S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 17, 2017
v	No. 329823 Antrim Circuit Court
DEENE CHRISTOPHER ROBINSON, Defendant-Appellant.	LC No. 2014-004616-FC

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

PER CURIAM.

Following a jury trial, defendant was convicted of one count of second-degree home invasion, MCL 750.110a(3), and one count of larceny in a building, MCL 750.360. Defendant was sentenced as a fourth-habitual offender, MCL 769.12, to 112 months to 20 years for the second-degree home invasion conviction and 6 to 15 years for the larceny in a building conviction. Defendant appeals by right. We affirm.

ANALYSIS

A. GREAT WEIGHT OF THE EVIDENCE

Defendant argues that the trial court abused its discretion in denying his motion for a new trial. A trial court's denial of a motion for a new trial on the ground that the verdict is against the great weight of evidence is reviewed for an abuse of discretion. *People v Stiller*, 242 Mich App 38, 49; 617 NW2d 697 (2000). "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside [the] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

A new trial may be granted, on some or all of the issues, if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e); *People v Lemmon*, 456 Mich 625, 635, 642; 576 NW2d 129 (1998). Such a motion should be granted only when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *Lemmon*, 456 Mich at 639, 642. The jury's verdict should not be set aside if there is competent evidence to support it; the trial court cannot substitute its judgment for that of the fact-finder. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999).

Determining whether a verdict is against the great weight of the evidence requires review of "the whole body of proofs." *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds by *Lemmon*, 456 Mich 625 (1998). The issue usually involves matters of credibility or circumstantial evidence, *In re Robinson*, 180 Mich App 454, 463; 447 NW2d 765 (1989), "but if there is conflicting evidence, the question of credibility ordinarily should be left for the fact-finder," *Dawe v Bar-Levav & Assoc (On Remand)*, 289 Mich App 380, 401; 808 NW2d 240 (2010). "In general, conflicting testimony or a question as to the credibility of a witness are not sufficient grounds for granting a new trial." *Lemmon*, 456 Mich at 643. "[W]hen testimony is in direct conflict and testimony supporting the verdict has been impeached, if 'it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it,' the credibility of witnesses is for the jury." *Id*. at 643, quoting *Anderson v Conterio*, 303 Mich 75, 79; 5 NW2d 572 (1942).

Here, there was extensive testimony of defendant's involvement in the crime. Katie Potter testified that she was with defendant at the victim's house when he eyed the uniforms and expressed that he wanted some of them, when they returned with others and stole the uniforms, and when they again retuned and stole other items. In addition, defendant's son testified that he went with defendant to the victim's house where he helped defendant carry the stolen items to a minivan. Defendant's daughter testified that she was in the minivan when defendant stole the items from the victim's house with Potter and his son. Moreover, several of the stolen items recovered were found in the possession of witnesses who testified that defendant gave them the items. Defendant's brother testified that defendant stored some of the stolen items at his house, while his cousin testified that he found some of the stolen property in defendant's mother's house and some in his own garage. The cousin also testified that defendant left a camouflage hat in his truck with the victim's name written on it. The police recovered fishing poles, two black jugs, antifreeze, a figurine, a hat, swords, bungee cords, boots, a motor, and a camouflage top from the cousin's house, and the victim identified some of the stolen items stored by defendant in his brother's garage as belonging to him.

It matters not that there was no physical evidence and that the witnesses' may have had ulterior motives for testifying against defendant. The question is not whether more compelling evidence could or could not have been presented but whether the evidence that was presented preponderates heavily against the verdict. Here, the evidence did not preponderate against the verdict. Indeed, there was overwhelming evidence of defendant's guilt. Although some of the witnesses contradicted one another on certain points, evidence of defendant's involvement in the theft and presence during the theft was consistent and not contradicted throughout the trial. "In general, conflicting testimony or a question as to the credibility of a witness are not sufficient grounds for granting a new trial." *Lemmon*, 456 Mich at 643. And, none of the "narrow exception[s] to the rule that the trial courts may not take the testimony away from the jury," *id*. apply to this case.

As the trial court found, defendant's conviction was not against the great weight of evidence because the evidence against him included testimony by people who were with him during the theft. Consistent with the trial court's decision is the fact that there was no inconsistent testimony regarding defendant's participation in the theft and his presence during the theft. In light of that testimony, and given the exclusive role of the jury in assessing the issue of credibility, it cannot be said that the evidence preponderates heavily against the verdict. *Id*., at

639. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial because the verdict was not against the great weight of the evidence.

B. LATE-ENDORSED WITNESS

Defendant also argues that the trial court abused its discretion when it allowed the testimony of defendant's daughter, a late-endorsed witness. This Court reviews a trial court's decision to permit the late endorsement of a witness for an abuse of discretion. *People v Callon*, 256 Mich App 312, 325-326; 662 NW2d 501 (2003). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

At least 30 days before trial, the prosecutor must send to the defendant or defense counsel a list of the witnesses he intends to produce at trial. MCL 767.40a(3). The prosecutor may add or delete witnesses from the list "at any time upon leave of the court and for good cause shown or by stipulation of the parties." MCL 767.40a(4). "Ordinarily, late endorsement should be permitted and a continuance granted to obviate potential prejudice that might result. All that is necessary is that the objecting party has time to interview the witness before he is called to testify, and to investigate facts bearing on his credibility, when appropriate." *People v Harrison*, 44 Mich App 578, 586; 205 NW2d 900 (1973) (internal citations omitted).

The prosecutor explained that defendant's daughter was not listed as a witness because he was unaware of her involvement until defendant's son gave a statement to an officer four days before trial, indicating that she was present in the minivan during the theft. The late discovery established good cause for the late endorsement. See *People v Gadomski*, 232 Mich App 24, 37; 592 NW2d 75 (1998) (holding that the late discovery of a res gestae witness provided good cause for the witness's addition to the witness list).

The trial court gave defense counsel the opportunity to interview the witness, but was still not able to articulate any prejudice. *Harrison*, 44 Mich App at 586. Therefore, the trial court did not abuse its discretion by allowing the late endorsement. Moreover, the testimony in essence confirmed that the witness was in the minivan during the theft. Defendant's contention that without the testimony the evidence against him was "thin" is not supported by the facts since the testimony was merely cumulative.

Affirmed.

/s/ Peter D. O'Connell
/s/ Jane E. Markey
/s/ Christopher M. Murray