STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY TORBERT,

Defendant-Appellant.

UNPUBLISHED
April 7, 1998

No. 191426
Genesee Circuit
LC No. 95-52406-FH

Before: Markey, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

The charges against defendant arose out of a May 7, 1995 police chase in which defendant fired four shots at the officers who were chasing him. Defendant was subsequently charged with four counts of assault with intent to murder, MCL 750.83; MSA 28.278, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Following a jury trial defendant was convicted of two counts of assault with intent to murder, MCL 750.83; 28.278, two counts of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and felony-firearm, MCL 750.227b; MSA 28.424(2). He was sentenced as a second offense habitual offender, MCL 769.10; MSA 28.1082, to concurrent terms of eight to fifteen years' imprisonment for the assault with intent to do great bodily harm convictions and twenty to forty years' imprisonment for the assault with intent to murder convictions, and a consecutive term of two years' imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

I

First, defendant argues that the verdict was against the great weight of the evidence. An appellate court reviews the trial court's grant or denial of the motion for new trial for an abuse of discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993).

Determining whether a verdict is against the great weight of the evidence requires review of the whole body of proofs. *Herbert, supra* at 475. The test is whether the verdict is against the overwhelming weight of the evidence. *Heshelman v Lombardi*, 183 Mich App 72, 76; 454 NW2d 603 (1990). We give substantial deference to the court's finding that the verdict was not against

the great weight of the evidence. *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995). The issue of whether the conviction was against the great weight of the evidence 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 should be left for the factfinder, *Rossien v Berry*, 305 Mich 693, 701; 9 NW2d 895 (1943); see also *Whitson v Whiteley Poultry Co*, 11 Mich App 598, 601; 162 NW2d 102 (1968). We will not interfere with the jury's role of determining the credibility of witnesses. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997).

Defendant lists a number of "inconsistencies" in the witnesses' testimonies and relies on these differences in concluding that the jury's verdict was against the great weight of the evidence. Defendant first states that there is a discrepancy about how many shots were fired and that this is important because each count charged against defendant originated from one of the shots. The differences in the officers' testimonies are easily attributed to the fact that each officer involved in this fast-paced, stressful, armed chase had a slightly different perspective based on his view of each event, when he joined the chase, and his position in relation to the other officers and defendant. These inconsistencies are not so overwhelming and insidious as to lead a jury or the court to the conclusion that these witnesses are to be afforded little or no credibility. Accord *McFall, supra*.

Moreover, the fact that the jury differentiated between assault with intent to murder and assault with intent to do great bodily harm less than murder with respect to the officers who were threatened with "I'll kill you" and those who were not, is an important consideration. The jury weighed the testimony and each officer's rendition of events and obviously found that the greater charge was merited only in two cases. The court properly deferred to the jury's determination and, given the evidence in this case, did not abuse its discretion in doing so.

Defendant also argues that if the jurors decided that defendant was guilty of assault with intent to murder as to Officer VanAlstine based on his testimony, then they had to reject Officer McKenna's testimony, and vice versa. Accordingly, defendant concludes that defendant cannot be guilty of assault with intent to murder as to both McKenna and VanAlstine because each officer viewed the gunshot from the fence as directed toward him. Defendant ignores, however, the testimony that during the chase, before defendant reached the fence, defendant fired at both officers while yelling "you'll have to kill me, because I'm going to have to kill you," or some similar statement. That particular incident could reasonably have been the basis for both counts of assault with intent to murder. Additionally, when Officers McKenna and VanAlstine were at the fence, they were so close to each other that a shot toward one could easily have been directed simultaneously at either or both officers. Defendant is attempting to make fine distinctions that counter the great weight of the evidence.

Therefore, the trial court properly found that the verdict was not overwhelmingly against the great weight of the evidence.

II

Defendant's second issue is whether the trial court erred by refusing defense counsel's request to conduct his own voir dire or to ask voir dire questions designed to probe whether the prospective jurors had racial prejudices that would affect the verdict. We disagree.

The scope and conduct of voir dire examination is entrusted to the discretion of the trial court and will not be set aside absent an abuse of discretion. *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994); *People v Daniels*, 192 Mich App 658, 666; 482 NW2d 176 (1991). Defendant does not have a right to counsel–conducted voir dire, individual sequestered voir dire, or to have the court ask questions submitted by counsel in every case. *Id*. Our Supreme Court has determined, however, that where the trial court, rather than the attorneys, conducts voir dire, the court abuses its discretion if it does not adequately question jurors regarding potential bias so that challenges for cause, or even peremptory challenges, can be intelligently exercised. *Id*.

Defendant claims that the trial court's refusal to allow counsel to conduct his own voir dire, in addition to the court's decision that questions regarding possible racial bias were unnecessary on the facts of this case, denied defendant a fair trial. This Court has declined to reverse a conviction based on this issue in cases where there is no showing of a bona fide issue of race. *Daniels*, *supra* at 666; see also *Carter v Braunstein*, 89 Mich App 119, 121-122; 279 NW2d 596 (1979). In *Braunstein*, *supra*, this Court examined earlier cases where a court was required to inquire about possible racial biases of the jury venire but concluded that "the mere fact that a plaintiff is black and a defendant white does not indicate that there is necessarily an issue of race," and that the trial judge was not required to ask specific questions relating to racial prejudice. *Id.* The *Braunstein* court distinguished its finding from *Ham v South Carolina*, 409 US 524, 527; 93 S Ct 848; 35 L Ed 2d 46 (1973), and *Ristaino v Ross*, 424 US 589, 597; 96 S Ct 1017; 47 L Ed 2d 258 (1976). *Braunstein*, *supra* at 121.

In *Ham*, *supra,* the defendant was a young African American who was well known for his work in civil rights activities and whose defense at trial was that the law enforcement officers who charged him with possession of marijuana were "out to get him" because of his civil rights activities and frame him with the drug charge. *Id*., 409 US 525. Defendant argued that the trial court's refusal to make *any* inquiry as to racial biases of prospective jurors violated the defendant's constitutional rights because issues of racial bias were at the heart of the defendant's case. The United States Supreme Court in *Ham, supra*, agreed and found that the trial court, on the facts of that case, was required to make an inquiry about any possible racial bias of the prospective jurors after one party requested such an inquiry and where race was an issue. *Id.*, 409 US 526-529. The court did not have to use the precise language requested by that party when questioning the jury, however. *Id*.

In *Ross*, *supra*, 424 US 597, an African American was convicted of crimes of violence against a white security guard. The United States Supreme Court held that his federal constitutional rights were not violated by the trial court's refusal to ask questions directed at discovering racial prejudice because "[t]he mere fact that the victim of the crimes alleged was a white man and the defendants were Negroes was less likely to distort the trial than were the special factors involved in *Ham.*" *Ross, supra*, 424 US

597. There were no facts in *Ross, supra,* to indicate that racial issues were "inextricably bound up with the conduct of the trial," *id.*, and thus the conclusion differed from that in *Ham, supra*.

Finally, in *Braunstein, supra*, this Court also cited a passage from one of the earliest Michigan cases to apply *Ham, supra*: *People v Wray*, 49 Mich App 344; 212 NW2d 78 (1973). This Court, in *Wray, supra*, reversed the defendant's conviction because the trial court refused to inquire about racial biases of prospective jurors. Basing its holding on *Ham, supra*, 409 US 524, this Court determined that although the trial court was not required to ask the defendant's requested questions verbatim, it was error mandating reversal not to ask specific questions dealing with the particular subject of racial prejudice. *Id*. While this Court did not specifically state that race was a "bona fide issue" in the case, which was the distinguishing factor in *Daniels, supra*, and *Braunstein, supra*, it did specify that the defendant was black while each of the jurors impaneled and called, and all of the prosecution witnesses, were white.

In summary, a trial court is given broad discretion as to the content and scope of voir dire, and the court is only required to explore the issue of racial bias of potential jurors if, in fact, race is a bona fide issue. *Daniels, supra* at 667. Even then, the trial court has discretion as to whether it will use specifically worded questions submitted by a party or whether it will ask its own questions. This Court has also concluded that merely because the defendant is black and the victims were white is not enough to make race a bona fide issue. *Braunstein, supra* at 119. The facts in *Ham, supra*, required the court to question potential jurors about racial biases because not only was the defendant black and the police witnesses white but also because the defendant argued that he was being framed because of his involvement in civil rights activities.

The present case does not involve any special circumstance that would make race a bona fide issue. These facts do not even rise to the level of *Wray, supra*, where the defendant was of one race and the entire jury pool and witness list were of another. Defendant himself points out that at least two of the police witnesses were black and two were white and several jurors were black. Consequently, the trial court did not abuse its discretion in refusing to inquire about racial biases of the jurors. Additionally, the trial court carefully examined each potential juror with respect to whether any one had any contact with relatives or friends who had either been accused or convicted of some crime, and whether that experience tainted the juror's view of judges, courts, lawyers, police officers, or those accused of crimes. The court also questioned the jury venire about factors such as education, occupation and prior contact with anyone involved in the case. A thorough review of the trial court's voir dire reveals that the purpose of voir dire was, in fact, accomplished, and sufficient information was elicited so that the parties could make intelligent challenges.

Defendant also complains that the trial court employed a "cumbersome procedure wherein he demanded that defense counsel write questions out in long hand in open court during the voir dire as a condition precedent to having the questions asked of the jurors." Defendant complains that he had already submitted his questions in writing and that the irrationality of the court's procedure, combined with the trial court's "curious refusal" to order that the questions be made part of the record, creates the appearance that the court was deliberately making it difficult for the attorneys to participate in voir dire. Defendant ignores the fact that when asked whether he had additional questions that should be asked,

defense counsel, instead of submitting questions at that time, stated that he had already submitted his questions and would not repeat this effort. Rather than avail himself of the opportunity to submit the questions that he deemed important about racial bias, defense counsel declined the invitation.

Consequently, the trial court did not abuse its discretion by refusing to allow defense counsel to conduct his own voir dire and by not asking questions that dealt with possible racial biases of the jurors. The court correctly determined that race was not an issue "inextricably bound up" in the issues of the case, and ruled accordingly.

III

The third issue is whether defendant was denied a fair trial by the trial court's instruction to the jury that it was entitled to consider defendant's interest in the outcome of the case when weighing defendant's testimony. A party waives review of jury instructions to which he accedes at trial. *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987). Defendant did not object to the jury instruction now appealed; he argues, however, that manifest injustice mandates review. Manifest injustice will not be found unless the alleged error or omission is outcome determinative, *People v McVay*, 135 Mich App 617, 618; 354 NW2d 281 (1984), or pertains to a basic and controlling issue in the case, *People v Hughes*, 160 Mich App 117, 119; 407 NW2d 638 (1987).

Defendant contends that the trial court's instructions emphasized to the jury that the court did not believe defendant's testimony. Defendant also argues that the fact that the trial judge emphasized only defendant's interest in the case and did not instruct that the police witnesses also had an obvious interest in the case "constituted an implied comment on defendant's credibility as a witness." Nevertheless, defendant failed to object to the instructions at the time of trial and has thus waived review on appeal unless he can show a manifest injustice, which we do not find. See *People v Seabrooks*, 135 Mich App 442, 452-454; 354 NW2d 374 (1984).

Moreover, the instruction in the present case is qualified by the fact that the court's extensive instructions on this issue included a directive that the jury must consider the entirety of the evidence. Specifically, the court instructed:

> Decide the case, not based upon which witnesses – which side produces the largest number of witnesses, but consider every witness, every piece of evidence and whether or not you believe that testimony.

Additionally, in contrast to the trial court's omission of a certain instruction regarding the weight to be given to police testimony in *Seabrooks, supra* at 452, this trial court did instruct the jury accordingly. The court told the jury that it was to consider police officers' testimony as it would consider that of any other witness and that a witness' occupation is not a factor in determining witness credibility or veracity. Therefore, we believe that defendant was not prejudiced by the court's instructions. Accord *Seabrooks, supra*.

Viewing the court's instructions in their entirety, there is no undue weight placed on the fact that defendant has an interest in the outcome of this case. The court's instructions were proper and did not give a "nonverbal indication" to the jury that the court believed defendant to be an incredible witness.

IV

Fourth, defendant argues that the court erred in permitting the prosecutor to argue to the jury that it was people like defendant who made Flint a dangerous place.

Defendant complains about the following passage from the prosecutor's closing argument:

> He admits to you that for coming to Flint he packs a weapon, a nine shot revolver. He knows he shouldn't do it, but he tells you Flint's a dangerous place. I think that's the most ironic thing I heard all – in this whole trial.
>
> Do you know why Flint's a dangerous place? Because of people like him, people who decide I'm going to carry a gun. And when the cops are after you I'm going to run. Well, you know why he runs; because he's got a gun.
>
> Flint's a dangerous place because you've got fools like this who shoot when they hear gunfire. You've got running gun battles because of people like him who are walking around heavily armed.

Defendant argues that this passage constituted an argument that the jury had a civic duty to convict defendant. While it is true that a prosecutor may not urge the jurors to convict the defendant as part of their civic duty, *People v Bahoda*, 448 Mich 261, 282-284; 531 NW2d 659 (1995), these comments make no such statement.

Our Supreme Court, in *Bahoda*, *supra* at 283, concluded that a number of comments made by the prosecutor about the size of the drug problem, the pervasive nature of the drug organization at issue in the trial, the amount and value of the drugs seized during the arrest, and the unique locations at which some of these drug transactions occurred were "permissible commentary on evidence admitted at trial." *Id*. at 283-284. The test was whether the prosecutor's comments "inject[ed] issues broader than the guilt or innocence of the accused under the controlling law." *Id.*

Similarly, in the present case, the prosecution's comments were simply in response to defendant's theory of the case. Defendant had, in fact, testified that he carried a gun and that he did so for his own protection because Flint is a dangerous place. Defendant explained that he knew it was illegal to have the gun, and when the police approached him, he knew that he had to run because he was not allowed to be carrying a weapon. Even if the prosecutor's comments rose to the level, as in *Bahoda*, where the prosecutor was commenting on the "pervasiveness" of the problem of violence in Flint because of those who carry guns, the state was not injecting issues beyond defendant's guilt or innocence. Moreover, the trial court's standard instruction that the jury must consider only the evidence and not the statements made by the lawyers in reaching its verdict would be sufficient to cure any minor prejudice that may have resulted from the prosecution's comments.

V

Finally, defendant argues that this case should be remanded to correct the judgment of sentence that has been erroneously interpreted as applying habitual offender status to all of defendant's sentences instead of just the two lesser sentences to which the court intended it to apply. Defendant argues that his judgment of sentence should be corrected to reflect the fact that he is only an habitual offender with respect to the lesser sentences and not the greater. He states that the Department of Corrections has erroneously interpreted the judgment of sentence in a way that does not differentiate between the habitual offender and the non-habitual offender sentences. Defendant's reasoning, however, is erroneous.

Defendant was sentenced as an habitual offender because he had previously committed another felony. The trial court had the authority and discretion, because of defendant's status as an habitual offender, to enhance his sentences or to impose a straight sentence from within the guidelines. The fact that the trial court chose to enhance the sentences with respect to the two lesser convictions and not with respect to the greater does not change defendant's status as an habitual offender. It is merely a reflection of the court's decision not to enhance his sentences. Accordingly, a remand for correction of the judgment of sentence is unnecessary.

We affirm.

/s/ Jane E .Markey
/s/ Richard A. Bandstra
/s/ Stephen J. Markman