

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
May 23, 2013

v

MARK ANTHONY SWAIZEY,
Defendant-Appellant.

No. 308710
Wayne Circuit Court
LC No. 11-004956-FC

Before: JANSEN, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

Defendant was originally charged with first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. Following a bench trial, the trial court convicted defendant of the lesser offense of second-degree murder, MCL 750.317, and acquitted him on the felony-firearm charge. Defendant was sentence to serve 255 to 500 months in prison. He now appeals and we affirm.

Defendant first argues that the trial court’s finding him guilty of second-degree murder was against the great weight of the evidence. We disagree. A new trial may be granted when “a verdict or decision [is] against the great weight of the evidence.” MCR 2.611(A)(1)(e). “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 it to stand.” *People v Reid (On Remand)*, 292 Mich App 508, 513; 810 NW2d 391 (2011). Absent exceptional circumstances, an issue of witness credibility should be left for the trier of fact. *Lemmon*, 456 Mich at 642-643. Further, deference must be given to the trial court’s superior ability to assess the credibility of witnesses. MCR 2.613(C); *Amb’s v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003).

In making his argument that the trial court’s verdict was against the great weight of the evidence, defendant relies primarily on the trial court’s evaluation of the witnesses’ credibility. In doing so, defendant points to some inconsistencies between the testimony of various witnesses at trial and their previous statements. But, although it is true that some of the witness testimony given at trial contradicts some of the statements that were made to the police prior to trial, those contradictions are relatively minor. The witnesses consistently testified to the following: (1) defendant’s car and a Tahoe were parked near Shalonda Richmond’s house, (2) they knew there was a gun present, (3) defendant said “shoot,” (4) the gun was fired by the man with braids, and

(5) Tyrell Taylor was shot. Further, Frederick Walker's testimony confirms that testimony given by the other witnesses. Walker testified that he (1) saw a GMC SUV and defendant's car parked near Shalonda's house, (2) saw a light-skinned male get out of the GMC with a gun in his hand, (3) saw this man turn and point the weapon across the street, and (4) heard two to three shots and then heard someone across the street firing.

Ultimately, this case comes down to questions of witness credibility, and the trial judge found the witnesses credible. Absent exceptional circumstances, an issue of witness credibility should be left for the trier of fact. *People v Lemmon*, 456 Mich 628, 642-643; 576 NW2d 129 (1998). The "exceptional circumstances" standard was set forth in *Lemmon* by the Michigan Supreme Court. There, the court stated that exceptional circumstances exist where the testimony "contradicts indisputable physical facts or law," "is patently incredible or defies physical realities," "is material and is so inherently implausible that it could not be believed by a reasonable juror," or "has been seriously 'impeached' and the case marked by 'uncertainties and discrepancies.'" *Id.* at 643-644. Exceptional circumstances, however, are not necessarily found just because the trial judge rejects "all or part of the testimony of a witness or witnesses." *Lemmon*, 456 Mich at 644, citing *United States v Sanchez*, 969 F2d 1409, 1414 (CA 2, 1992).

Furthermore, "conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Lemmon*, 456 Mich at 647. Here, we have just that: some conflicting testimony and minor impeachment. Moreover, Walker's testimony corroborates the relevant portions of the other witnesses' testimony as to Tyrell's death and defendant's involvement. Consequently, there is not enough evidence in the record to overcome the deference that is granted to the trial judge in determining the credibility of these witnesses. Therefore, there is insufficient grounds for granting a new trial based upon the trial court's decision being against the great weight of the evidence.

Next, defendant argues that the trial court rendered inconsistent decisions by convicting him of second-degree murder, but acquitting him of felony-firearm. We disagree.

While it is true that juries "are not held to any rules of logic nor are they required to explain their decisions," it is also true that these "considerations change when a case is tried by a judge sitting without a jury." *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980). A trial court, sitting without a jury, cannot "enter an inconsistent verdict." *People v Alonzo Walker*, 461 Mich 908; 603 NW2d 784 (1999); *People v Ellis*, 468 Mich 25, 26; 658 NW2d 142 (2003).

The trial court found that the elements of second-degree murder under a theory of aiding and abetting were met. The Taylor family and defendant fought on Griggs Street, often with violence, over a period of time. Defendant threatened the Taylor family with violence before the day of the killing. Most importantly, when the gunman arrived, defendant told him to shoot. In doing so, defendant had the intent to kill or at least to cause great bodily harm. Ultimately, the victim's death was the result of that shot.

While the trial court may have taken a more narrow interpretation of aiding and abetting as to the felony-firearm charge, requiring more than was required by law, its findings of fact cannot be said to be inconsistent with its verdict. This Court used reasoning in *People v Smith*, 231 Mich App 50, 52-53; 585 NW2d 755 (1998), that can be applied to this case:

It is unclear whether the trial court dismissed the felony-firearm count because it was under the impression that a gun had to have been introduced into evidence . . . or the court simply was affording defendant a measure of leniency to relieve him of a mandatory sentence. In any event, it is clear that the court had no doubt that a weapon was used in the assault, and the dismissal of the felony-firearm count was not based on a reasonable doubt whether a gun had been used, but on some misapplication of the law. Under these circumstances, where there is no factual inconsistency, we will not set aside defendant's conviction of an offense of which he was clearly found guilty beyond a reasonable doubt.

Ultimately, the trial court found enough evidence to return a guilty verdict as to second-degree murder and not guilty as to felony-firearm when it held the following:

I believe that the testimony, . . . and the words that were used by Mr. Swaizey, convinced me that there was an aiding and abetting situation. I believe that it wasn't necessarily, by the evidence that was presented, proven beyond a reasonable doubt that it was deliberate, premeditated. And so, I will find that, at least in my belief, that there was an act done where the knowing and likely consequence of the act, the shooting of Mr. Taylor was done, knowing that it would cause death or great bodily harm. And so, I am going to return a verdict of guilty of second degree murder, not guilty of felony firearm.

In sum, any inconsistency between the trial court's verdicts weighed in defendant's favor. That is, while there is arguably a factual inconsistency between the trial court's factual findings and the "not guilty" decision on the felony-firearm charge, there is no factual inconsistency between the trial court's factual findings and the guilty verdict on the murder charge. Therefore, reversal is not required.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Deborah A. Servitto