

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KIM LAMONT POINTER,

Defendant-Appellant.

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UNPUBLISHED  
October 11, 1996

No. 183805  
LC No. 94-1919-FC

Before: Fitzgerald, P.J., and O'Connell and T. L. Ludington,\* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to a prison term of twenty-three to forty years for the murder conviction and two years for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise from the shooting death of Jeffrey Price. The primary dispute at trial was whether the shooter was defendant or his brother, Willie Hart.

I

Defendant first argues that there was insufficient evidence to sustain his convictions. In reviewing a claim of insufficiency of the evidence, this Court must consider the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have concluded that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515, modified 441 Mich 1201; 489 NW2d 748 (1992); *People v Hurst*, 205 Mich App 634, 640; 517 NW2d 858 (1994).

Defendant specifically challenges the credibility of the witnesses who testified against him, namely those witnesses who gave an eyewitness account of having seen defendant shoot and kill Price. However, when leaving the matter of credibility to the jury as we are compelled to do, *Wolfe, supra* at

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\* Circuit judge, sitting on the Court of Appeals by assignment.

514, the evidence revealed that four witnesses saw the shooting of Price, and each positively identified defendant as the perpetrator. Defendant was seen approaching Marilyn Townsend's apartment holding a brown paper bag, he was then seen holding a gun with his arm extended and pointed toward Price, and finally, he was seen shooting Price several times at close range. Viewed in the light most favorable to the prosecution, the evidence was sufficient to permit a rational trier of fact to conclude beyond a reasonable doubt that defendant shot Price.

## II

Defendant argues that the jury's verdict was against the great weight of the evidence, and that the trial court abused its discretion in denying his motion for a new trial on that ground. We disagree.

Determining whether a verdict is against the great weight of the evidence requires a review of the whole body of proofs, *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993), with the test being whether the verdict is "against the overwhelming weight of the evidence." *Heshelman v Lombardi*, 183 Mich App 72, 76; 454 NW2d 603 (1990). Although it is in the trial court's discretion to grant or deny a new trial, *Herber, supra* at 477, the jury's verdict should not be set aside where there is competent evidence to support it. *King v Taylor Chrysler-Plymouth Inc*, 184 Mich App 204, 210; 457 NW2d 42 (1990). The issue generally involves matters of credibility or circumstantial evidence, *In re Robinson*, 180 Mich App 454, 463; 447 NW2d 765 (1989), and where there is conflicting evidence, the question of credibility must always be left for the factfinder. *Rossien v Berry*, 395 Mich 693, 701; 9 NW2d 895 (1943). Furthermore, this Court accords great deference to the trial court's decision because the trial court, having heard the witnesses, is uniquely qualified to judge the jury's assessment of witness credibility. *In re Leone Estate*, 168 Mich App 321, 324; 423 NW2d 652 (1988). We will not substitute our judgment for that of the jury unless a review of the record reveals a miscarriage of justice. *Id.* We find none here.

In addition to the eyewitness accounts given at trial, several other witnesses provided essential facts that refuted both defendant's theory that it was Hart, rather than him, that shot Price, and his argument that there was stronger evidence presented to support his theory, rather than supporting the charges raised against him. Further, the evidence introduced against Hart provided no concrete proof that Hart shot Price, nor weighed clearly in favor of finding defendant not guilty.

Although there were inconsistencies in the evidence presented, such matters are reserved for the jury's consideration alone, and given the evidence presented, we conclude that the jury's verdict is not against the great weight of the evidence. We find that the trial court did not abuse its discretion in denying defendant's motion for a new trial, nor was there any resulting miscarriage of justice. *People v Gonzalez*, 178 Mich App 526, 532; 444 NW2d 228 (1990).

## III

Defendant next contends that the court's jury instructions were confusing, suggestive, misleading, and prejudicial. We disagree. First, the jury was instructed verbatim from CJI2d 3.2 on the presumption of innocence, burden of proof, and reasonable doubt. The instruction adequately

presented the respective concepts to the jury, and we find no abuse of discretion in the trial court's decision to give CJI2d 3.2 rather than a similar instruction employed by the Sixth Circuit.

Second, after reviewing the court's instruction with respect to witness identification, and particularly the court's reference to the testimony of specific witnesses, it is evident that the trial judge sought only to clarify the issue of identification, and in no way endorsed the witnesses' testimony as being true. We have previously held that a trial judge has the statutory right to comment unprejudicially on evidence and to call the attention of the jury to particular facts, *People v Ciatti*, 17 Mich App 4, 9; 168 NW2d 902 (1969). Further, MCR 2.516(B)(2) states that "at any time during the trial, the court may, with or without request, instruct the jury on a point of law if the instruction will materially aid the jury in understanding the proceedings and arrive at a just verdict." When balancing the general tenor of the instant instruction within its context, even if somewhat imperfect, we find that the trial court fairly presented the issues to be tried, and did not misrepresent the testimony and evidence already before the jury. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995); *Freedland*, *supra* at 766.

Last, we find that the court's statements with respect to Price being "repeatedly shot" represented nothing more than an uncontested evidentiary fact presented during trial. We find no prejudice in the court merely reiterating a fact already before the jury.

#### IV

Defendant asserts that the court erred in refusing to allow the defense to introduce evidence, in the form of opinion testimony, of Hart's bad reputation for violence in the community. However, although defendant indicated at trial that he would like to introduce evidence of Hart's reputation to explain the "cold-blooded killing" of Price, and to explain Townsend's fear in testifying against Hart, defendant failed to properly preserve this issue by presenting an offer of proof. MRE 103(a). Without knowing exactly what evidence defendant intended to present, this Court cannot now judge its admissibility. We nevertheless note that evidence of a person's character is generally not admissible for the purpose of proving that he acted in conformity therewith, MRE 404(b), and neither reason proposed by the defense qualifies as an exception to that general rule of exclusion.

Furthermore, even if evidence of Hart's bad reputation would have been admissible, we conclude that defendant was in no way prejudiced by the court's decision to deny the admission. During trial, sufficient evidence was presented to raise the inference that Hart had a "bad" reputation; thus, any additional evidence would have been merely cumulative in nature, and would not have been outcome determinative at trial.

#### V

Finally, defendant argues that the court erred in excluding both the Townsend and Pointer families as spectators in the courtroom. Despite defendant's failure to preserve this issue for appeal by raising an objection to the exclusion during trial, we nevertheless find no error.

MCL 768.29: MSA 28.1052 provides that, in maintaining the integrity of the system, it shall be the duty of the judge to control all trial proceedings, and our Supreme Court has similarly held that the court has the power to, and should, adopt the proper measures necessary to conduct an orderly trial and to preserve the due administration of the law. *People v Greeson*, 230 Mich 124, 147; 203 NW 141 (1925). In light of the fact that the jurors were distracted by the constant movement within the courtroom, and because there were indications that the testimony of several witnesses was affected as a result of threats and pressure from the Townsends and the Pointers, we find that their exclusion from the courtroom did not constitute error.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Peter D. O'Connell

/s/ Thomas L. Ludington