STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED May 4, 2010
v	No. 288032 Macomb Circuit Court
MICHAEL RALPH GEORGE, Defendant-Appellee.	LC No. 2007-004766-FC

Before: GLEICHER, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), insurance fraud, MCL 500.4511(1), false pretenses over $100, MCL 750.218, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life in prison for the murder conviction and concurrent prison terms of one to four years for the insurance fraud conviction, and one to five years for the false pretenses conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. The trial court subsequently granted defendant's motion for a new trial, concluding that a new trial was warranted because of misconduct by the prosecutor, newly discovered evidence, and to prevent a gross injustice. This Court originally denied plaintiff's application for leave to appeal, but our Supreme Court, in lieu of granting leave to appeal, remanded the case to this Court for consideration as on leave granted. *People v George*, 483 Mich 921; 762 NW2d 921 (2009). We affirm.

Defendant's convictions arise from the shooting death of his wife, Barbara George, on July 13, 1990, in the Clinton Township comic book store, Comics Book World, which they both owned. The original police investigation in 1990 was discontinued without any charges having been brought. The investigation was reopened in late 2006, and defendant was later charged in August 2007 with first-degree murder and other offenses in connection with his wife's death. The prosecution's theory at trial was that defendant killed his wife because he was unhappy with their marriage and was involved with another woman. There was no direct evidence linking defendant to the crime. The prosecution's case principally relied on circumstantial evidence of defendant's conduct before and after the offense, and on the absence of evidence providing an alternative explanation for the victim's death. Defendant presented an alibi defense that he was at his mother's home at the time of the shooting and theorized that his wife was killed during a "robbery gone bad."

After defendant was convicted, he moved for a new trial on several different grounds. While that motion was pending, the prosecution discovered seven police tip sheets that apparently had become misplaced and were never previously provided to defendant. Relying on those tip sheets, defendant thereafter supplemented his motion to also request a new trial on the basis of newly discovered evidence. The trial court granted defendant's motion, concluding that defendant was entitled to a new trial because of several instances of prosecutorial misconduct, the newly discovered evidence, and to prevent what it believed would be an injustice because it would not have found defendant guilty beyond a reasonable doubt had it been the trier of fact.

This Court reviews a trial court's decision on a motion for a new trial for an abuse of discretion. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). An abuse of discretion occurs when the trial court's "decision falls outside the principled range of outcomes." *Id*. Although the trial court based its decision to grant defendant a new trial on several different grounds, we only address the trial court's ruling based on the newly discovered evidence, which, by itself, supports the trial court's decision.

A new trial may be granted on the basis of newly discovered evidence. MCR 6.508(D). To obtain a new trial on such grounds, the 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." *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), quoting *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996). The only prong of this test that is reasonably in dispute is the last one.[1]

The newly discovered evidence in this case consists of seven police tip sheets, three of which the trial court determined were significant enough to entitle defendant to a new trial. The first tip sheet documented Sergeant Donald Steckman's receipt of a telephone call from an unidentified person who called to report information about the case at 10:55 a.m. on July 14, 1990. Sergeant Steckman wrote, in pertinent part:

> [The caller] stated that his son wanted a special hocket [sic] card and was bugging him when he got home from work to find out if Comic World had it. The caller states he called there at approx 1755 hrs (just before 6:00 pm) and a male voice answered the phone "HELLO" at which time caller asked if they had this card, and the male on the other end said "NO" and hung up the phone.
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> Informant states that he thought this was aa [sic] strange [sic] way to answer the phone and handle a customer.

[1] We disagree with plaintiff's argument that because the prosecutor and the police investigators had prior knowledge of the police tip sheets, and merely inadvertently failed to disclose them to defendant before trial, they cannot be considered newly discovered evidence. Plaintiff does not dispute that the tip sheets were unknown to defendant, the party seeking a new trial, nor does plaintiff contend that defendant, using reasonable diligence, could have discovered and produced the evidence at trial. Thus, as to defendant, the tip sheets were "newly discovered."

Sergeant Steckman was the officer in charge of the investigation in 1990. Although plaintiff argues that the unidentified caller's statements are inadmissible hearsay, this evidence would have been significant for its impeachment value. The time of the call was critical because the evidence established that the victim was killed shortly after 6:00 p.m. There were numerous gaps in the 1990 investigation. In particular, the police did not confirm what time Michael Renaud's or Renee Balsick's calls came into the store on the afternoon of the offense, and defendant's mother's neighborhood was never canvassed to confirm or dispel defendant's alibi. Evidence that an unknown male's voice answered the telephone in the store shortly before the victim was killed, and answered it in a way that struck the caller as unprofessional, coupled with evidence that there was no attempt to identify the caller, could have raised questions about the adequacy and credibility of the original 1990 police investigation, upon which the more recent investigation was based.

The second tip sheet indicated that a telephone call was received on July 24, 1990, from an identified person who reported that she had spoken to a magazine owner or manager who told her that a "kid" had sold him a box of vintage comic books on July 22, 1990, in Harrisville, Michigan. The seller asked for $20 for the whole box, but the ultimate buyer inspected the contents of the box and discovered that the comic books inside were very valuable, with one being worth $385. The sale was made nine days after the offense. A significant portion of the prosecution's case was devoted to discrediting defendant's theory that his wife was killed during a robbery at the store in which comic books were stolen. The prosecutor argued that there was no credible evidence that any robbery was committed, or that any comic books were stolen. At a minimum, this new evidence could have significantly aided defendant in countering the prosecution's claim and theory that there was "no robbery anywhere" and "certainly not in defendant's store." In addition, the fact that apparently nothing was done to follow up this tip in 1990, and again during the reinvestigation beginning in 2006, would have further enabled defendant to question the adequacy of the police investigation.

The third tip sheet, dated July 29, 1990, contained information from an identified person, Pat Flannery, with the Wayne County Sheriff's Department, Trustee's Services, who reported that a woman with whom he lived, Rita Prog, had previously been married to a man named Marshall David Prog. Flannery believed that Marshall may have been involved in the victim's death. Flannery stated that the Progs were friends and business acquaintances of defendant and his wife, and that Marshall, who lived in Florida, came to Michigan on July 10 or 11, 1990, asking Rita for $500. Rita would not give him the money. According to Flannery, Marshall was a drug addict who frequently dealt in sports cards and coins. Flannery claimed Marshall had boasted that (1) he purchased coins with stolen checks, for which he did not get caught; and (2) years earlier he had been involved in a homicide and "did not tak[e] the rap." Flannery told the police that Marshall left Michigan on July 18, 1990, to return to Florida and that, despite having arrived in Michigan with nothing, he had a large sum of money with him when he left. This information suggested an alternative suspect who had ties to defendant and his wife, with a motive to commit a robbery. The failure to follow-up on this tip could have further called into question the adequacy of the 1990 police investigation and the credibility and reliability of the evidence that stemmed from it.

In evaluating whether the newly discovered tip sheets could make a different result probable on retrial, we note the importance of the fact that the case against defendant was

entirely circumstantial, and that most of the witness testimony was based on 18-year-old memories that often was inconsistent and frequently conflicted. In addition, much of the prosecution's case was focused on discrediting any suggestion that the victim was killed during a robbery. The prosecution maintained that there was no evidence that any robbery was ever committed, or that any comic books were taken. The information in the tip sheets could have significantly aided defendant in refuting this contention. As the trial court observed:

> The newly discovered evidence could serve to create new suspects, could serve to impeach witnesses' testimony, and render all the other evidence less than enough to convict beyond a reasonable doubt.
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> * * *
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> This evidence unquestionably raises doubt as to whether defendant should have been the only suspect, and further emphasizes inadequacy of the investigation both initiatively and when the case was reopened.

Taking into account these factors, we conclude that the trial court, who had a superior opportunity to evaluate the weight and strength of the evidence, had a principled basis for finding that the collective effect of the newly discovered tip sheets would make a different result probable on retrial. Therefore, the trial court did not abuse its discretion in granting defendant's motion for a new trial on this basis.

Having concluded that the trial court did not abuse its discretion in granting a new trial on the basis of newly discovered evidence, it is unnecessary for us to address the trial court's finding that prosecutorial misconduct supported its determination to grant defendant a new trial. We do, however, take this opportunity to address the trial court's determination that it could properly grant a new trial to prevent what it believed would be an injustice.

Relying on *People v Johnson*, 391 Mich 834; 218 NW2d 378 (1974) (*Johnson II*) and MCL 770.1, the trial court accepted defendant's argument that it could properly grant a new trial if it would not have found defendant guilty beyond a reasonable doubt had it been the trier of fact. The court determined that this concept was viable as long as it adhered to the prohibition against making credibility determinations, in keeping with *People v Lemmon,* 456 Mich 625; 576 NW2d 129 (1998).

In *Johnson II*, 391 Mich at 384, our Supreme Court upheld a trial court's decision to grant the defendants a new trial. The trial court in that case had stated, "I don't hesitate to say that had I tried this case without a jury I could not, consistent with my oath as a judge, have concluded that either one of these defendants was guilty beyond a reasonable doubt." *People v Johnson*, 52 Mich App 385, 388; 217 NW2d 417 (1974) (*Johnson I*). The trial court decided that it was justified in substituting its judgment for that of the jury because justice had not been done. *Id*. at 389. Through subsequent appeals, the Supreme Court reaffirmed its decision in *Johnson II*. *People v Johnson*, 397 Mich 686, 687-688; 246 NW2d 836 (1976) (*Johnson III*).

In *Lemmon*, however, our Supreme Court more recently stated, "Today we clarify that a judge may not repudiate a jury verdict on the ground that 'he disbelieves the testimony of witnesses for the prevailing party.'" *Lemmon*, 456 Mich at 636, quoting *Johnson III*, 397 Mich

at 687. We conclude that *Johnson II* cannot be reconciled with our Supreme Court's more recent pronouncement in *Lemmon*, which now sets forth the standard for a trial court to apply when considering a motion for a new trial. When a trial court views evidence as it would have in a bench trial, except for credibility determinations, it is essentially weighing the evidence. The *Lemmon* Court provides specific guidelines for a court to consider in determining whether manifest injustice has occurred such that there is concern that an innocent person was convicted; the trial court's analysis should focus on the great or overwhelming weight of the evidence. *Lemmon*, 456 Mich at 644-645.

The trial court here failed to evaluate defendant's claim in accordance with those guidelines, and erred in relying on the former standard in *Johnson II*, which is no longer controlling. As previously explained, however, the trial court did not abuse its discretion in determining that defendant was entitled to a new trial on the basis of newly discovered evidence. Accordingly, we affirm the trial court's decision.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder