

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
October 20, 2011

v

LATOYA MARIE FLOWERS,
Defendant-Appellant

No. 299961
Genesee Circuit Court
LC No. 09-026086-FC

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals as of right from her convictions of felonious assault, MCL 750.82, and witness intimidation, MCL 750.122. We affirm the witness intimidation conviction. However, because both parties acknowledge that defendant's felonious assault conviction must be vacated, we vacate the felonious assault conviction.

Defendant's convictions arose out of an altercation between defendant and Etelka Thomas. Etelka's husband, James, was having an affair with defendant. After the altercation, James attempted to discourage two witnesses from testifying against defendant. At defendant's trial, James testified pursuant to a plea agreement that defendant had instructed him to discourage the witnesses from testifying. He further testified that while he was meeting with the witnesses, he was talking with defendant on his cell phone and was receiving instructions from defendant regarding what to say to the witnesses.

On appeal, defendant claims (and the prosecutor concedes) that defendant's felonious assault conviction must be vacated on the ground that felonious assault is not a necessarily included lesser offense of assault with intent to murder. Because the parties do not dispute this issue, we vacate the felonious assault conviction.

Defendant next claims that the witness intimidation conviction was against the great weight of the evidence. We review this claim for plain error affecting defendant's substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "A verdict is against the great weight of the evidence if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow it to stand." *People v Reid*, ___ Mich App ___; ___ NW2d ___ (No. 286784, May 10, 2011)

We find no plain error in the witness intimidation conviction. To prove that defendant was guilty of witness intimidation, the prosecutor had the burden of establishing that defendant used threat or intimidation to discourage a witness from testifying, or to influence a witness's testimony, or to encourage a witness to withhold testimony or to testify falsely. MCL 750.122(3)(c). Defendant contends the evidence failed to support the conviction. A conviction may be reversed and remanded for a new trial if the jury's verdict is contrary to indisputable physical facts. *Musser*, 259 Mich App at 219. Similarly, a conviction may be reversed and remanded when the jury's verdict is based upon testimony that had no probative value. *Id.* Generally, however, a conflict in testimony does not warrant a new trial. *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998).

Defendant argues that James Thomas's testimony was so self-serving and implausible that we must remand for a new trial. We disagree. We acknowledge that the James's testimony was the primary evidence linking defendant to the acts of witness intimidation. We further acknowledge that James testified pursuant to a plea agreement, and that his testimony had inconsistencies. However, defense counsel cross-examined James about the plea agreement and about the inconsistencies. The jury nonetheless determined that defendant was complicit in attempting to influence the witnesses' testimony. As our Supreme Court explained, "[t]he credibility of a witness is determined by more than words and includes tonal quality, volume, speech patterns, and demeanor, all giving clues to the factfinder regarding whether a witness is telling the truth." *Lemmon*, 456 Mich at 646. Here, the jury observed James's testimony, and apparently found the testimony credible. This Court defers to the jury's credibility assessment. *Id.* at 642-643.

Aside from challenging James's credibility, defendant contends that the evidence at trial indicates that defendant lacked access to a telephone at the time James claimed to have been speaking with her by phone. Although police officers testified that they confiscated defendant's cell phone, nothing in the record established that defendant lacked any other access to a phone. The testimony from the witnesses and from James plainly allowed the jury to infer that even if defendant did not have her personal cell phone, she was nonetheless speaking to James by phone at the time he met with the witnesses.

In sum, the prosecutor presented sufficient evidence to allow the jury to conclude that defendant and James attempted to discourage the witnesses from testifying. Defendant has not established that the verdict on witness intimidation was against the great weight of the evidence.

Affirmed in part, vacated in part, and remanded to the trial court for the ministerial act of entering an amended judgment of sentence. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Peter D. O'Connell