

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARREN LEE GILES,

Defendant-Appellant.

UNPUBLISHED
November 1, 1996

No. 184476
LC No. 94-004370

Before: Wahls, P.J., and Cavanagh and J.F. Kowalski,* JJ.

PER CURIAM.

Defendant was convicted in a bench trial of felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to consecutive terms of one to four years' imprisonment on the assault charge and two years' imprisonment on the felony firearm charge. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court's finding that defendant assaulted the victim were clearly erroneous. We review the findings of fact of the trial court sitting without a jury under the clearly erroneous standard. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake was made. *In re Forfeiture of 19203 Albany*, 210 Mich App 337, 342-343; 532 NW2d 915 (1995).

Defendant asserts that the trial court's findings were erroneous because the evidence of the purported assault was based on "incredible testimony which was inherently inconsistent and implausible on its face." We disagree. The witness' testimony was corroborated by at least two independent witnesses whose credibility was not seriously impeached. Moreover, while the victim's testimony was somewhat inconsistent, we have carefully reviewed the record and do not find that these inconsistencies give rise to a definite and firm conviction that a mistake has been made.

Next, defendant argues that there was insufficient evidence to sustain the trial court's verdict. We disagree. The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and

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

(3) with intent to injure or to place the victim in reasonable apprehension of immediate battery. *People v Malkowski*, 198 Mich App 610, 614 ; 499 NW2d 450 (1993). Taylor's testimony established all three, as he testified that defendant, at gun point, demanded Taylor's money, a check, and the use of Taylor's car. Furthermore, Taylor's testimony was corroborated by a witness who testified that Taylor came to his door still partially bound in telephone cord. Finally, as discussed above, the trial court's findings with respect to credibility were not clearly erroneous. Therefore, the evidence was sufficient to support the felonious assault verdict.

Similarly, defendant argues that the trial court's verdict was against the great weight of the evidence. Defendant did not file a new trial motion on this basis, so we review the claim to determine if the verdict finds reasonable support in the evidence, or if it is more likely to be attributed to causes outside the record, such as passion, prejudice, or some extraneous influence. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993).

We do not find that the verdict was against the great weight of the evidence. A trial court's assessment of witness credibility is subject to a great weight challenge. *In re Robinson*, 180 Mich App 454, 463 ; 447 NW2d 765 (1989); *People v Hepner*, 285 Mich 631; 281 NW 384 (1938). The conviction in *Hepner* was against the great weight of the evidence because the testimony of the prosecution's sole witness was not corroborated by independent witnesses, while the defendants' testimony was. Furthermore, in *Hepner* the trial court convicted four of the eight defendants based on evidence which was "no stronger than that against . . . the other codefendants." *Id.* at 635-636. In the present case, on the other hand, it is the prosecution witness' testimony which was corroborated by other witnesses, and defendant's testimony was not. Therefore, we find no indication that the trial court's verdict was based on outside influences, such as passion or prejudice.

Defendant also argues that he was denied a fair trial because the trial court allowed the prosecution to introduce rebuttal testimony. We review a decision to allow rebuttal evidence for an abuse of discretion and reverse only on a finding that the error was so egregious as to result in a miscarriage of justice. *People v Eggleston*, 148 Mich App 494, 503; 384 NW2d 811 (1986).

Where a defendant presents evidence at trial, the prosecutor may use rebuttal evidence to contradict, repel, explain, or disprove the defendant's evidence. *People v Leo*, 188 Mich App 417, 422; 470 NW2d 423 (1991). The relevance of such evidence is not determined by whether it would have been admissible in the prosecutor's case in chief. Rather, the test is whether the evidence is justified by the evidence it is offered to rebut. *People v Bettistea*, 173 Mich App 106, 126; 434 NW2d 138 (1988). The evidence in the present case was offered to rebut defendant's claim that the victim lied on the witness stand. When the defendant does so, the prosecutor may introduce rebuttal testimony corroborating the initial testimony. *Id.* at 126. This is precisely the case here. Therefore, the rebuttal evidence was not improper, and we find no abuse of discretion.

Next, defendant argues that he was denied a fair trial when the prosecutor cross-examined defendant about a gun that was found under his bed when he was arrested. Defendant's cross-examination testimony was the only evidence of the gun presented at trial. Defense counsel did not object to these questions at trial. Therefore, the issue is not preserved, and we will grant relief only

upon a showing that manifest injustice would result if we do not review defendant's claim. *People v Stimage*, 202 Mich App 28, 29; 507 NW2d 778 (1993).

Defendant claims that his testimony was irrelevant and unfairly prejudicial. Where it is undisputed that a weapon in defendant's possession at the time of arrest was not used in the crime charged, evidence of such a weapon is inadmissible. *People v Burnett*, 166 Mich App 741, 752; 421 NW2d 278 (1988). However, if the weapon is similar to that used in the crime charged, then evidence of the defendant's possession of the weapon is relevant and admissible. See *People v Howard*, 391 Mich 597, 604; 218 NW2d 20 (1974). In the present case, defendant has not demonstrated that the gun was not the weapon used in the assault. Therefore, defendant has not demonstrated that manifest injustice would result if we do not review defendant's claim.

Defendant also argues that he was denied effective assistance of counsel when his trial attorney failed to object to the rebuttal testimony, failed to object to the testimony about the gun, and failed to cross-examine the victim about inconsistencies between his testimony at trial and at the preliminary examination. We review this claim to determine if counsel's performance was deficient and if the deficient performance prejudiced the defense in such a way as to deprive the defendant of a fair trial whose result is reliable. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995).

With respect to the rebuttal testimony, defense counsel's performance was not defective because that evidence was properly admitted. With respect to the testimony about the gun, defendant cannot prevail unless he can show that he was prejudiced. *Id.* As already discussed, defendant has not demonstrated that the gun was dissimilar to the one used in the assault and he therefore cannot establish that he was prejudiced by counsel's failure to object. Accordingly, defendant has not shown that he was denied effective assistance of counsel.

Nor was defendant denied effective assistance of counsel by his attorney's failure to bring up two inconsistencies between the victim's testimony at trial and at the preliminary examination. We have examined these inconsistencies and found them to be no stronger than the several inconsistencies which defense counsel brought to the trial court's attention. The court rejected these other attacks on the complainant's credibility, and we are not convinced that the trial court would have reached a different conclusion had the two additional inconsistencies been presented. Therefore, defendant has not established that he was denied effective assistance of counsel on this basis.

Finally, defendant objects to the scoring of the sentencing guidelines. A trial court has discretion in determining the number of points to be scored for any offense variables in the sentencing guidelines provided there is record evidence to support the score. *People v Day*, 169 Mich App 516, 517; 426 NW2d 415 (1988). We find that offense variable (OV) 1 was properly scored because the evidence was sufficient to support a finding that defendant accomplished the assault by pointing a gun at the victim. With respect to OV 2, we find that the evidence submitted at trial supported a finding that the defendant subjected the complainant to terrorism. Therefore, the trial court properly assigned twenty-five points for OV 2.

Affirmed.

/s/ Myron H. Wahls
/s/ Mark J. Cavanagh
/s/ John F. Kowalski