

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

NATHAN EMMANUEL JACOBS,

Defendant-Appellant.

UNPUBLISHED
December 7, 2010

No. 283056
Wayne Circuit Court
LC No. 07-013349-FC

ON REMAND

Before: WILDER, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

This case is on remand from our Supreme Court to address defendant's claim of newly discovered evidence in light of the laboratory report from Ron Smith & Associates, Inc. (RSA).¹ After considering the laboratory report, we deny defendant's request for a new trial based on newly discovered evidence. Consequently, we once again affirm defendant's convictions and sentences for second-degree murder of victim Eric Murrow, MCL 750.317, assault with intent to commit murder upon complainant Roy Portis, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b.

Defendant's convictions arise from an altercation with three men, Irvin Smith, Roy Portis, and Eric Murrow, the victim. The prosecutor's theory at trial was that defendant became involved in a fight with the three men and left to retrieve an assault rifle from his vehicle. Smith and Portis fled the scene, but the victim was struck by three bullets while standing near the front door and died from his wounds. Smith and Portis returned to the scene, but did not aid the victim or call for emergency assistance. The men came forward after being persuaded by the victim's family. Although there was testimony that the victim also fired a gun during the confrontation, no gun was recovered.

¹ *People v Jacobs*, ___ Mich ___ entered September 9, 2010 (Docket No. 139607).

At trial, police officer Tenisha Bridgewater of the firearms unit testified that she analyzed cartridge casings found at the scene. The five casings found at the scene were normally fired from an AK-47, the same weapon that defendant retrieved from his vehicle according to the prosecution witnesses.² These shell casings were of the same caliber and from the same manufacturer as were three live bullets found in defendant's home. She also analyzed a casing that was fired from a handgun. Although she was not given any weapons to correlate to the casings, Bridgewater testified that all of the casings were not fired from the same weapon. The medical examiner's office retrieved two bullets from the victim's abdomen and one bullet from his head. However, Bridgewater testified that sometimes bullets are damaged when they travel through hard objects. Consequently, she was unable to analyze the bullets retrieved by the medical examiner from the victim's body.

The findings of the Detroit Crime Lab were called into question in other criminal cases, and ultimately the lab was shut down. The prosecution sent the evidence in this case to RSA for an independent evaluation.³ The RSA evaluation found that evidence item seven, the second bullet taken from the victim's abdomen, was a small lead fragment that had no rifling marks and had no value for identification purposes. Retrieved from the victim's head, evidence item eight was a copper bullet fragment for which the caliber could not be positively determined, but the rifling measurements were "consistent with bullets fired from 9x18mm Makarov caliber pistols." Evidence item nine, the first shot taken from the victim's abdomen, was a copper bullet fragment for which the caliber could not be positively determined. However, the rifling measurements were "consistent with bullets fired from 7.62x39mm rifles."⁴

Defendant contends that the RSA report constitutes newly discovered evidence which warrants a new trial because the evidence contradicts the prosecutor's theory of the case and demonstrates that the star witnesses were incredible. We disagree.

To be entitled to a new trial based on newly discovered evidence, a defendant must show that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) was not discoverable and producible at trial with reasonable diligence, and (4) would probably result in a different outcome on retrial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003). "Newly

² Officer Bridgewater testified that an AK-47 would normally fire a 7.62x39mm caliber bullet.

³ The prosecution contends that the evaluation was initiated by the prosecutor's office, and the defense does not dispute that assertion.

⁴ In the defense brief requesting a remand to the trial court, the RSA report is cited for the conclusion that the bullet taken from the head was consistent with bullets fired from a pistol while the bullet taken from the abdomen was consistent with bullets fired from a rifle. Review of the report reveals that it does not correlate the bullet to the injury. Rather, the report identifies the exhibit number and correlates it to the envelop number assigned by the police department or the medical examiner. To determine the location of the identified bullet, the transcript must be examined.

discovered evidence is not ground for a new trial where it would merely be used for impeachment purposes.” *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993).

With regard to the criteria for newly discovered evidence, defendant demonstrated that the evidence was newly discovered, was not cumulative to evidence admitted at trial, and that the evidence was not discoverable and producible at trial. *Cress*, 468 Mich at 692. The questionable reliability of crime lab results had not been confirmed prior to trial, and therefore, defendant did not seek independent expert review of the evidence. See MCL 775.15; *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006). However, defendant failed to establish that the evidence would result in a different result on retrial. *Cress*, 468 Mich at 692.

The elements of second-degree murder are: (1) a death, (2) defendant’s act caused the death, (3) defendant acted with malice, and (4) defendant acted without justification or excuse. *People v Bulmer*, 256 Mich App 33, 36; 662 NW2d 117 (2003). The intent necessary to satisfy the crime of second-degree murder is the intent to kill, the intent to inflict great bodily harm, or the willful and wanton disregard for whether death will result. *People v Robinson*, 475 Mich 1, 14; 715 NW2d 44 (2006). A defendant is responsible for the crime that he intends to aid or abet as well as the natural and probable consequences of that crime. *Id.* at 14-15. The prosecutor need not negate every reasonable theory consistent with the defendant’s innocence. *People v Bowers*, 136 Mich App 284, 300; 356 NW2d 618 (1984). The prosecution need only prove its own theory beyond a reasonable doubt regardless of the evidence offered by defendant. *Id.*

Defendant contends that the newly discovered evidence contradicts the prosecutor’s theory of the case that he fired at the victim with an AK-47 striking him three times. However, like the defense, the prosecutor was unaware of the classification of the bullets at the time of trial. More importantly, the RSA report confirmed the prosecutor’s theory with regard to one bullet. Specifically, one of the gunshot wounds to the abdomen confirmed that the victim was shot with an AK-47, the gun identified by the eyewitnesses to the incident.⁵ The prosecutor was not required to prove whether defendant acted in concert with another individual. The fact that there was a second shooter does not contradict the testimony that defendant shot at the victim with an AK-47 or the prosecutor’s theory that defendant shot the AK-47.⁶

Furthermore, we reject the contention that this newly discovered evidence demonstrates that the testimony presented by the prosecutor’s eyewitnesses was incredible. At trial, defense

⁵ The RSA report concluded that the second bullet to the abdomen was inconclusive, a finding that is consistent with the testimony of Officer Bridgewater. The third bullet was likely fired from a pistol.

⁶ We note that defendant contends that a new trial was warranted because of the contradiction of the prosecutor’s theory of the case and the attack on the credibility of the prosecutor’s witnesses. The defense does not challenge the sufficiency of the elements of the convicted offenses of second-degree murder, assault with intent to commit murder on Portis, and felony-firearm. Therefore, we do not address it.

counsel thoroughly attacked the testimony of Portis and Smith. Specifically, the defense argued that these witnesses should not be believed because they were drug dealers who stole guns from the scene and left the victim, a friend, bleeding in the hallway to die. The defense asserted that their testimony was also incredible because they would not turn to see what defendant was doing or who he was firing at upon realizing that defendant was getting a weapon. The eyewitnesses were also challenged because they failed to obtain emergency aid for their friend and attend the funeral. Review of the record reveals that the defense extensively challenged the credibility of the prosecutor's witnesses by addressing the delay in coming forward, the plausibility of their testimony, the violent altercation that preceded the shooting, and their occupation. Despite these challenges, the jury nonetheless found the testimony to be credible, even convicting defendant of the assault upon Portis. The defense failed to establish that a different outcome would result in light of the RSA report. *Cress*, 468 Mich at 692. Accordingly, defendant is not entitled to a new trial on this basis.⁷

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood

⁷ The Supreme Court order on remand vacated the holding addressing the claim of newly discovered evidence only. Consequently, the other issues addressed in our prior opinion remain the law of the case. *People v Herrera (On Remand)*, 204 Mich App 333, 340; 514 NW2d 543 (1994).