

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE D. SANDERS,

Defendant-Appellant.

UNPUBLISHED

November 30, 2001

No. 207546

Kalamazoo Circuit Court

LC No. 97-000264-FC

Before: Gage, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions, following a bench trial, of first-degree murder, MCL 750.316, possession of a firearm during the commission of a felony, MCL 750.227b, and carrying a concealed weapon, MCL 750.227. The trial court sentenced defendant to the mandatory term of life imprisonment for the first-degree murder conviction, and a 40 to 60 month term of imprisonment for the CCW conviction, to be served consecutively to the mandatory two-year term of imprisonment for the felony-firearm conviction. We affirm.

This appeal arises from the January 8, 1997, shooting death of Clarence Lee McFerrin. On appeal, defendant challenges the trial court's denial of his motion for a new trial. Specifically, defendant asserts that a new trial was warranted on the basis of newly discovered evidence. We review a trial court's postconviction decision granting or denying a new trial based on newly discovered evidence for an abuse of discretion. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998); *People v Leonard*, 224 Mich App 569, 578; 569 NW2d 663 (1997).

A motion for a new trial based on newly discovered evidence may be granted upon a showing that (1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is not merely cumulative, (3) the evidence is such as to render a different result probable on retrial, and (4) the defendant could not with reasonable diligence have produced it at trial. [*Lester, supra* at 271.]

In support of his argument, defendant points to the evidence of James Camble, who testified during the May 12, 1998 evidentiary hearing¹ on defendant's motion for a new trial.² The thrust

¹ An evidentiary hearing on defendant's motion was conducted on May 12, 1998, July 26, 2000,
(continued...)

of Camble's testimony was that defendant was not responsible for the shooting of Clarence McFerrin on January 8, 1997. After a close review of the record, we agree with the trial court's assessment that a new trial was not warranted because Camble's evidence was not newly discovered, it was merely cumulative, and it would not have rendered a different result probable on retrial.

During the evidentiary hearing, Camble stated that defendant was not responsible for the shooting of McFerrin. Specifically, Camble testified that on January 8, 1997, he was standing approximately fifty feet away from where McFerrin was shot, and that defendant was not in the vicinity of the shooting. According to Camble, he did not initially tell the police he was present at the scene of the shooting when questioned in January 1997 because he did not want to get involved. Camble also testified that he had known defendant his entire life, and that the two communicated by mail while incarcerated in separate institutions. During his testimony, Camble repeatedly invoked his Fifth Amendment rights in response to various questions, and would not identify who was responsible for the shooting. According to Camble, the shooter's back was to him, and he was unable to tell what the shooter was wearing or discern his height. However, Camble testified that although he was far away from the shooting, he could tell that the shooter was a black male, and that it was not defendant.

The trial court ultimately denied defendant's motion for a new trial. In a well-reasoned nine-page written opinion and order entered February 21, 2001, the trial court characterized Camble's testimony as highly "suspect" and "inherently unreliable." The court arrived at this conclusion because Camble admitted lying to a detective investigating McFerrin's murder. The trial court also noted Camble's friendship with defendant and Camble's criminal background in making this assessment. A witness' credibility is a proper matter for the trial court to consider when deciding whether to grant a new trial on the basis of newly discovered evidence. *People v Mechura*, 205 Mich App 481, 484; 517 NW2d 797 (1994). The trial court further opined that Camble's evidence was not newly discovered because "[d]efense counsel knew that Mr. Camble was a witness to the crime at the time of trial, [and] failed to issue a subpoena for his testimony."

As an initial matter, we believe the trial court correctly concluded that Camble's evidence was not newly discovered. A trial court does not abuse its discretion in determining that evidence is not newly discovered where the witness was known to defense counsel at the time of trial. *People v Thomas*, 33 Mich App 664, 671; 190 NW2d 250 (1971); *Landis v Detroit*, 287 Mich 407, 410-411; 283 NW 628 (1939); see also *People v Pizzino*, 313 Mich 97, 109; 20 NW2d 824 (1945); *People v Snell*, 118 Mich App 750, 767; 325 NW2d 563 (1982). In the instant case, the record is clear that Camble was known to defense counsel at the time of trial.

For example, defense counsel repeatedly referred to Camble's possible involvement in the shooting during his opening statement to the court. Further, during the preliminary

(...continued)

July 27, 2000, and September 14, 2000.

² In the lower court, defendant argued that a new trial was also warranted based on the newly discovered evidence of Ronald Wimes. On appeal, defendant does not challenge the trial court's determination that a new trial was not required on the basis of Wimes' evidence.

examination and at trial, witnesses testified that Camble was present when the shooting occurred. Defense counsel also unequivocally testified during the September 14, 2000, evidentiary hearing that he knew of Camble before defendant's trial began in September 1997, and that he "talked with Mr. Camble a couple times [sic] prior to trial." According to defense counsel, Camble initially told him did not know anything about the shooting and that he did not want to get involved. Defense counsel further indicated that he decided not to call Camble as a witness because "he ha[d] nothing to say."³ However, according to defense counsel's testimony, it was only *after* trial that Camble indicated that he would not testify and would invoke his Fifth Amendment rights if questioned. Under the circumstances, we are satisfied that the trial court did not abuse its discretion in determining that Camble's evidence was not newly discovered.⁴

In addition, we share the trial court's view that Camble's testimony was cumulative. Evaluating whether Camble's testimony would render a different result probable on retrial, the trial court made the following comments.

[E]ven if the same testimony was presented at retrial, there is no indication that defendant would be acquitted. The cumulative nature of . . . Mr. Camble's testimony does not present any evidence that would convince this Court that a different result would be probable This Court heard all the proofs in this non-jury trial. Reliable testimony at trial placed the Defendant at the scene as the shooter.

The thrust of Camble's testimony was that defendant could not have shot McFerrin because he was not in the vicinity at the time of the shooting. We agree with the trial court that this evidence was cumulative to evidence presented by defendant at trial. For example, during trial defendant presented the testimony of Roscoe Manns, who testified that he was with defendant at Monique Camble's home at the time of the shooting. Manns further testified that around 11:30 p.m. on the evening of January 8, 1997, a man named Michael Lemon⁵ entered the

³ According to the record, defense counsel did not make any attempt to subpoena Camble's testimony.

⁴ In support of his assertion that Camble's evidence was newly discovered, defendant cites this Court's decision in *People v Terry Burton*, 74 Mich App 215; 253 NW2d 710 (1977). In *Burton*, a panel of this Court reasoned that evidence is newly discovered "if it can be shown to have been unknown to the defendant or his counsel at the time of trial." *Id.* at 222-223. We find the present case distinguishable from *Burton*. In that case, after the defendant was convicted of felony murder in relation to a gas station shooting, the defendant's three sisters came forward with evidence that he was not involved in the shooting. The actual perpetrator of the crime also testified at an evidentiary hearing that the defendant was not involved in the shooting. In *Burton*, the Court observed that the pertinent evidence was "deliberately withheld" from the defense where the defendant's sisters testified that they withheld information because they were confident the defendant would be acquitted, and they feared being implicated in the crime. In the present case, there is no evidence in the record to indicate a deliberate scheme by Camble to withhold the evidence. Further, under the circumstances we are unable to conclude that "an exercise of diligence [by defense counsel] in excess of what was actually undertaken would [not] have uncovered [Camble's] evidence." *Id.* at 224.

⁵ According to the record, Lemon is Manns' cousin.

home and said that he had just shot someone in a car on Woodbury Street. Manns also testified that Lemon placed a gun in a bag in order to bury it. Monique Camble also testified that defendant was in her home from approximately 11:00 p.m. until shortly before midnight, when he went to the liquor store. Moreover, Lee Logan testified that he witnessed the shooting, and that defendant was not the individual who shot McFerrin. Further, Tamica Cohen testified that she saw two men flee the scene shortly after the shooting, and that defendant was not one of them.

Likewise, we reject defendant's claim that Camble's testimony rendered a different result probable on retrial. As the trial court observed, four witnesses at trial positively identified defendant as the shooter. Darlynzo Brown, a passenger in McFerrin's car, testified that defendant approached him and asked for drugs as he walked toward McFerrin's car. According to Brown, defendant then approached the driver's side window, pulled out a gun and shot McFerrin. Troy Elliot, who was sitting in the backseat of the car, also testified that defendant was the individual who shot McFerrin. Additionally, Brown's aunt, Thelma Fry, who was standing on a nearby porch when the shooting occurred, identified defendant as the shooter. Her nephew, Jeffrey Fry, further testified that he observed defendant standing near a fence across the street from where the shooting occurred minutes before McFerrin was killed.

In his brief on appeal, defendant argues that a new trial would allow him to present Camble's evidence in an effort to impeach these witnesses. However, "where the new evidence is useful only to impeach a witness, it is deemed merely cumulative." *People v Barbara*, 400 Mich 352, 363; 255 NW2d 171 (1977); see also *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993). In light of the evidence presented at trial, defendant has not met his burden of showing that a different result was probable on retrial. Therefore, we are satisfied that the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Defendant also contends that the trial court abused its discretion in denying his motion for a new trial because the verdict was against the great weight of the evidence.

This Court reviews for an abuse of discretion the trial court's denial of a motion for a new trial on the ground that the verdict was against the great weight of the evidence. The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. [*People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001) (citations omitted).]

Defendant asserts that the verdict was against the great weight of the evidence because the prosecution's eyewitness testimony identifying defendant as the shooter was unreliable. Defendant also argues that the verdict cannot stand because defense witness testimony demonstrated that he was not the shooter, and placed him elsewhere at the time of the shooting. The trial court's acceptance of the prosecution witnesses' testimony and rejection of the defense witnesses' testimony required it to weigh their credibility. After observing their demeanor and listening to their account of the relevant events, the trial court determined that Brown, Elliot, Thelma Fry, and Jeffrey Fry's identification of defendant was credible and reliable. "[I]t is well settled that this Court may not attempt to resolve credibility questions anew" when reviewing a trial court's denial of a new trial. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). The record evidence does not heavily preponderate against the verdict to the extent that

it would be a miscarriage of justice to allow the verdict to stand. *McCray, supra* at 637. Accordingly, we are unable to conclude that the trial court abused its discretion in denying defendant's motion for a new trial.⁶

Affirmed.

/s/ Hilda R. Gage
/s/ Kathleen Jansen
/s/ Peter D. O'Connell

⁶ In its brief on appeal, the prosecutor argues that the trial court improperly considered evidence of polygraph tests administered to defendant and Camble when deciding the motion for a new trial. The prosecutor also urges this Court to rule that polygraph evidence is not admissible in postconviction proceedings on a defendant's motion for a new trial. These issues are not properly before this Court because the prosecutor did not raise them on cross-appeal. See *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140; 602 NW2d 390 (1999); *Pulver v Dundee Cement Co*, 445 Mich 68, 70 n 2; 515 NW2d 728 (1994).