

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTINEZ FELDER,

Defendant-Appellant.

UNPUBLISHED

May 11, 2001

No. 220269

Wayne Circuit Court

LC No. 99-000837

Before: Hood, P.J., Doctoroff and K.F. Kelly

PER CURIAM.

After a bench trial, defendant was convicted of assault with a dangerous weapon (felonious assault), MCL 750.82; MSA 28.277. Defendant was sentenced to two years' probation with the first thirty days to be served in the county jail. Defendant appeals as of right. We affirm.

I. Basic Facts and Procedural History

On December 15, 1998, defendant confronted complainant at work. At the bench trial, complainant testified that defendant threatened her with a gun during the confrontation. However, after the trial concluded and after defendant was found guilty of the charged offense, complainant subsequently recanted her trial testimony in a sworn affidavit. Defendant contends that complainant's recanting affidavit constitutes newly discovered evidence and that the trial court abused its discretion when it denied defendant's motion for a new trial. We disagree.

II. Defendant's Motion for New Trial¹

¹ We note here that in defendant's brief on appeal, in the first argument defendant submits that the trial court "abused its discretion" by denying "[d]efendant's motion for judgment notwithstanding the verdict and motion for new trial based on newly discovered evidence." Defendant then proceeds only to argue the merits on the trial court's denial of defendant's motion for new trial and abandons his claim that the trial court erred by not granting defendant a JNOV. A trial court's denial of a judgment notwithstanding the verdict is reviewed de novo by this court and not reviewed for an abuse of discretion as defendant submits. *Abke v Vandenberg*, 239 Mich App 359; 608 NW2d 73 (2000). Since defendant did not advance his argument that the trial

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A post conviction ruling granting or denying a new trial based on newly discovered evidence is reviewed for an abuse of discretion. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). A court may grant a new trial based on newly discovered evidence, where the party requesting the relief establishes that: (1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is not merely cumulative, (3) the evidence is such as to render a different result probable on retrial, and (4) the defendant could not with reasonable diligence have produced it at trial.” *Id.* When a witness testifies in a trial and after trial recants her testimony, the information contained in her recanting affidavit, “[i]f newly discovered, can form the basis for the granting of a new trial . . .” *People v Burks*, 30 Mich App 102, 103; 186 NW2d 18 (1971). See also, *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994) (stating that “[t]he discovery that testimony introduced at trial was perjured may be grounds for a new trial.”).

Notwithstanding, “[w]here newly discovered evidence takes the form of recantation testimony, it is traditionally regarded as suspect and untrustworthy.” *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992). In fact, the *Canter* Court observed that “[t]here is no form of proof so unreliable as recanting testimony.” *Id.* at 559. Accordingly, the courts of this State are reluctant, at best, to grant motions for new trials based on recanting testimony. *Id.*, at 560. However, when this Court considers whether the trial court abused its discretion by denying a motion for a new trial under these circumstances, it is incumbent upon this Court to give “[d]ue regard . . . to the trial court’s superior opportunity to apprise the credibility of the recanting witness and other trial witnesses.” *Id.*

In the case at bar, we find that the trial court did not abuse its discretion when it determined that the complainant’s subsequent recanting affidavit was unreliable. A review of the record in this matter relating to the circumstances immediately preceding complainant’s recantation amply supports the trial court’s finding that defendant engaged in inappropriate and harassing behavior toward complainant which indicated that defendant coerced the complainant into recanting her trial testimony. The record established that defendant contacted the complainant four times by telephone, followed the complainant in her vehicle, proceeded to confronted her in the presence of her children, and drove by the complainant’s home. In fact, during the evidentiary hearing, the complainant testified that she was afraid and that she agreed to recant her trial testimony because she wanted no further contact with defendant, did not want him following her, calling her, or otherwise harassing her. The trial court determined that the complainant’s trial testimony was more credible than her statements contained in the recanting affidavit. Thus, we find no error requiring reversal on this issue.

Next, defendant asserts that a new trial must be granted to prevent a miscarriage of justice. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). In support of his argument, defendant essentially assails the complainant’s credibility. Defendant merely points to contradictions between complainant’s trial and evidentiary hearing testimony and the information

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court erred by failing to grant his motion for JNOV beyond a conclusory statement to that affect, we only analyze defendant’s argument that the trial court erred by denying defendant’s motion for a new trial.

contained in her affidavit. This court must defer to the trial court's superior ability to assess the credibility of the witnesses testifying before it. *Canter supra* at 560. Since we already determined that the trial court's determination as regarding the complainant's credibility did not rise to the level of an abuse of discretion, beyond that, defendant has not demonstrated the requisite miscarriage of justice required to reverse the trial court's decision.

Defendant further alleges that the trial court violated his rights pursuant to the Fifth and Sixth Amendments to the United States Constitution, and Const 1963, art 1, § § 17 and 20 by refusing to provide a new trial in which he could present the recanting affidavit to a jury for their consideration and subject the complainant to cross-examination thereupon. Defendant argues that by not granting his motion for a new trial, the trial court effectively deprived him the right to present evidence in his defense thus violating the federal and state constitutions. To that end, defendant argues that a new trial is necessary to permit a jury to evaluate complainant's affidavit along with her trial testimony. We do not agree. The trial court conducted a full evidentiary hearing when presented with the recanting witness' affidavit in conjunction with defendant's motion for a new trial. After hearing all of the testimony, the trial court made a factual finding that defendant pressured the complainant into swearing out the recanting affidavit and further determined that the witness' trial testimony was more credible than her statements contained in the affidavit. The trial court did not commit a palpable abuse of discretion mandating reversal.

III. Defendant's Waiver of a Trial by Jury

A trial court's determination that a defendant validly waived his constitutional right to a trial by jury is reviewed for clear error. *People v Leonard*, 224 Mich App 569; 569 NW2d 663 (1997). The right to waive a trial by jury in a criminal matter is not a right secured by the constitution, but rather arises solely by statute. *People v Kirby*, 440 Mich 485; 487 NW2d 404 (1992). MCL 763.3; MSA 28.856 provides in pertinent part that:

In all criminal cases . . .the defendant may, with the consent of the prosecutor and approval by the court, waive a determination of the facts by jury and elect to be tried before the court without a jury. Except in cases of minor offenses, the waiver and election by a defendant shall be in writing signed by the defendant and filed in the case and made a part of the record.

* * *

(2) Except in cases of minor offenses, the waiver of trial by jury shall be made in open court after the defendant has been arraigned and has had opportunity to consult with legal counsel.

MCR 6.402(B) sets forth the procedure to effect a valid waiver of a jury trial:

Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to a trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and

that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding.

In the instant case, the trial court advised defendant that he had a constitutional right to have his case tried by a jury, and determined that defendant understood this right, that defendant voluntarily chose to have his case tried by the court, and that he had the opportunity to consult with counsel. The court inquired whether the defendant had any questions “[a]bout [his] right to a trial by jury or giving up that right” to which defendant responded in the negative. The defendant, defense counsel, and the prosecutor signed and completed a waiver form as prescribed by MCL 763.3; MSA 28.856 and that form was placed in the file. The trial court fully complied with the mandates of MCR 6.402 to secure a valid waiver. We thus reject defendant’s argument that his waiver of a jury trial was invalid.

To the extent that defendant argues that the trial court should have provided more information regarding the relative differences between a trial by jury and a bench trial, or otherwise argues that his waiver was not voluntarily rendered, we find defendant’s argument unpersuasive in light of the colloquy that occurred between the court and the defendant on the record as regards defendant’s right to a trial by jury and subsequent waiver of that right. Furthermore, defendant does not claim or otherwise suggest that he was coerced into signing the waiver. *People v Leonard*, 224 Mich App 569, 596; 569 NW2d 663 (1997). Accordingly, we do not find that the trial court committed clear legal error requiring reversal of defendant’s conviction or remand on this basis. *Id.* See also *People v Shields*, 200 Mich App 554, 560; 504 NW2d 711 (1993) (wherein the court held that the defendant’s waiver of his right to a trial by jury was voluntarily rendered in the absence of a direct inquiry from the court whether defendant was “[t]hreatened or promised anything in exchange for his waiver.”).

Affirmed.

/s/ Harold Hood
/s/ Martin M. Doctoroff
/s/ Kirsten Frank Kelly