STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KEITH TRENELL TAYLOR,

Defendant-Appellee.

UNPUBLISHED
December 11, 2008

No. 284331
Saginaw Circuit Court
LC No. 93-008476-FC

Before: Saad, C.J., and Fitzgerald and Beckering, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the trial court order granting defendant's motion for relief from judgment and new trial based on newly discovered evidence. We affirm.

Underlying this appeal is the 1993 shooting death of a teenage boy. The victim was shot through the head at close range while sitting in the backseat of a car stopped behind a truck driven by defendant's stepbrother, and in which defendant and another man were riding. This third man was implicated as the shooter. In 1994, following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, conspiracy to commit second-degree murder, MCL 750.157a and MCL 750.317, possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b, and carrying a concealed weapon in a vehicle (CCW), MCL 750.227. The conspiracy conviction was subsequently vacated by the court. Defendant was sentenced to concurrent terms of 40 to 65 years' imprisonment for second-degree murder, as a second habitual offender, MCL 769.10, and 36 to 90 months' imprisonment for CCW. These sentences were to run subsequent to a consecutive five years' imprisonment for felony-firearm. In a prior appeal, *People v Taylor*, unpublished opinion per curiam of the Court of Appeals, issued July 30, 1996 (Docket No. 176111), this Court affirmed defendant's convictions and sentences and denied plaintiff's cross-appeal to have the conspiracy conviction reinstated.

At trial, defendant's stepbrother testified that he saw defendant point a gun at the victim and heard the gun click. Defendant then gave the gun to the third man, who fired the fatal shot. The newly discovered evidence proffered by defendant is the testimony of a man who claims to have witnessed the shooting from his bedroom window when he was 11 years old. The witness testified that he told his mother about the shooting, but was told by her not to get involved. The witness's mother also testified and she corroborated her son's story. According to the witness, he met defendant years later while they were both incarcerated. During a conversation with

defendant, the witness realized that the killing he had witnessed years prior was the crime underlying defendant's convictions.

Plaintiff argues that the trial court erred in granting defendant's motion for new trial by failing to address the requirements of MCR 6.508(D)(3) and properly apply the relevant four-part test set forth in *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003). We disagree. We review a trial court's decision to grant or deny a motion for new trial for an abuse of discretion, which occurs when a trial court chooses a result that is outside the range of reasonable and principled outcomes. *Id*. at 691; see also *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). "A mere difference in judicial opinion does not establish an abuse of discretion." *Cress*, *supra* at 691, citing *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 228; 600 NW2d 638 (1999).

In order to grant a new trial "on the basis of newly discovered evidence, a defendant must show that: (1) 'the evidence itself, not merely its materiality, is newly discovered'; (2) 'the newly discovered evidence was not cumulative'; (3) 'the party could not, using reasonable diligence, have discovered and produced the evidence at trial'; and (4) the new evidence makes a different result probable on retrial." *Cress*, *supra* at 692, quoting *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996), and citing MCR 6.508(D).

While the trial court did not specifically mention the requirements of MCR 6.508(D)(3) when ruling on the motion, it is clear that its analysis encompassed its dictates. MCR 6.508(D)(3) provides that the trial court may not grant relief based on grounds that could have been raised in a prior appeal or motion, unless the defendant demonstrates that: (1) there is a good reason for not raising the grounds earlier; and (2) the defendant was prejudiced from the alleged irregularity. These requirements significantly overlap the four *Cress* factors. Indeed, in support of its articulation of the factors, *Cress* cited MCR 6.508(D). Thus, the *Cress* analysis set forth below applies to the application of the court rule. Accordingly, we will address the *Cress* factors before returning to the issue of the court rule.

The first *Cress* factor is that the evidence itself, not merely its materiality, is newly discovered. The trial court found that the evidence was newly discovered based on the witness's failure to come forward when the incident occurred. Based on the witness's testimony that he did not come forward until after meeting defendant, this conclusion is not error. With respect to the third *Cress* factor, due diligence, the trial court stated that defendant could not with reasonable diligence have discovered and produced the evidence at trial. This conclusion was based on the fact that the witness was 11 years old at the time of the shooting and his mother's reluctance to cooperate with the police. This conclusion is also not erroneous, given that even if defendant had investigated what people in the neighborhood saw, it is likely that the witness's mother would have kept him from defendant. Indeed, when the police came to her home while investigating the shooting, the witness's mother testified that she told the police she "didn't see anything."

The third *Cress* factor involves cumulative evidence. "Cumulative testimony" is defined as "[i]dentical or similar testimony by more than one witness . . . offered by a party usu[ally] to impress the jury with the apparent weight of proof." Black's Law Dictionary (8th ed). As the trial court noted, the case against defendant was "highly circumstantial . . . with the only direct evidence coming from the eyewitness testimony of" defendant's stepbrother. The newly

discovered witness's testimony cannot be characterized as cumulative simply because it tends to support defendant's version of the facts, particularly in light of the disparity between the stories testified to by defendant and his stepbrother. Further, the newly discovered witness's testimony provides information not testified to by defendant.

Additionally, as the trial court observed, the newly discovered witness's testimony "suggests that [defendant's stepbrother] may have had a motive to fabricate his testimony against Defendant in order to deflect attention from his own involvement in the crimes." Similar to the trial testimony of the stepbrother, the newly discovered witness testified that something was passed between two men standing outside the victim's car before the fatal shot was fired. Under the witness's version, however, the item (presumably the gun) was passed between the shooter and another person, after a third person (presumably defendant) had gone back to the truck. Defendant testified at trial that he was sitting in the truck when the fatal shot was fired. Thus, the second *Cress* factor is established.

Plaintiff argues that the trial court most clearly erred in applying the fourth *Cress* factor, i.e., whether a different result would be probable on retrial based on the newly discovered evidence. Plaintiff argues that the trial court's error is evidenced in its comment that the witness's "contradictory testimony could have lead [sic] to a different result" and that if credited by the jury, the newly discovered witness's testimony would have made "a different result reasonably probable." Plaintiff asserts that this does not comport with the requirement in *Cress* that "the new evidence makes a different result *probable* on retrial." *Cress, supra* at 692 (emphasis added). "Probable" means "likely to occur" or "having more evidence for than against." *Random House Webster's College Dictionary* (1997). See also *Sutter v Biggs*, 377 Mich 80, 89; 139 NW2d 684 (1996) (observing that "probable" means "more likely than not" (internal quotation marks and citation omitted)). It does not mean, however, certain to occur. See *The American Heritage Dictionary of the English Language* (1996) (defining "probable," in part, to mean "[l]ikely but uncertain").

When the determination whether a different result is probable depends not on undeniable physical facts but the credibility of a testifying witness, the trial court has the discretion to determine the credibility of the witness. See *Cress, supra* at 693, 695. It is true that the trial court did initially speak of the probability of a different result in terms suggesting it was considering whether it was possible as opposed to "more likely than not." Later, however, the court carefully considered the witness's credibility, crediting both the factors supporting and undermining it. It considered the testimony in light of the witness's affidavit, his age in 1993, the delay in reporting, corroborating testimony, and lack of motive to lie. It also specifically found that the testimony was "believable and plausible" in light of both the witness's "live testimony" at the motion hearing and "the other evidence presented at trial." In referring to the witness's "live testimony," the trial court alluded to the significance of being able to observe a witness in assessing whether the witness is being truthful. As our Supreme Court has observed, "The credibility of a witness is determined by more than words and includes tonal quality, volume, speech patterns, and demeanor, all giving clues to the factfinder regarding whether a witness is telling the truth." *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998) (citation omitted). The trial court's reference to considering the testimony in view of "the other evidence presented at the trial" shows that the court did not view the testimony in a vacuum, but determined how well it matched up with the established facts. See *Cress, supra* at 692-694.

Although not specifically stated, we deem it implicit in the court's opinion and order that it found the witness credible and that his testimony would probably have resulted in a different verdict. The court noted that defendant had been acquitted "of all the armed robbery and assault charges,"[1] which the court concluded "suggests that [the jurors] were not persuaded by the prosecution of a concerted robbery plot between Defendant and [the shooter], and . . . instead relied on [the stepbrother's] testimony to convict" defendant of second-degree murder. Further, the jury found defendant not guilty of first-degree premeditated or felony murder. We believe it is reasonable to assume that the jury did rely heavily on the stepbrother's testimony in light of all the not-guilty verdicts. Thus, credible evidence supporting defendant's testimony and casting serious doubt on the stepbrother's story would more likely than not have led to a different result. Plaintiff argues that the newly discovered witness was unreliable. However, as noted, the trial court did consider his credibility, and we are mindful about not "substituting [our] judicial opinion regarding . . . credibility for that of the trial court." *Cress, supra* at 694. The court's credibility determination falls within the range of principled outcomes. Cf. *id.* at 692 (observing that "it is within the trial court's discretion to determine the credibility of" the witness).

For the reasons indicated, we reject plaintiff's argument predicated on MCR 6.508(D). The newly discovered witness testified that he did not meet defendant until the two were incarcerated together. Thus, in addition to the reasons set forth above, the issue could not have been raised in a prior motion. See MCR 6.508(D)(3)(a). Further, the trial court examined the testimony in light of the existing record and concluded that it would have made "a different result reasonably probable." MCR 6.508(D)(3)(b)(i) provides that a defendant convicted following trial must show that "but for the alleged error, the defendant would have had a reasonably likely chance of acquittal." Probable and likely are synonymous. Therefore, the trial court did not err in failing to specifically mention MCR 6.508(D)(3).

Affirmed.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering

[1] Defendant was found not guilty of four counts of armed robbery, MCL 750.529, and three counts of assault with intent to commit murder, MCL 750.83.