STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 15, 2002
v	No. 233145 Wayne Circuit Court
DWAYNE NOLAN, Defendant-Appellant.	LC No. 00-008219-01

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life in prison for his first-degree murder conviction and two years in prison for his felony-firearm conviction. We affirm.

Defendant argues that the trial court abused its discretion when it denied his motion for a new trial based on newly discovered evidence, specifically, Keeyon Wilson's affidavit, which was obtained after trial. The affidavit stated that James Griffin, rather than defendant, committed the murder. We disagree. "A trial court's decision regarding a motion for a new trial based on newly discovered evidence will not be reversed absent an abuse of discretion." *People v Miller*, 211 Mich App 30, 46; 535 NW2d 518 (1995):

> Before a new trial is warranted, a defendant must demonstrate that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) probably would have caused a different result, and (4) was not discoverable and producible at trial with reasonable diligence. [*Id.* at 46-47.]

Defendant failed to demonstrate that Wilson's affidavit constituted newly discovered evidence warranting a new trial. "[E]vidence is newly discovered if it can be shown to have been unknown to the defendant or his counsel at the time of trial." *People v Burton*, 74 Mich App 215, 222-223; 253 NW2d 710 (1977). While it is true that Wilson's affidavit states that Wilson did not come forward with the information prior to trial, there is no evidence that defendant did not possess this information at the time of trial. Defendant must demonstrate that the evidence is "newly discovered" and has failed to meet this burden. *Miller*, *supra* at 46. Moreover, there is no indication that Wilson's testimony "was not discoverable and producible at trial with reasonable diligence." *Id.* at 47. The fact that defendant's attorney admitted defendant

knew the names of some of the people in the car with Griffin illustrates that Wilson's testimony was discoverable.

Finally, defendant has not shown that the evidence "probably would have caused a different result." *Id.* at 46-47. The evidence against defendant is compelling. Robinson identified defendant as the shooter and Coachmen identified defendant in the car he saw leaving the scene immediately following the shooting. Furthermore, based on defendant's conviction and the trial court's comments, it is apparent that Robinson and Coachmen were believable witnesses.[1] Although defendant did not testify, when questioned by Lt. Morrell, he gave several inconsistent statements. First, defendant insisted that he was not the shooter and was with his girlfriend all day. When asked which day he had spent with his girlfriend, defendant could not remember. Second, defendant insisted that he had not been to the scene of the shooting. When told he was identified at the scene, defendant said someone must have seen him when he drove by the coney island to see what had happened. In light of the evidence against defendant and the inconsistent statement he made to Lt. Morrell, it is not probable that the affidavit evidence would have "caused a different result" at trial. *Miller*, *supra* at 46-47.

After applying the *Miller* factors, we hold that the trial court did not abuse its discretion in denying defendant's motion for a new trial.

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[1] In denying defendant's motion for a new trial, the trial judge ruled:

> *The Court*: I was very impressed with the level of evidence presented at the trial by the prosecutor regarding the involvement of this defendant in the crime. I thought that the prosecutor had a very strong case especially when Mr. Robinson and Mr. Coachman came forward and gave their testimony. I thought they were very reliable, believable witnesses. And apparently the jury agreed with my assessment of the situation.
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> There is some concern here that this information comes late, and I understand the explanation that has been offered here by the defense, that Mr. Wilson might have been fearful of giving up this information, but it does appear that Mr. Nolan, the defendant, knew about some of this and I think he had some obligation to at least share with his attorney this information.
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> The other concern is whether or not all of this is made up. It seems to me from reading the affidavit and the motion that maybe some of this information is, has been contrived or fabricated by Mr. Wilson in order to help his, help Mr. Nolan out.
>
> I don't believe a proper basis has been laid here for the granting of a new trial, and for that reason the Court will deny the request.

Affirmed.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Patrick M. Meter