STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 2, 2010
v	No. 292368 St. Clair Circuit Court
DOUGLAS ALLEN PLANT, Defendant-Appellant.	LC No. 08-003064-FC

Before: O'CONNELL, P.J., and BANDSTRA and MURRAY, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of armed robbery, MCL 750.529, and one count of possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent terms of 25 to 60 years' imprisonment for the armed robbery convictions and to two years' consecutive imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant makes three arguments on appeal. First, defendant argues that the prosecution failed to present sufficient evidence to support the felony-firearm conviction because (1) one of the witnesses testified that defendant carried a box cutter, not a firearm; and (2) police officers never found a handgun on defendant's person or in his vehicle. Second, defendant claims that the felony-firearm conviction was against the great weight of the evidence and would result in a grave injustice. Third, defendant argues that the trial court erred by assessing 15 points for Offense Variable (OV) 1 and five points for OV 2 because he did not use an actual firearm during the course of the robbery.[1] We disagree with defendant on all three points.

Defendant's convictions arise from his robbery of an insurance agency located in the City of Port Huron. The two victims of the robbery, the company's office manager and a customer, gave substantially different testimony as to the type of weapon used during the robbery. The office manager testified that the robber pointed a silver handgun, which she believed to be .22 caliber, in her general vicinity, but she acknowledged that the weapon "was . . . pulled into his

[1] Defendant indicated that he instead used a "fake gun," and a firearm while committing the robbery.

sleeve." The customer described the weapon as a silver box cutter and stated that she could "[see] the . . . point." This discrepancy in testimony forms the basis for each of defendant's issues on appeal.

When confronted with a claim of insufficiency of the evidence, this Court reviews the record de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). A conviction should not be reversed if a rational jury viewing the evidence in the light most favorable to the prosecution could have found the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Due process prevents a defendant from being convicted on less than sufficient evidence. *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). The prosecution has the burden of proving every element of a criminal offense beyond a reasonable doubt and, in doing so, must provide enough evidence to justify the trier of fact's conclusion. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Jolly*, 442 Mich 458, 465-466; 502 NW2d 177 (1993).

According to MCL 750.227b, "a person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . is guilty of a felony. . . ." Thus, the prosecution must show that the defendant committed or attempted to commit a felony while possessing a firearm. *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007); *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Michigan statutory law defines a "firearm" as "any weapon from which a dangerous projectile may be propelled by using explosives, gas or air as a means of propulsion," MCL 8.3t, except for several exceptions not related to this appeal. Therefore, the prosecution must prove that defendant used a firearm as our Legislature has defined that word.

During trial, the jury heard two dissimilar accounts regarding the weapon defendant used to commit the underlying felony: the office manager believed that defendant had a .22 caliber pistol, while the customer characterized the weapon as a box cutter. The jury is the finder of the facts and issues of credibility are within its exclusive province. *People v Lacalamita*, 286 Mich App 467, 469-470; 780 NW2d 311 (2010). That is, "[j]uries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony. Where sufficient evidence exists, which may be believed by the jury, to sustain a verdict of guilty beyond a reasonable doubt, the decision of the jury should not be disturbed by an appellate court." *People v Palmer*, 392 Mich 370, 375-377; 220 NW2d 393 (1974). Defendant is essentially asking this Court to discount the office manager's testimony and conclude that there is no evidence that a firearm was used during the commission of the crime. However, this Court cannot simply ignore the office manager's testimony. The office manager identified the robber as having a particular type of firearm, a .22 caliber pistol, leading one to believe she had a fairly good view of the weapon. And, the customer indicated that the manager was closer to the robber. Viewing the evidence in the light most favorable to the prosecution, the jury was permitted to accord more weight to the manager's testimony than to the customer's testimony, and it resolved the conflicting testimony by determining that defendant did possess a firearm at the time of the robbery. Although a different panel of jurors may have weighed the testimony differently, this Court may not substitute its interpretation of the facts for that of the

jury. *Lacalamita*, 286 Mich App at 469-470. Michigan law grants the jury the sole responsibility to interpret facts and determine the credibility of the witnesses. The jury chose to believe the office manager's testimony, and that testimony was sufficient to permit a reasonable jury to find defendant guilty of felony-firearm.

This Court reviews the denial of a motion for a new trial based on a great weight of the evidence argument for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998); *People v Gadomski*, 232 Mich App 24, 27-28; 592 NW2d 75 (1998). "[A] new trial . . . should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *Lemmon*, 456 Mich at 642, quoting *State v LaDabouche*, 146 Vt 279, 283; 502 A2d 852 (1985); *People v DeLisle*, 202 Mich App 658, 660-661; 509 NW2d 885 (1993).

Lemmon grants a trial court some leeway in ruling on "great weight" motions. However, issues of witness credibility are within the exclusive province of the jury, and generally conflicting testimony or questions of witness credibility are not sufficient grounds for granting a new trial, even if the trial court would have reached a different result. *Lemmon*, 456 Mich at 643-644, 647. Only under extraordinary circumstances can a trial court evaluate a witness' credibility. The Supreme Court in *Lemmon* set forth these exceptions as dictated in other cases: (1) the testimony contradicts indisputable physical facts or laws; (2) the testimony is patently incredible or defies physical reality; (3) the testimony is so inherently implausible that it could not be believed by a reasonable juror; or (4) the testimony has been seriously impeached and the case marked by uncertainties and discrepancies. *Id.* 643-644. Thus, our Supreme Court has acknowledged situations when a trial court can consider witness credibility and analyze conflicting testimony, but underscored that only exceptional circumstances call for this measure. Mere conflicts in testimony do not allow a trial court to engage in a wide-scale evaluation of the credibility of the witnesses. *Id.*

Here, defendant erroneously asserts that he is entitled to a new trial simply because of conflicting testimony. However, *Lemmon* does not stand for the proposition that mere disagreements in testimony open the door for the trial court to evaluate the credibility of witnesses. When listing the special circumstances for granting a new trial based on the great weight of the evidence, *Lemmon* used rather emphatic words, such as "patently incredible," "inherently implausible," and "seriously impeached." Here, the manager's story did not contain any noticeable holes or irregularities that would hint at improbability or fabrication. Her perception of the events simply did not match that of the customer—a reality that characterizes many criminal trials. Our court system solves this problem by calling upon jurors, and not the trial judge or this Court, to assess a witness' veracity. *Lacalamita*, 286 Mich App at 469-470. The jury chose to credit the office manager's recollection of the facts over that of the customer and since both witnesses offered believable accounts, this Court may not disturb its decision. Hence, the trial court did not abuse its discretion when it denied defendant's motion for a new trial.

Finally, defendant challenges the scoring of OVs 1 and 2 of the sentencing guidelines. We find no scoring errors.

The Michigan Legislature has provided statutory sentencing guidelines for virtually all felony offenses and these guidelines have the full effect of law. *People v Hegwood*, 465 Mich

432, 438-439; 636 NW2d 127 (2001). When analyzing a defendant's sentencing points, this Court should review the record de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). A trial court's scoring will be upheld if the "evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

In scoring OVs 1 and 2, a trial court is to "determin[e] which of the following [situations] apply and . . . assign[] the number of points attributable to the one that has the highest number of points." MCL 777.31; MCL 777.32. With regard to OV 1, MCL 777.31(1)(c) provides that 15 points should be assessed when "[a] firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting device." The office manager testified that she could see the barrel of a gun and that the robber pointed a small .22 caliber pistol "towards [her]." A scoring decision "for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006), citing *People v Elliott*, 215 Mich App 259, 260; 546 NW2d 748 (1996); *McLaughin*, 258 Mich App at 671. The manager's testimony serves as the requisite evidence for the trial court's scoring of OV 1. Thus, the evidence presented adequately supports the trial court's assessment of 15 points for OV 1.

For the same reasons, this Court will not reduce the points assessed for OV 2. MCL 777.32(1)(d) states that five points should be assessed when "[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." Although defendant advised the court that he used a "fake gun" and not an actual weapon when committing the robbery, the version of events offered by both witnesses place defendant's offense within MCL 777.32(1)(d). Therefore, the evidence presented adequately supports the trial court's assessment of five points for OV 2.

We affirm.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Christopher M. Murray