

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LIONEL HOKES,

Defendant-Appellant.

UNPUBLISHED

May 18, 2004

No. 246007

Wayne Circuit Court

LC No. 02-002135

Before: Fitzgerald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Defendant was charged with delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and possession with intent to deliver less than fifty grams of cocaine, MCL 333.7413(2). Additionally, defendant was charged with being a second-time drug offender, MCL 333.7413(2), and an habitual offender, fourth offense, MCL 769.12. He was convicted of both drug offenses and, in an amended judgment of sentence, was sentenced to consecutive prison terms of one to twenty years, to be served consecutive to the sentence defendant was currently serving for an unrelated conviction. Defendant's motion for a new trial was denied. Defendant appeals as of right. We affirm.

Defendant argues that certain newly discovered evidence developed after trial and that the trial judge erred in denying his request for a new trial on this basis. Whether to grant a new trial is in the trial court's discretion and its decision will not be reversed absent an abuse of that discretion. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003).

Defendant contends that newly discovered evidence cast enough doubt on the integrity of the police investigatory procedures leading up to the arrest to necessitate a new trial. The newly discovered evidence concerned an indictment alleging corrupt police practices on the part of seventeen Detroit police officers, including the four officers involved in this case. Defendant contends that evidence of the charges against the officers in other cases would have impeached their credibility in this case. Defendant's argument is rejected for two reasons. First, the "newly discovered evidence" involves only an indictment and not convictions or admissions by the officers. The indictment itself does not prove that the officers engaged in the conduct alleged, cf. *People v Bell*, 74 Mich App 270, 280; 253 NW2d 726 (1977) (official transcript of testimony

containing arresting officer's admission of perjury in another trial was admissible for impeachment),¹ nor is the indictment related and material to the facts of defendant's case. Second, defendant asserts that the newly discovered evidence is relevant to the officers' credibility. It is well established that newly discovered evidence that tends merely to impeach the credibility of a witness will not ordinarily be the basis of a new trial. *People v McWhorter*, 150 Mich App 826, 835; 389 NW2d 499 (1986). The trial court did not abuse its discretion by denying defendant's motion for new trial.

Defendant also argues that the trial court erred by failing to instruct the jury that a prosecution witness' prior inconsistent statement can only be used to impeach the witness and not as substantive evidence of defendant's guilt. Claims of instructional error are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253, rem'd 467 Mich 888; 653 NW2d 406 (2002), on rem 256 Mich App 674; 671 NW2d 545 (2003).

There is no indication in the record that defendant requested that the trial court read an instruction on the use of prior inconsistent statements or that he objected to the trial court's failure to sua sponte read the instruction. Defendant failed to preserve this issue by requesting the omitted instruction or objecting to the instructions given. *People v Gonzalez*, 468 Mich 636, 642-643; 664 NW2d 159 (2003). This issue therefore has not been preserved for appeal. *People v Lee*, 243 Mich App 163, 183; 622 NW2d 71 (2000); *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Consequently, this Court reviews defendant's unpreserved claim of nonconstitutional error only if he establishes plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999); *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000). We have reviewed the lower court record and conclude that defendant has not established plain error affecting his substantial rights and, therefore, we decline to review this claim.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Kathleen Jansen
/s/ Michael J. Talbot

¹ Additionally, the indictment refers to specific cases not including the present case.