

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
March 28, 2013

v

REGINALD HOLMES,
Defendant-Appellant.

No. 308370
Wayne Circuit Court
LC No. 11-007341-FH

Before: MURPHY, C.J., and O'CONNELL and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(iii). The trial court sentenced defendant to five years' probation on the convictions. We affirm.

Defendant's sole argument on appeal is that he is entitled to a new trial because his convictions are against the great weight of the evidence. We disagree.

A new trial may be granted if a verdict is against the great weight of the evidence. *People v Brantley*, 296 Mich App 546, 553; 823 NW2d 290 (2012). The determination of whether a verdict is against the great weight of the evidence requires review of the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). A verdict is against the great weight of the evidence if "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009).

Appellate review of findings of fact is for clear error. *People v Buie*, 491 Mich 294, 304; 817 NW2d 33 (2012). A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that an error occurred. *Id.* at 315-316.

Defendant claims that his convictions are against the great weight of the evidence because the convictions were based solely on the conflicting testimony of the officers. Moreover, defendant argues that the trial court incorrectly concluded that the narcotics recovered by officers in the backyard of a home owned by defendant were narcotics discarded by defendant. Rather, defendant contends that the narcotics in question were actually discarded by

another individual who claimed to have run out of the house when it was raided by police. Defendant's arguments fail.

“[T]o support a conviction for possession with intent to deliver less than fifty grams of cocaine, it is necessary for the prosecutor to prove four elements: (1) that the recovered substance is cocaine, (2) that the cocaine is in a mixture weighing less than fifty grams, (3) that defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the cocaine with intent to deliver.” *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). To establish that defendant committed the offense of possession with intent to deliver less than five kilograms of marijuana, “the prosecution had to prove beyond a reasonable doubt that (1) defendant knowingly possessed a controlled substance, (2) defendant intended to deliver the controlled substance to someone else, (3) the substance possessed was marijuana and defendant was aware that it was, and (4) the marijuana was in a mixture that weighed less than five kilograms.” *People v Williams*, 268 Mich App 416, 419-420; 707 NW2d 624 (2005).

With respect to whether a new trial is warranted on the basis that the verdict was against the great weight of the evidence, “[c]onflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial.” *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). Absent exceptional circumstances, the issue of witness credibility and the weighing of conflicting testimony should be left to the trier of fact. *Lemmon*, 456 Mich at 642-643. The exceptional circumstances recognized in *Lemmon* are as follows: (1) the testimony contradicts indisputable physical facts or laws; (2) the testimony is patently incredible or defies physical realities; (3) the testimony is so inherently implausible that it could not be believed by a reasonable juror; or (4) the testimony has been seriously impeached and the case is marked by uncertainties and discrepancies. *Id.* at 643-644.

In *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001), this Court held that despite discrepancies among witness descriptions of the assailant and the defendant's appearance, in reviewing the entire record, the verdict was not against the great weight of the evidence. The defendant was convicted following a bench trial of assault with intent to commit murder, two counts of assault with intent to commit armed robbery, and possession of a firearm during the commission of a felony. *Id.* at 633. While on patrol, two officers had observed two men lying face down on the ground and another man standing over them, holding a weapon. *Id.* at 634. The assailant ran toward a waiting vehicle and took off in the vehicle. *Id.*

The officers pursued the vehicle, and when it came to a stop, the assailant fled on foot. *Id.* One officer chased the assailant, and during the pursuit, the assailant shot the officer. *Id.* At trial, testimony was introduced that there had been three men in the fleeing vehicle, including the assailant. *Id.* The defendant testified that he was present at the scene of the attempted robbery, but he claimed that he remained in the back seat of the vehicle and that one of the other men had actually committed the attempted robbery and subsequently shot the officer. *Id.* The individual who the defendant claimed was the assailant testified that he was the driver and that it was defendant who committed the crimes. *Id.* This Court concluded that the discrepancies did not preponderate so heavily against the verdict that it would be a miscarriage of justice to let the verdict stand. *Id.* at 638.

In this case, based on the whole body of proofs, defendant's convictions of possession with intent to deliver less than 50 grams of cocaine and possession with intent to deliver less than five kilograms of marijuana are not against the great weight of the evidence. An officer had arranged for a controlled buy using an informant that was successful in the purchase of cocaine at the home owned by defendant. One week later, after a second controlled buy was unsuccessful, the officer observed an amount of traffic going to the home that was consistent with a narcotics operation. During a subsequent raid, three officers testified that they observed defendant run out of the back of the house, and two of them saw defendant discard the marijuana and cocaine by the back porch. There was one bag that contained 26 smaller baggies of marijuana and which also contained a pill vial filled with eight ziplock baggies of cocaine. The officers were paying close attention to defendant because his name and picture were listed in the search warrant. The officers pursued and caught defendant three to four houses away in an alley. The discarded items included 13 pink ziplock baggies containing marijuana. A police sergeant testified that colored ziplock bags were indicative of delivery of narcotics.

To the contrary, defendant testified that he was working on the backyard fence with another individual at the time of the raid. This person testified that he was with defendant at all times and that he did not see defendant run from the home as claimed by police. In addition, defendant presented the testimony of yet another individual who asserted that he ran out of the house and discarded 13 or 14 bags of marijuana. However, on cross-examination, the individual admitted that the 26 baggies of marijuana and the vial of cocaine were not his drugs. Defendant testified that he did not run from the officers because he was not capable of running due to a plate in his leg. However, on cross-examination, there was testimony that called into question this assertion.

Despite defendant's argument that the conflicting testimony entitles him to a new trial, conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial. *Unger*, 278 Mich App at 232. This case does not involve any exceptional circumstance as recognized in *Lemmon* that would justify us disturbing the trial court's findings. See *Lemmon*, 456 Mich at 643-644. Just as in *McCray*, the evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. Therefore, defendant is not entitled to a new trial.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Jane M. Beckering