testimony challenged by defendant was not "so far impeached that it 'was deprived of all probative value . . . .'" Nor did the challenged testimony "contradic[t] indisputable physical facts" or "def[y] physical realities." Accordingly, it was not inappropriate for the jury to consider the challenged testimony or to credit the testimony as it saw fit. We will not interfere with the jury's determinations in this regard. *Id*.

Defendant also argues that the verdict was against the great weight of the evidence. A verdict is against the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice for the verdict to stand. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). Considering the testimony of the witnesses, including the police officer who testified that defendant admitted striking the complainant with the pistol, we simply cannot conclude that the evidence preponderated so heavily against the jury's verdict that it would be a miscarriage of justice to allow the verdict to stand. *Id.* Defendant's convictions were not against the great weight of the evidence in this case. See *id*. at 232-233.

II

Defendant next argues that he was denied his right to a fair trial by the actions of the prosecutor. Defendant did not preserve this issue below, *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003), so we review it for plain error affecting his substantial rights, *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Defendant asserts that the prosecutor engaged in misconduct when she elicited testimony from a police officer that the officer wanted the complainant to hide his face at the time defendant was arrested. Defendant argues that this testimony did not make it more probable that he committed the charged crimes, but only served to leave the impression that the police believed the complainant would be in danger if he was seen. The officer at issue testified that he did want to assure the complainant's safety, and that it is standard practice to keep victims and defendants separated prior to trial. We are not convinced that this procedure would have been understood by the jury as anything other than a reasonable precautionary step taken for the purpose of protecting the complainant. We perceive no prosecutorial misconduct in this regard.

Defendant also argues that the prosecutor should not have asked a police officer about any concerns he may have had with respect to the initial statements given by one of defendant's accomplices. Any testimony suggesting that the police officer had concerns about the witness's veracity, however, would have actually supported defendant's theory that the witness's testimony had been fabricated in order to secure a plea bargain. In any event, the testimony was properly admitted because it provided a perspective for understanding why the officer continued to question the witness. Because this limited background information was relevant to explain why the officer continued questioning the witness, see *People v Wilkins*, 408 Mich 69, 73; 288 NW2d 583 (1980), the prosecutor did not commit misconduct by introducing it at trial, *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999).

The prosecutor also argued in rebuttal that defendant is "a person who commits crimes against people like [the complainant]." In a contextual vacuum, this assertion could arguably be characterized as improper. However, in context, it is clear that the statement was merely the conclusion of the prosecutor's response to defense counsel's repeated criticism of the complainant throughout trial and during closing argument. See *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). It is well settled that "a prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Id*. A prosecutor is entitled to respond to defense counsel's arguments. *Id*. In addition, a prosecutor is free "to comment on the evidence and to draw all reasonable inferences therefrom," and need not phrase his argument in the blandest of all possible terms. *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989).

Defendant also takes issue with the prosecutor's statement during rebuttal argument that defendant could have, but did not, take legal steps to pursue his claim that the police had acted improperly. Again, however, this prosecutorial statement was directly made in response to defense counsel's closing argument. See *Callon*, 256 Mich App at 330. Viewed against defense counsel's arguments, we cannot conclude that the prosecutor's remarks denied defendant a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Moreover, we note that a timely objection and request for a curative instruction could have alleviated any

possible prejudice that may have resulted from the allegedly improper comments. *Callon*, 256 Mich App at 330.

Finally, we find no merit in defendant's assertion that the prosecutor asked the jury to convict defendant out of a sense of civic responsibility. Instead of encouraging the jury to consider matters beyond the scope of defendant's guilt or innocence, *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003), the prosecutor simply argued that given the evidence adduced, the jury should hold defendant accountable and return a guilty verdict. This argument was not improper.

III

Defendant also raises three arguments related to his sentence. The first is predicated on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000). However, this argument has been repeatedly put to rest by our Supreme Court. See, e.g., *People v McCuller*, 479 Mich 672, 684-686; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

Defendant's second argument is that the trial court erred by assessing 10 points for offense variable (OV) 1. Under OV 1, a trial court may assess 25 points if a "firearm was discharged at or toward" a victim, MCL 777.31(1)(a), 15 points if a "firearm was pointed at or toward" a victim, MCL 777.31(1)(c), and 10 points if the victim was "touched by any other type of weapon," MCL 777.31(1)(d). Defendant asserts that because "firearm[s]" are specifically mentioned in MCL 777.31(1)(a) and (c), they cannot be considered "any other type of weapon" for purposes of MCL 777.31(1)(d). This argument misses the mark. Contrary to defendant's assertions, the central focus of OV 1 is not the *type* of weapon involved, but rather the *manner* in which the weapon was used. Indeed, MCL 777.31(1)(a) and (c) are not confined to "firearm[s]," but also include language concerning "kni[ves] or other cutting or stabbing weapon[s]." Moreover, under OV 1, zero points are appropriate only when there has been "[n]o aggravated use of a weapon," MCL 777.31(1)(f), which is clearly not the case here. Although perhaps inartfully worded, we conclude that MCL 777.31(1)(d) applies when a victim is touched by *any* type of weapon, including a firearm.

Defendant also challenges the scoring of OV 3. MCL 777.33(1)(e) provides that the trial court may assess 5 points for OV 3 when "bodily injury not requiring medical treatment occurred to a victim." Given the police officers' testimony that the complainant suffered a physical injury, evidenced by a bloody lip, we conclude that this variable was properly scored.

IV

Defendant next challenges defense counsel's effectiveness at trial. His argument is predicated on the alleged errors discussed above. However, having found no errors, we cannot fault counsel's performance at trial. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003); see also *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). We perceive no ineffective assistance of counsel in this case.

V

Lastly, we reject defendant's unpreserved argument that his convictions for assault with intent to rob while armed and felonious assault violate the constitutional guarantee against double jeopardy. Because conviction of each crime requires proof of an element that the other does not, there has been no double jeopardy violation. *People v Smith*, 478 Mich 292, 296; 733 NW2d 351 (2007); see also *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932). Defendant has failed to establish plain error affecting his substantial rights with respect to these two convictions.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen