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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000158-MR

MICHELE RAE NAPIER

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE RON JOHNSON, JUDGE
ACTION NOS. 02-CR-00035 AND 02-CR-00035-0

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: LAMBERT AND THOMPSON, JUDGES; KNOPF,¹ SENIOR
JUDGE.

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

LAMBERT, JUDGE: Michelle Napier appeals from an order of the Whitley Circuit Court denying her motion for a new trial. For the reasons stated herein, we affirm.

On March 11, 2002, the Whitley Circuit Court returned an indictment charging James Wesley Napier with murder for shooting and killing Roger “Cotton” Adams on or about October 7, 1984. In the same indictment, Michelle Napier was charged with criminal complicity to commit murder in connection with Adam’s 1984 death.

The Kentucky Supreme Court summarized the facts from Michelle’s trial as follows:

On March 11, 2002, the Whitley County Grand Jury issued an indictment charging James Wesley Napier ([James]) with murder and Appellant, Michelle Napier [Michelle], with Complicity to Commit Murder, for the October 7, 1984, shooting death of Roger “Cotton” Adams (Adams). At the time of the shooting, [Michelle] was dating [James]. They were married approximately six months later. At [Michelle’s] request, she and [James] were tried separately, with [Michelle] having been tried first.

[Michelle] was twenty-three (23) in October of 1984. Her sister, Sherri Long (Sherri), was nineteen (19). At the time, Sherri was dating Adams and living in a motel room with Adams, Martin Monholland (Monholland), and Marvin Luttrell (Luttrell).

According to Monholland, on October 4, 1984, he and Adams were just outside the open door to the motel room working on a car when they heard a gunshot from the

motel room. Monholland immediately ran inside and found Sherri, who he believed, had shot herself in the right temple. Luttrell was in the bathroom. Monholland then called the police. Marilyn, Sherri and [Michelle's] mother, later testified, however, that Sherri was left handed. However, no charges were filed in Sherri's death as it was treated as a suicide.

Shortly after Sherri's funeral, Adams disappeared. His body was found several weeks later by a fisherman in Cabin Creek. He had been shot once in the forehead and his body was wrapped in chains. Years later, on February 19, 2002, [Michelle] was interviewed by Joie Peters of the Kentucky State Police. The tape of that interview was played in full for the jury during the trial.

In the interview, [Michelle] acknowledged that she believed someone murdered Sherri, noting that Sherri was left-handed, yet she was shot in the right temple, with no powder burns on her hands and no fingerprints on the gun. She thought that one of the three persons present had killed her. She noted that Adams did not come to the funeral, but admitted that after she and [James] left the cemetery following Sherri's burial, they saw Adams, stopped and asked him if he wanted to see Sherri's grave, which he did, so they drove him back to the cemetery.

When they got to the cemetery, [Michelle] walked to Sherri's grave. Adams, however, did not follow her. Then, as she knelt by the grave, she heard a "pop," looked back and saw [James] standing by his white Lincoln Town car with the door open. He told her to "come on." When she got to the car, [James] said to her, "are you okay with it?" She looked in the back seat and saw Adams dead. She thought [James] had a .38 caliber pistol.

When the officer asked her again what [James] had said, she repeated that he had asked her if she was "okay with

it” because “if you're not, I'll have to do you too.” She indicated that she said, “[she] was okay with it, because [she] was afraid.” According to her statement, [James] then dropped her off at a woman's house, whose name she could not recall, and she ultimately ended up at her mother's house. She also stated that [James] later got Ed Sizemore (Sizemore) to clean the car up. Sizemore testified at trial as to his attempts to clean the car and the assistance he gave [James] in disposing of Adams' body.

[Michelle] noted that she was not married to [James] at the time of the alleged murder, but married him later when she was pregnant and he was in jail. She said they were still married, but she wanted a divorce, so she could have a real marriage, but acknowledged she would then have to testify against him.

She also stated that a few months before the interview, [James] had come to see her and took her to Williamsburg to his sister's house, where his sister tried to get her to say that she had committed the murder, reasoning that since [James] had money, he could take care of her daughter (who was living with him) better than she could; however she refused. She also reiterated that she was afraid of [James] and that when he found out that she had given a statement, “[she] would be dead, or her mother would be, or somebody.” [James] did not testify at [Michelle's] trial.

Officer Powers testified that [Michelle] did appear to be afraid of [James] during the interview. He also testified that [James] drove up during the interview, but fled before he could arrest him. He was arrested later in 2005, approximately a year before the trial, in August 2006.

Sizemore testified that he drove a truck for [James] and, at various times, had been related to him through several marriages. He testified that in October 1984, [James] brought his white Lincoln Town car to him and asked him if he would clean it up and he agreed. He believed it

was late at night. At the time, he noticed that Napier had what appeared to be spots of blood on his pants, which [James] said was rust.

Although he at first testified that “Marilyn” ([Michelle] and Sherri's mother) was with [James] that night and that it was his “understanding that she had dropped him off, then came back later and picked him up,” the Commonwealth pointed out “Marilyn” was [Michelle's] mother, then reiterated the question, asking if [Michelle] was with [James] that night when he came to see him. Sizemore then answered, “yes.”

Sizemore testified that he left town for a little while, but when he got around to cleaning the car a couple of days later, it was in [James'] mother's driveway. There was a mess in the floor and under the mat. When asked what it looked like, he testified “flesh” and added, “[w]hat was left of a man's head, I guess.” He testified he tried to clean it up, but could never get rid of the foul smell and worked on it for two days, but never opened the trunk. At one point, he overheard [Michelle] state to [James'] sister, Carol, that there was a body in the trunk, that it was Adams' body and that she had killed him. According to Sizemore, she said she had reached across the back seat and shot him. [James], however, told Sizemore that he had killed Adams and put him in the trunk.

Sizemore said that [James] later suggested that they get rid of the body and Sizemore suggested the place to dispose of it. He then described how he and [James] had gotten rid of the body, wrapping it with a logging chain and dumping it in the water at a fishing hole in Cabin Creek, where he used to fish.

Monholland, who testified about Sherri's death, also testified that he went to the funeral home the night before her funeral and while there, [James] wanted him to go outside and talk, but he did not go. He became concerned and had his sister bring the car around and they left. He

also noted that when he entered the funeral home, he heard [Michelle] screaming. He assumed it was because he was there. While there, [Michelle], however, did not approach him, only [James].

Monholland did testify, however, that [James] and [Michelle] followed him and his sister in the white Lincoln Town car when they left. After a while, however, he pulled his car over onto the shoulder and got out holding his gun. [James] drove on by. He acknowledged that he did not attend the funeral for Sherri, since he “knew not to.”

The last time he saw Adams was the night before they were supposed to go to court on a public intoxication (PI) charge, which apparently was the Monday following Sherri's Sunday funeral. He went to Adams' motel that morning to get him to go to court, but no one answered the door. Once he got the motel operator to let him in, he looked in the room. Adams was not there and his bed had not been slept in.

Larry Adams, Adams' brother, testified that he also visited the funeral home before Sherri's funeral. When he was leaving, headed for his car, he overheard [Michelle] tell [James], “[that's] not [Adams] that's his brother.” To him, it was an eerie experience as they were “staring holes through him.”

The next day Larry received a phone call from [Michelle] and Sherri's mother. About halfway through the conversation, based upon what she said, he immediately felt Adams was dead. Larry then tried to locate his brother and the next day called the police. He testified later on rebuttal, that Marilyn, in this tearful telephone conversation had told him “I'm so sorry they have hurt your brother ... [he] didn't deserve that.”

The Commonwealth also called Dr. George Nicholls, a forensic pathologist, who had performed the autopsy on

Adams. Dr. Nicholls testified that Adams was killed by a .38 caliber bullet which struck him in the head. He found an additional bullet in Adams' diaphragm, but noted that it had been from a previous shooting, possibly a long time prior to the date of his death. He did not find any corresponding gunpowder residue around the bullet wound to the head, nor was there any suet present around the skin. Therefore, he believed the muzzle to target distance of the gunshot exceeded the length necessary to produce gunpowder residue and suet. He did not state his belief as to the actual distance.

Napier v. Commonwealth, 2008 WL 3890163 (Ky. 2008).

The jury found Michelle guilty of complicity to commit murder and recommended a sentence of twenty years. The trial judge sentenced Michelle per the jury's recommendation, and her conviction was affirmed on appeal to the Kentucky Supreme Court.

On April 24, 2007, while Michelle's direct appeal was still pending, James pleaded guilty to the amended charge of manslaughter in the first degree. While under oath, the trial judge asked James about the murder and he stated:

We were coming back from the funeral [interrupted by Judge] we were coming back from the funeral, we were coming through Corbin and we met Cotton there and we was talking to him and took him out to the graveyard to see Sherri's grave, he hadn't been out there. When me and him come back to the car and Michelle was still at the grave, I shot him.

I didn't plan on shooting him. What happened was, to me what he did [unintelligible] to that little girl [unintelligible]. When we got back to the car and she's a

kneel up there at the grave and he's sittin' there looking at me [unintelligible], I just shot him, your Honor.

James stated that he brought a gun to the scene, and Adams was in the backseat and James was in the front seat of the vehicle when James shot Adams. James testified that Michelle knew James had a gun at the time, and Michelle did not have a weapon.

The trial judge continued to ask James questions, and James stated that after shooting Adams, he rolled down the vehicle's window and told Michelle to "come on." When Michelle got to the vehicle, she had no reaction because she was on drugs at the time. With the dead body in the backseat, Michelle and James drove to Berea, where James then wrapped the body in chains and disposed of it in a creek in Estill, County, Kentucky. The next day, James recruited a friend to clean the backseat. According to James, while he did not tell Michelle where he dumped the body, he did tell her he had gotten rid of it.

On May 17, 2007, James appeared before the trial judge for sentencing, and prior to sentencing James to fourteen years' imprisonment per the terms of his plea agreement, the trial judge again questioned James. This questioning focused on why James waited to come forth with his testimony that Michelle was not involved in Adam's shooting. James' response indicated that he was scared of going to prison and thought he could better care for his and Michelle's child. Despite testifying previously that he brought the gun to the

scene, James testified that he killed Adams on the spur of the moment and that Michelle knew nothing about the shooting until afterward, when James asked her if she was okay with it. James denied threatening Michelle and stated that she was “out of it” because she was on drugs given to her by her mother.

At the conclusion of James’ sentencing, counsel for Michelle approached the bench and filed her new trial motion, arguing James’ statement during his guilty plea colloquy and sentencing constituted newly discovered evidence. The motion totaled two pages and did not contain an affidavit from Michelle or her counsel. After that motion was filed, the Commonwealth filed its response, and another reply was filed in support of the motion for a new trial (again without any affidavits). The Commonwealth filed a second memorandum opposing the motion.

By order entered November 16, 2007, the trial judge denied the motion for a new trial. Neither the Commonwealth nor Michelle received this order until January 2008, by which time the period in which to file a notice of appeal had expired. A motion for a belated appeal was filed and granted by this Court on January 6, 2009. This appeal now follows.

On appeal, Michelle’s only argument is that the trial court should have granted her motion for a new trial, based upon what she calls the “newly discovered evidence” of James testifying that she was not involved in Adams’

murder. The Commonwealth argues that Michelle's motion for a new trial was procedurally defective and that even if the motion were proper, James' statement was not "newly discovered evidence" and would not change the verdict in Michelle's case.

The granting of a new trial is warranted in circumstances where a defendant was somehow prevented from having a fair trial, or if otherwise required in the interests of justice. Rule of Criminal Procedure (RCr) 10.02(1). It is well-accepted that the standard for adjudging whether a new trial is warranted based upon newly discovered evidence is whether such evidence carries a significance which "would with reasonable certainty, change the verdict" or would probably change the result if a new trial should be granted. *See e.g., Collins v. Commonwealth*, 951 S.W.2d 569, 576 (Ky. 1997) (quoting *Coots v. Commonwealth*, 418 S.W.2d 752 (Ky. 1967)); *Caldwell v. Commonwealth*, 133 S.W.3d 445, 454 (Ky. 2004). Likewise, Kentucky courts have consistently held that evidence which is merely cumulative, collateral, or which impeaches a non-material witness is insufficient to warrant a new trial. *See Foley v. Commonwealth*, 55 S.W.3d 809, 814 (Ky. 2000).

"Whether to grant a new trial on the basis of newly discovered evidence is largely within the discretion of the trial court, and the standard of review is whether there has been an abuse of that discretion." *Id.* Finding no

abuse of the trial court's discretion, we affirm the trial court's order denying Michelle's motion for a new trial.

We agree with the Commonwealth that Michelle's motion for a new trial is likely defective, although such ruling was not made by the trial court. Michelle failed to tender any sort of affidavit with her motion for a new trial and this, by itself, is likely fatal to the motion. *See Spradlin v. Commonwealth*, 473 S.W.2d 818, 819 (Ky. 1971) ("They allege in their motion and grounds for new trial that they have newly discovered evidence but nowhere do they, by affidavit or otherwise, set out the substance of the evidence. In the absence of such affidavit a motion is fatally defective."). Furthermore, it is settled that a movant herself must tender an affidavit with her motion "showing diligence in attempting to discover the new evidence before the first trial." *Wheeler v. Commonwealth*, 395 S.W.2d 569, 571 (Ky. 1965); *Collins v. Commonwealth*, 951 S.W.2d 569, 576 (Ky. 1997) ("A motion for a new trial based upon newly discovered evidence must be accompanied by an affidavit showing that Appellant exercised sufficient diligence to obtain the evidence prior to trial."). The rationale for this requirement was explained in *Wheeler*:

It is contended for Wheeler that there is no reasonable basis for a rule requiring the defendant himself to make an affidavit when it is done by his attorney. This overlooks the fact that the affidavit is in the nature of the testimony. Counsel cannot speak for his client in the sense of giving the client's testimony. On the question of

newly discovered evidence it is necessary that the diligence of both be shown...And again, as in the instance of the others, counsel's diligence in this respect is not necessarily tantamount to diligence on the part of Wheeler himself.

Wheeler, 395 S.W.2d at 571-72.

Here, no affidavit was filed with Michelle's motion. Neither Michelle nor her counsel explained in a sworn statement what efforts they made to secure the statement at issue. Given that James did not testify at Michelle's trial, it is not evident that she made any effort to seek out his statements or this evidence during her trial. While Michelle states in the motion prepared and filed by her counsel that at the time of her trial, James "had made no statement indicating the extent of his involvement and was himself under indictment," this does not speak to anyone's diligence to determine whether this "made no statement" assertion was actually true, and does not explain whether Michelle made any efforts to seek out her husband's testimony at her trial.

Even if Michelle's motion for a new trial were proper, James' statement was not newly discovered evidence, and thus a new trial was not warranted. In a case similar to the case at bar, a panel of this Court recognized the majority position that "previously unavailable evidence does not become 'newly discovered evidence' upon becoming available" and "[w]hen a witness who has chosen not to testify subsequently comes forward to offer testimony exculpating a

defendant, the evidence is not ‘newly discovered.’ ” *Carwile v. Commonwealth*, 694 S.W.2d 469, 470 (Ky. App. 1985). In *Carwile*, the appellant was convicted of murder and sought a new trial based on newly discovered evidence, specifically the affidavit of the appellant’s brother stating he (the appellant) acted in self defense when the victim was killed. *Id.* Applying the “majority” position to the facts before it, the Court ruled the affiant’s testimony “was or should have been known to appellant at the time of the trial when he sought, unsuccessfully, to call him as a witness” and the affiant’s “claimed willingness to testify now does not constitute newly discovered evidence.” *Id.*

In the instant case, James’ statement was or should have been known to Michelle before trial, particularly since she was no stranger to the events leading up to the shooting, the shooting itself, and the aftermath. Further, there is nothing in the record or in Michelle’s affidavits (which were never filed) indicating that Michelle even sought to present James’ testimony at her trial. James’ willingness to shift all the blame to himself after pleading guilty to a lesser offense does not constitute newly discovered evidence. *See Carwile*, 694 S.W.2d at 470.

Finally, even if James’ statement was “newly discovered evidence,” it is not evidence that carries a significance which would with reasonable certainty change the verdict’ and would not likely change the result if a new trial were granted. *See Bedingfield v. Commonwealth*, 260 S.W.3d 805, 810 (Ky. 2008).

“[N]ewly discovered evidence that merely impeaches the credibility of a witness or is cumulative is generally disfavored as grounds for granting a new trial.” *Id.* at 814.

James’ statement indicates what Michelle already claimed in her trial, that James killed Adams and that Michelle only played a minor part in the death. While James claims that Michelle had nothing to do with the murder, the other facts indicate that she and James planned to kill some of the men in the room with her sister when she died, if not all of them, and that Michelle knew James was going to commit the murder ahead of time. Thus, we cannot discern how James’ statement that Michelle had nothing to do with the actual shooting of Adams will change the outcome of her trial. Michelle presented such evidence through other witnesses and by playing her taped statement for the jury at trial.

Michelle’s counsel specifically stated that Michelle’s statements and James’ statement were similar in the motion for a new trial:

The statement of James Napier . . . is identical in almost all respects with the video statement of Michelle Napier which was offered as evidence by the Commonwealth. Had the testimony of James Napier been available to corroborate Michelle’s statement

As set forth in Michelle’s motion for a new trial, her statement and James’ statements are “identical in almost all respects,” and thus, the “new evidence” is cumulative, at best. James’ statement does not warrant a new trial and would not

likely change the outcome of Michelle's trial were it introduced. As the Kentucky Supreme Court recognized, there was ample evidence to sustain the jury's verdict that Michelle conspired with James to kill Adams. James' statement, assuming it is even believable, would not undermine this evidence, particularly considering the jury heard Michelle by video indicate that James killed Adams, which is exactly what James' testimony purports to say.

In summation, Michelle's motion for a new trial was likely defective, as it contained no affidavit in support of the motion and no statements certifying that Michelle and her counsel sought out the statements from James' prior to her trial. Even if the motion were not defective on its face, James' statement does not constitute newly discovered evidence and would not have changed the outcome of Michelle's trial with reasonable certainty. Thus, we find no abuse of discretion in the trial court's denial of Michelle's motion for a new trial, and we affirm the November 16, 2007, order of the Whitley Circuit Court in its entirety.

KNOPF, [SENIOR](#) JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS AND FILES SEPARATE
OPINION.

THOMPSON, JUDGE, CONCURRING: I concur in the result and write separately to emphasize that a defendant must file an affidavit with her motion for a new trial due to the discovery of new evidence if she is to be granted

relief from a prior judgment. *Commonwealth v. Carneal*, 274 S.W.3d 420, 432 (Ky. 2008). The purpose of the affidavit is to demonstrate that the defendant exercised sufficient diligence to obtain the newly discovered evidence prior to trial. *Id.* Here, ignoring the question as to whether the substance of James's plea testimony constituted newly discovered evidence, the appellant's complete failure to demonstrate her reasonable diligence regarding the acquisition of this evidence is fatal because it left this question to the whims of speculation.

Further, I believe that the trial court as finder of fact is in the best position to judge the credibility of James's testimony regarding the appellant's participation in the death of Roger Adams. *McQueen v. Commonwealth*, 721 S.W.2d 694, 698 (Ky. 1986). From its colloquy with James, the trial court clearly had great reservations about the timing of James's confession, accepting sole responsibility for Adams's death. The trial court also informed the prosecutor that there was evidence contradicting James's confession. Based on these facts and the high burden required to warrant a new trial, the trial court did not abuse its discretion by denying the appellant's motion for a new trial. *Commonwealth v. Harris*, 250 S.W.3d 637, 640-41 (Ky. 2008).

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