

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

THOMAS WEIR FOLEY,

Defendant-Appellee.

UNPUBLISHED

January 27, 2011

No. 297679

Branch Circuit Court

LC No. 09-059264-FC

Before: SAWYER, P.J., and WHITBECK and WILDER, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b(1). He was sentenced to life imprisonment for the murder conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. The trial court granted defendant's posttrial motion for a new trial based on newly discovery evidence. The prosecutor appeals that decision by leave granted. We affirm.

Defendant's convictions arise from the shooting death of his wife of nearly 15 years, 41-year-old Dee Dee Foley (the "victim"). The victim's unclothed body was discovered in the first-floor shower of the family's home in the late afternoon of February 7, 2009. The victim had been shot in the head. Defendant claimed that he discovered the victim's body when he returned home after the victim failed to show up for a family birthday party at a friend's house.

The case against defendant was entirely circumstantial. Although no weapon was ever recovered, the victim's wounds were consistent with a high-powered rifle or shotgun fired at close range. Two plastic shotgun shell wads and a fiber wad were found on the floor of the bathroom where the victim was shot. The victim's brother testified that a shotgun that he owned, and possibly some shotgun shells, turned up missing in the summer of 2008. He believed that the gun was taken by a friend or family member because nothing else was missing. Defendant would have had access to the gun locker where the gun was stored. A plastic bag containing three unused shotgun shells was found in a basement area of defendant's home, which can be accessed from a door in the bathroom where the victim was found. The shells were the same type that the victim's brother owned, and the bag appeared clean, unlike other items in the basement. Defendant's fingerprint was found on the bag.

Evidence was presented that sometime before 4:00 p.m., defendant's son was playing outside with a friend when they both heard a loud noise that sounded like thunder or glass shattering. The sound came from the house, near the area where the bathroom is located. They investigated, but saw nothing unusual. Defendant later offered an explanation for the noise, claiming that he was moving some salvaged windows from beside the house to a barn, and that one of the frames slipped out of his grasp and the window glass shattered on the back steps of the house. When his son asked what happened, he told him that everything was alright. A police investigator later found the windows in the barn where defendant had said he put them, and also found a piece of glass in the flower garden where defendant had set the broken window while he cleaned up the glass.

Shortly before 4:00 p.m. on the day of the offense, defendant left the house to drive his son and his son's friend to the birthday party. Defendant dropped the boys off at another friend's house at 4:20 or 4:30 p.m., and then left to get some ice. According to the homeowner, defendant appeared nervous and jittery. Defendant was gone approximately 15 minutes. At 5:00 p.m., defendant appeared concerned that the victim had not yet arrived with the other children for the party. He called the parents of the other children to see if the victim had arrived to pick them up, but did not attempt to call the victim at the family's home. Defendant then returned home and discovered the victim's body in the shower, after which he called 911. The police were dispatched to the home at 5:20 p.m.

The prosecution presented evidence that defendant and the victim had been having marital difficulties during the two years before the victim's death. Evidence was presented that they frequently argued, that defendant told the victim that he did not love her, and that defendant had engaged in flirtatious behavior with one of the victim's co-workers. However, there was also evidence that defendant and the victim had attempted to work out their difficulties, and that defendant voluntarily participated in counseling. The prosecution also presented evidence that defendant inquired about the victim's salary, benefits, and life insurance two days after the victim's death. In addition, some witnesses testified that defendant was observed laughing, joking, and seemingly happy just a few weeks after the victim's death.

The defense theory at trial was that an unknown intruder broke into the house, shot the victim, and stole items from the house. Although there was evidence that a kitchen door window was broken, that areas of the house appeared to be ransacked, and that some items were missing, the officer in charge believed that the circumstances were suspect and that the burglary appeared to be staged. One witness, Kenneth Brownell, testified that sometime between 3:00 and 4:00 p.m. on the day of the offense, he observed an older-model, white or light-colored car backing out of defendant's driveway at a high rate of speed. The driver was a white male with bushy hair.

After defendant was convicted, other witnesses came forward with information. Defendant thereafter filed a motion for a new trial, relying principally on the affidavits of three new witnesses who averred that they had seen a strange vehicle at defendant's house near the time of the offense. At an evidentiary hearing, Jeanette Moor testified that at approximately 4:45 p.m., she saw an older-type white car coming out of the driveway (driving forward) very fast. It would have hit her if she had not braked. The driver had curly black hair and a long face, and appeared to be 18 to 20 years old. The driver sped off going west. Jacklyn Gibson testified that

at approximately 4:00 p.m., she noticed a white car, probably a 1990s mid-size GM product, parked in the driveway, behind the victim's car. Terry McClughen testified that at approximately 3:30 p.m., he saw a dark SUV or cross-over vehicle, possibly a Ford, parked close to the barn furthest south on defendant and the victim's property. He knew it was not one of the vehicles normally present at the home. Given its location, it would not have been visible from the residence.

The trial court found that the witnesses' testimony was newly discovered and could not have been discovered with reasonable diligence because defense counsel had no basis for discovering the witnesses' existence or identity before trial. Although the court recognized that Brownell had testified at trial that he saw an older white car backing out of the victim's driveway very quickly sometime between 3:00 and 4:00 p.m., it determined that the new evidence was not cumulative to Brownell's testimony. The court noted that there was no direct evidence supporting the prosecutor's theory that defendant shot the victim before leaving the house while the children were playing outside. It also observed that defendant had explained the noise heard by the children, and that the plastic bag with his fingerprint could have been taken from a storage container in the kitchen. The court found that the most contested issue in the case was whether there was an actual break-in or a staged burglary. The court reasoned that within the context of this "contentious issue," Moor's and Gibson's new testimony was not cumulative because, whereas Brownell's observation was not probative of how long the car had been in the driveway and could have been consistent with a car merely briefly turning around, "Gibson's and Moor's testimony adds substantially to the possible inference of another person being at the house for a significant period of time in the time frame when the murder occurred." The trial court further reasoned:

Furthermore, since Brownell made his observations between 3 and 4 PM [3:45 PM according to his wife] and Moor made her's about 4:45 PM, since one saw a white car backing out of the driveway and the other saw the white car coming out forward, since both were nearly in an accident with a white car, their testimony tends to establish one of two conclusions; either two different white cars [and thus, different people] were at the place where the murder took place within the time frame when it occurred or, since their descriptions of both the car and the driver are similar, that the same car and the driver were there on two different occasions in that time frame.

None of this is cumulative to Brownell's testimony.

The trial court also concluded that although McClughen's testimony alone did not support a new trial, the testimony of Moor and Gibson had "sufficient weight and consistency for this Court to conclude that a fact-finder would be likely to consider it and to give it substantial weight." The court further found that Moor's and Gibson's "testimony has far greater weight than Brownell's to establish that another person was at the house for a significant period of time, perhaps even twice, during the time frame when this murder occurred after the Defendant left." The court found that there was a reasonable likelihood that defendant would have been acquitted if the newly discovered evidence had been presented, explaining:

The Court presided throughout the trial of this case in November 2009. This Court can think of no direct evidence of this Defendant's guilt offered at the trial. All evidence of his guilt is circumstantial and, while the jury's guilty verdict in this case is certainly reasonable, there is no question that an acquittal would have been equally so.

Accordingly, the trial court granted defendant's motion for a new trial.

Plaintiff now argues that the trial court abused its discretion in granting defendant's motion for a new trial based on newly discovered evidence. We disagree.

In reviewing a trial court's decision on a motion for a new trial based on newly discovered evidence, the trial court's findings of fact are reviewed for clear error, questions of law are reviewed de novo, and the trial court's ultimate decision whether to grant the motion is reviewed for an abuse of discretion. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). A finding is clearly erroneous "if, after review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *People v Hermiz*, 235 Mich App 248, 255; 597 NW2d 218 (1999), *aff'd* 462 Mich 71 (2000). An abuse of discretion occurs only when the trial court's decision falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

To be entitled to a new trial on the basis of newly discovered evidence, a defendant must show (1) that the evidence, not merely its materiality, was newly discovered, (2) that the new evidence is not cumulative, (3) that the defendant could not have, by the use of reasonable diligence, discovered and produced the evidence at trial, and (4) that the new evidence would make a different result probable on retrial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003). In determining whether newly discovered evidence warrants a new trial, a trial court may evaluate the credibility of the witnesses. *Id.*

Initially, the trial court did not clearly err in finding that the testimony of Moor, Gibson, and McClughen was newly discovered. All three testified that they did not contact defense counsel until after the verdict. Although Gibson and McClughen testified that they had contacted the police after the offense, neither was interviewed nor listed on any police report. Thus, their existence could not have been discovered by defense counsel. Moor did not contact the police at all. Accordingly, the trial court did not err in finding that their testimony was newly discovered and that defendant could not have discovered it by the use of reasonable diligence.

We also conclude that the trial court did not clearly err in finding that the new evidence was not cumulative to Brownell's trial testimony. Brownell testified that he drove by defendant's home sometime between 3:00 and 4:00 p.m. (closer to 4:00 p.m. according to his wife and stepson). He stated that he saw a white or light-colored car backing out of defendant's driveway at a high rate of speed. The driver was a white male with bushy hair, and the car sped away heading west after backing out of the driveway.

McClughen's testimony involved a dark vehicle parked by the last barn and clearly was not cumulative of Brownell's testimony. Moor's testimony described a vehicle similar to the one described by Brownell, which similarly was going very fast, but she saw the vehicle 45 minutes

or an hour later, and the vehicle was driving forward, not backing out. Gibson also described a vehicle similar to that described by Brownell, and her observation was made within the same timeframe as Brownell's, but she testified that the vehicle was parked in the driveway, whereas the vehicle Brownell saw was backing out of the driveway. Given the differences in the testimony, the trial court did not clearly err in finding that the new evidence was not cumulative of Brownell's trial testimony.

The more difficult issue is whether the new evidence would make a different result probable on retrial. In evaluating this question, the trial court focused on two principal aspects of the case. The first was that there was no direct evidence that defendant shot the victim. Rather, as the trial court observed, defendant's guilt depended solely on circumstantial evidence, most of which was subject to plausible, innocent explanations. Second, the primary contested issue in the case was whether an actual break-in occurred at defendant's house or whether a burglary was staged, as the police believed. Brownell's testimony was helpful in refuting the possibility of a staged break-in, because it was the only apparent aspect of the defense theory that was not subject to defendant's control. However, it was also ambiguous because the observation was fleeting and could have merely involved a driver turning around in the driveway. We agree with the trial court that, against this backdrop, "Gibson's and Moor's testimony adds substantially to the possible inference of another person being at the house for a significant period of time in the time frame when the murder occurred."

Considering that the circumstantial evidence against defendant was not particularly strong, and that the newly discovered evidence was highly probative of the presence of an unknown intruder, thereby supporting the defense theory that the victim was killed during a break-in, which the trial court found was the principal contested issue at trial, we cannot disagree with the trial court's determination that the new evidence would make a different result probable on retrial. The trial court's decision was rationally based on an evaluation of the weight and strength of the competing evidence and the parties' competing theories, and as such reflects a reasonable and principled outcome. Accordingly, the trial court did not abuse its discretion in granting defendant's motion for a new trial.

Affirmed.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Kurtis T. Wilder