

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCO THOMAS HART,

Defendant-Appellant.

UNPUBLISHED

December 30, 1996

No. 188617

Recorder's Court

LC No. 94-012504 FY

Before: Taylor, P.J., and Markman and P. J. Clulo,* JJ.

PER CURIAM.

After a bench trial, defendant was convicted of four counts of assault with intent to murder, MCL 750.83; MSA 28.278, one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and habitual offender, second offense, MCL 769.10; MSA 28.1082. Defendant appeals as of right. We affirm.

Jeffrey Foster, his two sons Isaac and Berry Foster, and his business manager Frank Fullmore were at Foster's wrecking yard when the group decided to go out for breakfast. Isaac and Berry entered their father's truck and, as their father and Fullmore were getting into the truck, gun shots came through the windshield of the truck. The shots came from the other side of railroad tracks directly across from the wrecking yard. A total of between nine and seventeen shots were heard. As the occupants of the truck stepped out of it, they saw a man running away from the area from where the bullets came. The man was wearing a dark colored jogging suit with the hood up, was carrying a duffel bag with what appeared to be a long gun inside and had guns tucked under his arms. Jeffrey Foster and Fullmore recognized the gunman as defendant. Immediately thereafter, the men discovered that two of the bullets had grazed Isaac and Berry Foster, one in the knee and the other in the chest. Defendant was charged and convicted in relation to the incident.

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

On appeal, defendant first contends that there was insufficient evidence presented at trial to convict him of assault with intent to murder. Specifically, defendant contends that reasonable doubt existed based upon the testimony of his alibi witness and the testimony of Tyrone Perte who testified that Jeffrey Foster and Fullmore later stated to him that they did not see who shot at them. In an appeal challenging the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

The trial judge set forth detailed findings of fact. She noted that Jeffrey Foster's and Fullmore's description of defendant were consistent with each other and with another witness who lived near the scene, heard the gunshots and also saw defendant running away. In addition, the trial judge determined that defendant's alibi witnesses' testimony was unreliable. This Court will not ordinarily interfere with the trier of facts' primary role in determining the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), amended 441 Mich 1201 - 1202 (1992). We find that there was no error in the trial judge's determination not to accept defendant's alibi defense.

Defendant next contends that the trial judge improperly allowed Jeffrey Fullmore to testify that Perte had told Fullmore that defendant had issued threats against Jeffrey Foster and Fullmore. Defendant contends that this testimony was hearsay. During his cross examination, Perte was questioned with regard to a statement that he had allegedly made concerning defendant's threats against Jeffrey Foster and Fullmore. Perte denied having told them about any such threats. The prosecution thereupon recalled Fullmore and he testified that Perte had, in fact, communicated these threats.

When attempting to impeach a witness with a prior statement made by the witness, a proper foundation must be laid by questioning the witness as to the time and place of the statement and the person to whom it was allegedly made. MRE 607; MRE 613. *People v Barnett*, 165 Mich App 311; 418 NW2d 445 (1987); *People v Santana*, 139 Mich App 484, 488; 363 NW2d 702 (1984). Once a proper foundation has been laid and the witness either admits or denies making the statement in controversy, the witness may be impeached by evidence that he made the statement. *Id.* The purpose of admitting extrinsic impeachment evidence is to prove that a witness made a prior inconsistent statement, not to prove the contents of the statement. *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). In the instant matter, the prosecution laid the proper foundation with Perte and was simply attempting to impeach Perte by its questioning of Fullmore. Perte's credibility, both in regard to his denial that he had been privy to a threat by defendant and in his assertion that-- contrary to their testimony-- Jeffrey Foster and Fullmore had told him that they could not identify their assailant, was a critical issue at trial. A trial court's decision to admit evidence will not be reversed absent an abuse of discretion. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). We are unable to conclude that such an abuse occurred here.

Finally, defendant contends that the trial judge pierced the veil of impartiality and denied defendant a fair trial by questioning witnesses. Defendant did not object to the challenged conduct on the part of the trial judge. In the absence of an objection, this Court may review the matter if manifest

injustice would result from the failure to review. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). A trial court's conduct pierces the veil of impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. *Id.* A trial court may question a witness in order to clarify testimony or elicit additional relevant information. MRE 614(b); *People v Davis*, 216 Mich App 47, 49-52; 549 NW2d 1 (1996); *People v Weathersby*, 204 Mich App 98, 109; 514 NW2d 493 (1994). Review of the questions asked by the trial judge reveals that the judge who was conducting a bench trial was simply attempting to clarify testimony or follow up testimony with relevant questions. The trial judge did not improperly pierce the veil of impartiality.

Affirmed.

/s/ Clifford W. Taylor

/s/ Stephen J. Markman

/s/ Paul J. Clulo