STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 22, 2009
v	No. 288131 Wayne Circuit Court
MICHAEL ANTHONY MCCREE, Defendant-Appellant.	LC No. 08-001782-FH

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a second habitual offender, MCL 769.10, to one to seven years in prison for the felon in possession of a firearm conviction and two years in prison for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant was convicted of possessing a .40-caliber Glock handgun, which a police officer observed him throw away as the police approached in a squad car. The police recovered the gun from a nearby dumpster. The defense theory at trial was that another man possessed and threw the handgun before running from the scene.

Defendant first argues that the trial court abused its discretion by denying his posttrial motion for a new trial based on newly discovered evidence, specifically the testimony of Charles Williams, who claimed to have been the person who threw the gun and ran from the scene. We disagree. "This Court reviews a trial court's decision to grant or deny a motion for new trial for an abuse of discretion." *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003) (citation omitted). "A trial court's factual findings are reviewed for clear error." *Id.*, citing MCR 2.613(C).

> For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) "the evidence itself, not merely its materiality, was 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*, p 692 (citations omitted).]

The trial court did not clearly err in finding that defendant failed to show that the evidence was newly discovered. Even though defendant testified that he did not know the man who ran from the scene, the record supports the inference that defendant and Williams were familiar with each other. Williams testified that, from the neighborhood, he "knew of" defendant and also knew another man who was at the scene in a white truck. The man in the white truck was defendant's friend, Earnest Henton. Williams also testified that his child's mother knew defendant's wife. Williams opined that defendant's wife probably tried to find Williams after defendant's arrest. Williams testified that he approached defendant to attempt to sell the gun to him, and the trial court found incredible the claim that Williams would attempt to sell a gun to a person he did not know. Because the evidence supports a finding that defendant knew Williams's identity, the trial court could correctly conclude that Williams's identity is not newly discovered evidence[1] and did not abuse its discretion in denying defendant's motion for a new trial with respect to this issue.

Defendant next argues that the trial court "unduly coerced" the jury's verdict because it told the jury that testimony would be played back, but then failed to do so, and subsequently responded to the jury's note that it was deadlocked by urging it to continue deliberating.

In the morning of the first full day of deliberations, the jury sent out a note that stated:

> DUE TO JURY TEAM REMEMBERING DIFFENT [sic] STATEMENTS DURING TESTIMONY CAN THE JURY BE REFRESHED ON OFFICER #1 & THE DEFENDENT'S [sic] TESTIMONY BY WAY OF TRANSCRIPTS? *IN REGARDS TO IF DEFENDANT WAS INVESTIGATED PRIOR BY OFFICER #1.

In response, the trial court addressed the jury as follows:

> Ladies and gentlemen, I've received a message in which you are request [sic] that the testimony be played back as well as the defendant's testimony.
>
> You want transcript but you know we don't have transcripts. This is, you know, I don't know maybe what you see on TV is different than what happens here.
>
> But transcripts you got to type them all out and it takes a lot of time. We don't have transcripts.
>
> Now it is recorded and we'll play that for you if you want. Now in regards to if the defendant was investigated prior to officer number one?
>
> The lawyers agree that the question was asked and the answer was no.

[1] We note that defendant also failed to argue or show that the purportedly new evidence could not have been discovered before trial with reasonable diligence.

All right.

We'll play it back for you. Go back in the jury room.

Approximately 30 minutes later, the jury sent out another note stating that it could not agree on a verdict. The court then instructed the jury using CJI2d 3.12, the standard instruction for a deadlocked jury, and asked the jurors to return to the jury room and continue deliberations. In the morning of the second full day of deliberations, the jury returned a verdict.

Defendant does not argue that the trial court's response to the jury's initial note was improper. Rather, he contends:

> To tell the jury that testimony will be played back to them but not to do so is and [sic] abuse of discretion. It is only reasonable to surmise that the expectation of the jurors were ignored and even when they related that they were hung nothing whatsoever was done to aid them other than to tell them to go back and continue deliberating despite their requests.
>
> This is more than abuse of discretion it was coercion to have them reach a verdict without all of the tools reasonably asked for to deliberate.

Defendant did not object at any time to the trial court's actions. Therefore, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

With respect to the trial court's unfulfilled assurance, "We'll play it back for you if you want," defendant has not shown that his substantial rights were affected. The jury's note indicated that it was requesting testimony "IN REGARDS TO IF DEFENDANT WAS INVESTIGATED PRIOR BY OFFICER #1." The trial court responded to that concern by informing the jury, "Now in regards to if the defendant was investigated prior to officer number one? The lawyers agree that the question was asked and the answer was no." Inasmuch as the trial court, with the agreement of counsel, was able to directly address the subject of the jury's request, defendant's substantial rights were not affected. Further, there was nothing otherwise coercive about the trial court's deadlocked jury instruction, which comported with CJI2d 3.12.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder