STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 13, 2004
v	No. 246026 Wayne Circuit Court
CHARLES CONWAY, Defendant-Appellant.	LC No. 02-007061-01

Before: Talbot, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree premeditated murder, MCL 750.316(1)(a); assault with intent to murder, MCL 750.83; possession of a firearm during the commission of a felony, MCL 750.227b; and possession of a firearm by a felon, MCL 750.224f. Defendant was sentenced to life imprisonment for the murder conviction, twenty to forty-five years' imprisonment for the assault with intent to murder conviction, two years' imprisonment for the felony-firearm conviction, and two to five years' imprisonment for the possession of a firearm by a felon conviction. On appeal, defendant argues through counsel that the trial court errantly allowed inadmissible hearsay into evidence at trial and that he is entitled to a new trial on the basis of newly discovered evidence. In propia persona, defendant argues that the trial court committed reversible error when it allowed two statements into evidence. Because the record does not support any of defendant's claims on appeal, we affirm.

On April 11, 2002, Dayon Garrett and two friends, Bill (last name unknown) and Orlando Mollette, went to a gas station in Detroit. While there, Garrett saw defendant. Garrett had previously dated defendant's sister. The relationship had not ended amicably and tension still existed between Garrett and defendant's family. The two had an acrimonious exchange before Garrett drove away with his friends. About forty-five minutes later, Garrett, Bill, and Mollette stopped in front of Bill's house. Bill exited the vehicle and entered his house. Garrett and Mollette remained in the vehicle when a Grand Am pulled up directly next to Garrett's vehicle. Garrett was sitting in the driver's seat and noticed defendant's sister, Elena Conway, driving the Grand Am. There was another person in the passenger seat. Garrett stated that Elena Conway gave him a devilish-looking grin immediately before several shots were fired from the back of the Grand Am. Garrett and Mollette both exited the vehicle and ran. Mollette stumbled to the ground, and Garrett was shot in the leg as he ran. The Grand Am traveled in reverse following Garrett. Garrett noticed the rear window of the Grand Am shatter and then saw defendant in the back seat of the car shooting an assault-type rifle. The Grand Am then sped off down the street.

Garrett saw Mollette unconscious on the ground, and called 911. Mollette had been shot in the back. Mollette died from a single gunshot wound to the back.

Following a jury trial, defendant was found guilty as charged. Defendant now appeals his conviction as of right.

Defendant first argues he was denied due process of law when the trial court admitted inadmissible hearsay testimony evidence that resulted in his conviction. We review the admission or exclusion of evidence by the trial court for a clear abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would say that there is no justification or excuse for the trial court's decision. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

Defendant asserts that the trial court's decision to admit the statements of Sharita Williams at trial violated his rights under the Confrontation Clause, US Const, Am VI; Const 1963, art 1, § 20. Elena Conway made incriminating statements to a cellmate, Sharita Williams, while both women were in police lockup. In a motion prior to trial, when it was presumed that both Elena Conway and defendant would be tried together with one jury, the trial court held that Williams' testimony would be admissible against both Conway and defendant over defense objection. The court found the statement admissible as a statement against penal interest since Conway would have the opportunity to exercise her fifth amendment right not to testify thus making her unavailable.

Conway later entered into a plea agreement where she agreed to testify against defendant at trial. At trial, over defense objection, the court allowed Williams' testimony as a statement against Conway's penal interest citing its earlier pretrial hearing decision. On appeal, the prosecution admits Conway testified at trial, she was available, and that Williams' testimony was inadmissible under MRE 804(b)(3), statements against penal interest. However, the prosecution argues that the admission of the testimony did not cause error because sufficient other evidence existed to support defendant's guilt. It is defendant's position that the error was not harmless and reversal is required.

To preserve an evidentiary error, a party must object at trial on the same grounds raised on appeal. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). The prosecution argues that the error is unpreserved because defendant's objection at trial that Williams' testimony was inadmissible hearsay based on his prior pretrial argument under the Confrontation Clause did not preserve defendant's present claim that the testimony was hearsay because Conway was not unavailable under MRE 804(b)(3). The record illustrates that defense counsel objected to particular testimonial evidence during Williams' testimony, stating that his objection was based on hearsay in general and violation of the confrontation clause incorporating the previous objections brought prior to trial. The prosecution points out in its brief on appeal that "[a]t no point was an objection raised to calling both Williams and Conway." However, a careful review of the transcripts reveals that Elena Conway was not called until *after* Williams already testified to their exchange. Therefore, under the particular circumstances in this case, requiring defense counsel to specifically object under MRE 804(b)(3), statements against penal interest, may have been premature since Conway's availability was still in question. For these reasons, we will assume the error is properly preserved for our review.

Because defendant has asserted that the trial court's decision to admit the statements of Sharita Williams at trial violated his constitutional right to confrontation we will review this issue as a preserved constitutional error. Where preserved constitutional error occurs, it is harmless if the benefiting party demonstrates on appeal that no reasonable possibility exists that the evidence complained of might have contributed to the conviction. *People v Smith (On Remand)*, 249 Mich App 728, 730; 643 NW2d 607 (2002).

Here, Garrett testified that he clearly saw defendant in the back seat of the Grand Am shooting at him and Mollette. Immediately following the shooting, Garrett told the police that defendant was the person shooting. Elena Conway, defendant's sister, testified that she and defendant sought out Garrett. Conway stated that she witnessed defendant acquire a gun from the attic, direct her where to drive, and specifically pointed out Garrett's vehicle. Conway further stated that she saw defendant shoot his weapon out of the backseat of the Grand Am and continue shooting as she pulled away from the scene. Gunshot residue testing performed on defendant found gunshot residue on his face, forehead, and right hand between his thumb and forefinger consistent the recent firing of a weapon. We find this evidence sufficient to demonstrate that any error in admitting Williams' testimony was harmless beyond a reasonable doubt. Therefore, there is no reasonable possibility that the admission of Williams' statement might have contributed to the conviction. *Smith, supra*, 249 Mich App at 730. Any constitutional error was harmless beyond a reasonable doubt. *Id*.; *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994).

Next, defendant argues he is entitled to a new trial or remand on the basis of newly discovered evidence. Defendant asserts that an affidavit from his sister, Elena Conway, attached to the brief on appeal, contains new evidence that Kendrelle Giles, not defendant was the shooter in this case. A motion for a new trial based on newly discovered must first be brought in the trial court in accordance with MCR 2.611 and 2.612. *People v Darden*, 230 Mich App 597, 605-606; 585 NW2d 27 (1998). Because defendant did not move for a new trial before the lower court, this issue was not preserved for this Court's review and we need not reach it.[1] Because all the facts are before the Court, we will review the issue only for plain error. *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994).

New evidence in the form of a witness' recantation testimony has traditionally been regarded as suspect and untrustworthy. *People v Barbara*, 400 Mich 352, 362-363; 255 NW2d 171 (1977), citations omitted. And this Court has expressed reluctance to grant new trials on the basis of such evidence. *People v Canter*, 197 Mich App 550, 560; 496 NW2d 336 (1992). In *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), our Supreme Court stated the grounds for granting a new trial because 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. Here, it is unlikely that Conway's new testimony would make a difference in the probable results at retrial. While her recantation may impeach her original

[1] Defendant did file a motion to remand with this Court, but it was denied.

testimony, this evidence did not provide the sole basis for defendant's conviction. Conway's trial testimony was wholly corroborated by Garrett's testimony and the forensic evidence. And under *Canter*, her new testimony is deemed untrustworthy. Defendant is not entitled to remand or a new trial under the standard set forth in *Cress*.

Finally, in a late-filed standard 11 brief, defendant argues that the trial court committed reversible error when it allowed two statements into evidence on the last day of trial and that he was denied due process of law. Defendant is obviously confused because the first statement defendant complains of, dated April 11, 2002, was not allowed in at trial. The trial court granted defense counsel's motion finding that there could be prejudice to the defense since the prosecution inadvertently failed to produce the statement to defense counsel. Accordingly, the trial court granted defendant's motion to preclude questioning with respect to the statement. Thus, there was no error and defendant was not denied due process of law.

Regarding the alleged second statement dated May 20, 2002, the statement at issue was actually statements made to Sergeant Abdallah pursuant to arrest by defendant that were contained in Abdallah's PCR. Below, defense counsel specifically requested that the trial court preclude the prosecutor from attempting to impeach defendant by calling Abdallah to the witness stand and mentioning the statement in rebuttal. The trial court would not disallow Abdullah's testimony or use of the PCR to refresh his memory during the prosecution's rebuttal. However, the prosecution did not call Abdallah, or any other witnesses in rebuttal, and therefore the PCR was not introduced. Again, there was no error and defendant was not denied due process of law.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Pat M. Donofrio