

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSHUA WILLIS,

Defendant-Appellant.

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UNPUBLISHED

June 3, 2008

No. 277653

Wayne Circuit Court

LC No. 06-014258-01

Before: Davis, P.J., and Murray and Beckering, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to six months to four years in prison for the assault conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm defendant's convictions but remand for resentencing.

Rayan Ali testified that he worked at a gas station in Detroit. It was his practice to screen customers before allowing them inside the building and then locking the door after admitting them. In the early morning hours of October 1, 2006, Ali let a customer inside and locked the door. Defendant drove up and tried to enter. He was holding an AK-47 inside his jacket; the muzzle was pointed at the ground. Defendant had been evicted several times before for stealing and Ali told him he was not going to open the door. When Ali picked up the phone to call the police, defendant pointed the gun at him. Afraid he would be shot, Ali put the phone back down. Defendant tried again, without success, to open the door and then left. A police officer arrived and took a report.

Ali testified that he saw defendant several more times after the incident. The first two times, Ali refused to open the door and called the police. The third time defendant showed up, he tried to convince Ali to open the door, saying, "Come on, I want to talk to you." Ali refused. Ten minutes later, the building and Ali's car were shot up. A police officer who investigated the incident testified that shell casings found at the scene were from a type of ammunition that could only be fired by an AK-47 or an SKS rifle.

Defendant testified that he was a regular customer of the gas station. He admitted that he went to the station on October 1 and tried to enter. When Ali would not open the door, he left.

He was not armed with a gun. Defendant admitted that he returned to the gas station after that incident.

Defendant first argues that the evidence was insufficient to support his convictions and that the verdict was against the great weight of the evidence. Defendant does not appear to dispute that Ali's testimony, if believed, was sufficient to prove each element of the crimes charged. He contends only that the trial court should not have believed Ali's testimony because it was not corroborated by the customer or by surveillance tapes, because an actual weapon was never recovered, and because Ali, who claimed to have known defendant, had told the police that his assailant was an unknown black male.

Witness credibility is a matter of weight, not sufficiency, of the evidence. *People v Scotts*, 80 Mich App 1, 9; 263 NW2d 272 (1977). The credibility of witness testimony is a matter for the trial court, as the trier of fact, to decide. *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991); *People v Jackson*, 178 Mich App 62, 64-65; 443 NW2d 423 (1989). This Court will not substitute its judgment for that of the trial court but will defer to the trial court's resolution of factual issues that involve the credibility of witnesses. *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997); *People v Martin*, 199 Mich App 124, 125; 501 NW2d 198 (1993). Further, conflicting testimony, even when impeached to some extent, is not a sufficient ground for granting a new trial absent exceptional circumstances. *People v Lemmon*, 456 Mich 625, 643-644, 647; 576 NW2d 129 (1998). Defendant has not shown that such circumstances are present here.

Defendant next contends that the trial court erred in admitting testimony about the subsequent shooting, arguing that it was not admissible under MRE 404(b). Defendant failed to preserve this issue for appeal because he did not object until after the evidence was admitted and did not object on the same ground asserted on appeal. *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997); MRE 103(a)(1). Therefore, the issue is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Houston*, 261 Mich App 463, 466; 683 NW2d 192 (2004).

Character evidence is not admissible when offered to prove that defendant acted in conformity with his character on a specific occasion. MRE 404(a). Similarly, other acts evidence is not admissible to prove character in order to show action in conformity therewith. MRE 404(b). It is, however, admissible for other purposes when material to an issue in the case. *Id.* In this case, the evidence was admitted for a proper purpose; it permitted an inference that defendant was the person who shot up the premises, which in turn permitted an inference that he assaulted Ali with a real weapon. Further, this was a bench trial in which the judge was presumed to have followed the law and to have ignored errors and decided the case on properly admitted evidence. *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988); *People v Farmer*, 30 Mich App 707, 711; 186 NW2d 779 (1971). Defendant has not shown that he is entitled to relief.

Defendant lastly argues, and the prosecutor agrees, that he is entitled to resentencing on the felonious assault conviction because the trial court departed from the guidelines range without stating a valid reason for departure.

Felonious assault is a Class F offense covered by the legislative guidelines. MCL 777.16d. A trial court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is permitted for substantial and compelling reasons. MCL 769.34(2). The guidelines as scored placed defendant in the A-II category, for which the minimum sentence range is zero to six months. MCL 777.67. When the upper limit of the applicable guidelines range is 18 months or less, “the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections.” MCL 769.34(4)(a). An intermediate sanction in this instance may include a jail sentence of up to six months, but it does not include a prison sentence. *Id.*; MCL 769.31(b); *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002). Because the trial court imposed a prison sentence without stating a substantial and compelling reason for doing so, defendant is entitled to resentencing. *People v Johnigan*, 265 Mich App 463, 477-478; 696 NW2d 724 (2005).

We affirm defendant’s convictions but remand for resentencing on the felonious assault conviction. We do not retain jurisdiction.

/s/ Alton T. Davis  
/s/ Christopher M. Murray  
/s/ Jane M. Beckering