STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 6, 2001
v	No. 222304 Wayne Circuit Court
WILLIAM GARRETT, Defendant-Appellant.	LC No. 95-003838

Before: Hoekstra, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

Defendant appeals by leave granted his 1995 jury conviction of armed robbery, MCL 750.529. The trial court sentenced defendant to an enhanced sentence of fifteen to thirty years' imprisonment as a third-offense habitual offender, MCL 769.11, and we affirm.

I. Procedural History

This case is before our Court for a third time to review defendant's motion for a new trial based on newly discovered evidence and defendant's claim that the jury's verdict was against the great weight of the evidence.

Defendant raised his claim that the verdict was against the great weight of the evidence in a motion for judgment notwithstanding the verdict, which the trial court denied on November 2, 1995. Defendant filed a claim of appeal in this Court and, along with his great weight of the evidence argument, defendant contended that he should be granted a new trial based on newly discovered evidence, including the alibi testimony of Joe Benke, polygraph examination results, and evidence that complainant, now deceased, allegedly suffered a traumatic brain injury that may have affected her testimony.[1] On direct appeal, this Court remanded the case to the trial court to conduct an evidentiary hearing on the newly discovered evidence issue in an order entered on October 27, 1998. *People v Garrett*, unpublished order of the Court of Appeals,

[1] While his appeal was pending, defendant filed an interlocutory motion to remand the case for a new trial based on newly discovered evidence. Both our Court and our Supreme Court denied defendant's motion.

entered May 6, 1999 (Docket No. 191858). In the order, our Court stayed further proceedings with regard to defendant's remaining claims.

Following the evidentiary hearing on remand, the trial court granted defendant's motion for new trial based on newly discovered evidence in an opinion and order entered on April 21, 1999. Specifically, the trial court found that the polygraph evidence did not warrant a new trial, that evidence regarding complainant's mental health would not produce a different result at trial, but that the discovery of Benke's alibi testimony warranted a new trial. Because the trial court granted defendant a new trial, this Court dismissed defendant's prior appeal.

The prosecutor appealed the trial court's order and argued that Benke's testimony was not newly discovered and was cumulative of other testimony. This Court agreed and peremptorily reversed the trial court's order for a new trial on that basis, without addressing the trial court's rulings on the polygraph and mental health evidence. *People v Garrett*, unpublished order of the Court of Appeals, entered July 28, 1999 (Docket No. 219803). Defendant now appeals by leave granted the trial court's order denying his motion for a new trial based on newly discovered evidence of complainant's mental condition and the trial court's denial of his motion regarding his great weight of the evidence claim.

II. Great Weight of the Evidence

At the outset, we note that defendant did not technically preserve his claim that the jury's verdict was against the great weight of the evidence by moving for a new trial. See *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999). However, he raised the issue before the trial court in his motion for judgment notwithstanding the verdict and subsequently requested a new trial on that basis. Defendant also timely appealed the issue to this Court which did not address the claim because it remanded on other grounds. We now consider the merits of defendant's claim and hold that he is not entitled to a new trial.

We review a trial court's decision on a motion for a new trial under an abuse of discretion standard. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). An abuse of discretion occurs when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Defendant's trial concluded in 1995 and he filed his motion regarding the weight of the evidence shortly thereafter. At that time, in reviewing a motion based on the great weight of the evidence, case law dictated that the trial court act as a "thirteenth juror" and evaluate factual issues and the credibility of witnesses. *People v Herbert*, 444 Mich 466; 511 NW2d 654 (1993), overruled in *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). However, as our Court explained:

> [W]hen sitting as a thirteenth juror, the hurdle a judge must clear to overrule a jury, is unquestionably among the highest in our law. It is to be approached by the court with great trepidation and reserve, with all presumptions running against its invocation. [*People v Bart*, 220 Mich App 1, 13; 558 NW2d 449 (1996).]

During the numerous appeals and remands in this case, our Supreme Court overruled *Herbert* and rejected the "thirteenth juror" standard. *Lemmon, supra* at 627. However, the Court clarified "that the newly adopted limitations on *Herbert* apply prospectively to cases not yet final as of the date of this decision," on March 24, 1998. *Id*. at 648. Here, because the jury returned its verdict and defendant filed his motion regarding the verdict in 1995, the *Herbert* standard applies. *Id*.; see also, *People v Brown*, 239 Mich App 735, 745 n 5; 610 NW2d 234 (2000).

The trial court did not abuse its discretion in refusing to grant a new trial because the verdict was not against the great weight of the evidence. Defendant's arguments concern the credibility of witnesses and the lack of physical evidence. Specifically, defendant contends that complainant offered unreliable testimony and that he offered many more witnesses than the prosecutor.

The armed robbery statute, MCL 750.529, provides:

> Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while committing an armed robbery as defined in this section, the sentence shall be not less than 2 years' imprisonment in the state prison.

Here, complainant provided substantial testimony that fulfilled the above elements. She testified that her assailant brandished a knife; he struck her with the knife; he threatened to inflict further injury with the knife; he slapped her and demanded money; she saw him take the money out of her hiding place; he ripped the phone from the wall as she tried to call for help (which photographic evidence confirmed); and her house was ransacked. Further, and most damaging, was complainant's unwavering confidence that defendant perpetrated the crime, and her corroborating statements to neighbors, family members, and the police immediately following the incident. Further, complainant's daughter-in-law testified similarly regarding damage to the phone and the ransacked house.

Defendant presented numerous alibi witnesses, all of whom were either defendant's friends or family of friends. Also, the prosecutor repeatedly undermined the witness' credibility. For example, Charles Klause, defendant's girlfriend's father, testified that he saw defendant for the first time in his life on the day of the incident, and only for a few, brief moments. Nonetheless, Klause recalled defendant as a "good, clean cut" young man. The prosecutor rebutted this testimony with a photograph of defendant, taken around the time of the incident, in which defendant appeared strikingly disheveled. The prosecutor also impugned the credibility of defendant's witnesses by showing that they generally ate lunch with each other, sat with each other during trial, and that they had discussed the case. The credibility of defendant's witnesses also suffered when one of them intentionally approached, and tried to start a conversation with, a juror. Further, along with eyewitness testimony, the prosecutor presented evidence that defendant tried to flee when police officers confronted him.

While the number of witnesses defendant presented exceeded the number the prosecutor presented, "[t]he number of witnesses which a party garners is quite irrelevant in determining where the truth lies." *People v Phillips*, 112 Mich App 98, 109-110; 315 NW2d 868 (1982). Following the jury's guilty verdict, the trial court judge, acting as the "thirteenth juror," specifically ruled that he believed complainant's testimony and that defendant's alibi witnesses utterly lacked credibility. This Court gives great deference to the trial court's ability to hear and see witnesses, which uniquely qualifies it to assess their credibility. *People v Martin*, 199 Mich App 124, 125; 501 NW2d 198 (1993). For that reason, we will not substitute our judgment for that of the trial court in finding certain witnesses more credible than others. *Id*.

We hold that, not only did the evidence presented weigh in favor of the jury's guilty verdict, the trial court's determination of the credibility of all the witnesses clearly weighed against defendant. Accordingly, the trial court did not abuse its discretion in denying defendant's motion regarding the weight of the evidence at trial.

III. Newly Discovered Evidence

Defendant further argues that the trial court abused its discretion by denying defendant's motion for new trial and for concluding that complainant did not exhibit signs of mental illness before trial. We disagree. On appeal from a motion for new trial based on newly discovered evidence, we review a trial court's findings of fact for clear error, and we review its ruling on the motion for an abuse of discretion. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1999).

A party seeking a new trial based on newly discovered evidence must show four elements: (1) the evidence itself, and not merely its materiality, is newly discovered; (2) the evidence is not cumulative; (3) the new evidence would probably cause a different verdict on retrial; and (4) the party with reasonable diligence could not have discovered and produced the evidence at trial. *People v Miller (After Remand)*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995).

The trial court correctly ruled that the evidence would not have caused a different verdict on retrial. Doctors diagnosed complainant with senile dementia and Alzheimer's disease four months after trial. When she testified, complainant was eighty-seven years old and, not surprisingly, she suffered some memory lapses during her testimony. Regardless of the clinical diagnosis rendered months later, momentary failures in complainant's memory and mental faculties were evident during her testimony and would have been apparent to the jury.

Likewise, defendant was certainly aware of complainant's age and some of the inconsistencies in her testimony and could have vigorously questioned her regarding her memory or mental capacity, but did not. Further, defendant apparently would have presented complainant's medical diagnosis to impeach her testimony which, in and of itself, is not sufficient to warrant a new trial. *People v Sharbnow*, 174 Mich App 94, 104; 435 NW2d 772 (1989). Moreover, despite complainant's advanced age and the difficulties in her testimony, the jury found defendant guilty beyond a reasonable doubt. We are not persuaded that the impact of her diagnosis some months later would have resulted in a not guilty verdict. Therefore, defendant failed to meet the high burden of showing "there was no justification or exclude for the

ruling made" and, indeed, we hold that the trial court correctly denied defendant's motion for a new trial on this basis. *Ullah, supra* at 673.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Henry William Saad
/s/ William C. Whitbeck