

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ANTHONY MC SWAIN,

Defendant-Appellant.

UNPUBLISHED
December 9, 2004

No. 249206
Wayne Circuit Court
LC No. 03-000821-01

Before: Murray, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

This case arose from an incident that took place outside a Coney Island restaurant in Detroit. The main prosecution witness testified that he and his cousin were approaching the eatery when two men accosted them with guns. The complainant identified defendant as the man who pointed a gun at his cousin's head. The assailants took from the complainant his gray coat, ten dollars, and several other items. According to the complainant, several weeks later he was at work and spotted defendant in line as a temporary worker, wearing the gray coat that had been taken from him.

Defendant first argues that the prosecutor presented insufficient evidence to support his convictions. We review de novo the record to determine whether the prosecutor presented sufficient evidence to support defendant's convictions. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). When reviewing the sufficiency of evidence in a criminal case, we view the evidence of record in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *Id.*

Defendant points out that the complainant initially described the assailants to the police in ways that do not perfectly comport with defendant's physical characteristics, essentially arguing that the evidence did not support a finding that defendant was the perpetrator. However, the complainant unequivocally identified defendant at trial. The complainant's clear identification of defendant as one of his assailants was sufficient to support the jury's conclusion

that defendant was indeed responsible for the crimes. See *People v Newby*, 66 Mich App 400, 405; 239 NW2d 387 (1976). The jury exercised its prerogative to reject the alibi defense, and we will not disturb that conclusion. It is for the trier of fact to determine the weight of evidence and the credibility of witnesses. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). Furthermore, on appellate review any conflicts in the evidence are resolved in the prosecution's favor. *Id.* at 562. Therefore, defendant's argument that his convictions were not supported by sufficient evidence is without merit.

Defendant also asserts that the verdicts were contrary to the great weight of the evidence. Because defendant did not raise this issue in a motion for new trial, we review for plain error affecting defendant's substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Id.* at 218-219.

Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial. [U]nless it can be said that directly contradictory testimony was so far impeached that it "was deprived of all probative value or that the jury could not believe it," or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination. [*Id.* at 219, quoting *People v Lemmon*, 456 Mich 625, 645-647; 576 NW2d 129 (1998) (citations omitted).]

Defendant identifies no prosecution testimony that may be fairly characterized as patently incredible or in defiance of the laws of physics, and fails to show that setting aside the jury's verdict would have been justified, let alone that the trial court erred in failing to do so on its own initiative. At most, defendant's argument shows that there was conflicting evidence at trial. Defendant has failed to show plain error affecting his substantial rights.

Next, in his brief in propria persona, defendant challenges the trial court's qualification of a witness as an expert in the area of eyewitness identification. But the expert witness, who was a forensic psychologist, qualified as an expert on defense counsel's motion. Because defendant presented this witness as an expert, appellate objections in the matter are affirmatively waived, extinguishing any alleged error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Defendant cannot now be heard to complain.

Lastly, defendant contends that the prosecutor committed misconduct during his closing argument. The remarks defendant now takes issue with drew no defense objections at trial, leaving this issue unpreserved. Accordingly, we review for plain error only. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant argues that the prosecutor stated a personal belief that defendant was lying and vouched for a witness' credibility. We disagree. It was permissible for the prosecutor to argue from the evidence that defendant was not worthy of belief. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Nothing in the commentary of which defendant makes issue suggests that the prosecutor was urging the jury to suspend its own judgment and base its decision on the prosecutor's own extra-judicial insights into the crimes or the witnesses. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

Defendant also points out that the prosecutor reminded the jury that the defense expert opined that identifications tend to be more accurate when identifier and identified are of the same ethnicity, and that both defendant and the complainant are young African-American men. Defendant argues that such commentary was unfairly prejudicial, but fails to explain why it was improper for the prosecutor to capitalize on the defense expert's testimony. The prosecutor was free to argue all the evidence and reasonable inferences arising from it in support of his theory of the case. *Id.* at 282. We find no prosecutorial misconduct in this case.

Affirmed.

/s/ Christopher M. Murray

/s/ David H. Sawyer

/s/ Michael R. Smolenski