



Missouri Court of Appeals
Southern District

Division Two

STATE OF MISSOURI,)	
)	
Plaintiff – Respondent,)	
)	
vs.)	No. SD29233
)	
ZACKARY LEE STEWART,)	Opinion filed:
)	October 2, 2009
Defendant – Appellant,)	

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY

Honorable Timothy W. Perigo, Circuit Judge

AFFIRMED

A jury found Zachary Stewart ("Defendant") guilty of murder in the first degree for fatally shooting David Dulin ("Victim") and assessed a punishment of life in prison without the possibility of parole. The trial court entered judgment in accordance with the jury's verdict. Defendant now appeals his conviction and asserts three points of trial court error: 1) failing to grant his motion for judgment of acquittal as the evidence presented was insufficient to support the necessary element of deliberation; 2) failing to grant his motion for a new trial based on post-trial discovery indicating someone else had confessed to the murder; and 3) allowing a witness to testify that a confidential informant

had implicated Defendant in the murder. Finding no merit in any of Defendant's contentions, we affirm.

I. Facts¹

On November 29, 2006, Defendant along with Defendant's mother, Paula Eby ("Paula"); Paula's boyfriend, Mark Myers ("Mark"); Mark's son, Robert Myers ("Robert"); Defendant's sister, Christy Pethoud ("Christy"); and Christy's boyfriend, Leo Connelly ("Leo"), went to Victim's house to steal Victim's "dope." Defendant and Robert were supposed to keep Victim on the couch and "watch" him while the others searched Victim's house.

While Defendant was holding Victim down, Victim got an arm loose and grabbed a Walther .22 pistol from a nearby drawer. Defendant was able to take the pistol away from Victim, and he shot Victim a total of five times with it. Defendant first shot Victim "a couple of times, or three times," then shot Victim two more times because Victim was "trying to stick his arms up or come up off of something." Defendant, along with the others, then ran out of Victim's house. After they left, Victim was able to call 9-1-1 on his cell phone. Victim told the 9-1-1 operator that he had been shot; that he didn't know the identity of the person who had shot him but that his assailants were from the nearby town of Hurly; and that one of the two men present said he was "the Eby girl's boyfriend." Officers and paramedics responded to the scene, but Victim, although conscious, was no longer able to communicate and was pronounced dead before he could be taken to the hospital.

¹ "[I]n reviewing a claim challenging the sufficiency of evidence, we must determine whether the evidence is sufficient to support a conviction by viewing the evidence and all reasonable inferences therefrom in the light most favorable to the verdict, disregarding all contradictory evidence and inferences." *State v. Davis*, 903 S.W.2d 930, 934 (Mo. App. W.D. 1995). Our summary of the facts is presented in accordance with that standard.

On March 23, 2007, Defendant was incarcerated in the Stone County jail after a DWI arrest. Five days later, detective Karl Wagner of the Stone County Sheriff's Office ("Detective Wagner") interviewed Defendant at the jail because he suspected Defendant had been involved in Victim's death. Defendant denied any involvement. However, when Defendant returned to his cell, he was shaken about the accusation and confessed to his two cellmates that he had killed Victim. Defendant's cellmates later informed Detective Wagner that Defendant told them that he had killed Victim. Defendant's cellmates repeated this claim when they testified of behalf of the State at Defendant's trial.

After Defendant was convicted, he filed a motion for a new trial based on a claim that newly discovered evidence indicated that Timothy Seaman ("Tim") had confessed to killing Victim. The trial court denied Defendant's request for a new trial after holding an evidentiary hearing, and this appeal followed. Other relevant facts will be set forth in the context of our discussion of Defendant's points relied on.

II. Analysis

Point I: Sufficiency of the Evidence

Defendant's first point alleges that "the state's evidence was insufficient to support a finding of guilt beyond a reasonable doubt for murder in the first degree, in that the evidence was that the victim pulled out a gun and was shot in the course of a struggle, so that [Defendant] did not have sufficient time to deliberate upon murder."²

² Defendant's point relied on states that he is appealing the denial of his "motions for judgment of acquittal at the close of the state's evidence and at the close of all the evidence." Because Defendant presented evidence, the portion of his claim challenging the denial of his motion for judgment of acquittal at the close of the State's evidence is waived. *State v. Tanner*, 220 S.W.3d 880, 886 (Mo.App. S.D. 2007). We will, however, review the portion of his first point that challenges the trial court's denial of his motion for acquittal at the close of all evidence.

When reviewing a challenge to the sufficiency of the evidence, we must determine whether there is sufficient evidence from which a reasonable juror could have found the defendant guilty beyond a reasonable doubt. *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001). We review the evidence in the light most favorable to the verdict, grant all reasonable inferences from the evidence in its favor, and disregard contrary inferences unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. *Id.* "We defer to the superior position of the jury to assess the credibility of witnesses and the weight and value of their testimony." *State v. Smith*, 185 S.W.3d 747, 758 (Mo. App. S.D. 2006).

Section 565.020³ states that "[a] person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter." Section 565.002 defines "deliberation" as "cool reflection for any length of time no matter how brief."

Coty Pollard ("Pollard") was one of the two cellmates Defendant had confided in at the Stone County jail. Pollard testified that Defendant told him that the police wanted "to charge [Defendant] with murder." According to Pollard, Defendant first told him that he did not commit the murder, but later changed his story. Pollard's trial testimony on the matter was as follows:

[Defendant] said that himself, [Leo], [Paula], [Christy], Mark and [Robert], all went to [Victim]'s house in search of dope. And they had taken two vehicles; there was [sic] three in each vehicle. [Defendant], Leo, and Christy were in one vehicle when they arrived, and the other three were in another vehicle. And Leo knocked on the door and the guy said come in, so they went in. And [Defendant] and one of the Myers, I'm not sure which one, were supposed to hold him down while they looked for what they were looking for. And [Victim] got an arm away and reached in a drawer and grabbed a .22 caliber pistol, and [Defendant] took it from

³ Unless otherwise indicated, all references to statutes are to RSMo 2000.

him and shot him five times, and then they all left. Except for [sic] this time it was Leo and [Defendant] in one car and the rest in the other. And Leo and [Defendant] went to Leo's house. Before they did that, he told me they had brought extra clothes and whatnot.

Pollard also testified that Defendant told him that "they burned the clothes in a barrel and threw it in the river. And then [Defendant] gave Leo the gun and Leo was supposed to get rid of it."

Victor Parker ("Parker") was Defendant's other cellmate in the Stone County jail. Parker testified that Defendant told him that "[h]is mom, his sister, Leo, and I believe his name was Mark Myers and Robert Myers" went to Victim's house. Parker testified that Defendant told him:

Well, [Defendant] said that they went over there to just take his dope, and when they got there and walked in, that they asked him where the dope was and stuff, and I guess they didn't get the response they wanted, so they sat him down on a couch, or put him on a couch. And then [Defendant] and I believe it was Robert was [sic] to watch him while the other four went and tried to find the dope.

Parker also stated that Defendant told him that, at this point, "[Victim] started acting like he was trying to get away or trying to get to something, and that's when [Defendant] said that [Victim] pulled a gun out of a nightstand, or a little end table, or something that was beside the couch next to a lamp." Parker then testified that:

[Defendant] was standing there and said that, you know, the struggle ensued, and [Defendant] came up with the gun, and he just shot a couple of times. And I guess [Victim] was still trying to stick his hands up, and he shot him a couple more times, and that's when he shot him in the stomach.

Parker also described the motions that Defendant made as he relayed the story to

Parker:

[Defendant] was acting like he shot a couple of times, or three times, and then tried to back off, because, you know, he was scared. And then I guess

[Victim] kept trying to stick his arms up or come up off of something there, and he shot him again.

Because "deliberation is a mental state and difficult to prove through direct evidence, it may be established by indirect evidence and inferences reasonably drawn from the circumstances surrounding the offense." *State v. Smith*, 966 S.W.2d 1, 5 (Mo. App. W.D. 1997). "Proof of deliberation does not require proof that the defendant contemplated his actions over a long period of time, only that the killer had ample opportunity to terminate the attack once it began." *State v. Johnston*, 957 S.W.2d 734, 747 (Mo. banc 1997) (internal citation omitted). The evidence, viewed in the light most favorable to the verdict, supports the conclusion that Defendant deliberated before he killed Victim. According to Defendant (via the testimony of Pollard and Parker), he took the gun away from Victim, shot him two or three times, then backed off and shot him again. This was not a situation where shots went off in the midst of a struggle for the gun. Instead, Defendant got complete control of the gun and -- rather than simply holding Victim (who was outnumbered six-to-one) at gunpoint -- decided to shoot Victim a total of at least four times: twice in the head, once in the chest, and once in the stomach.

"Deliberation c[an] also be inferred from the number, severity, and location of wounds to the victim[]." *State v. Howard*, 896 S.W.2d 471, 481 (Mo. App. S.D. 1995). Dr. Keith Norton ("Dr. Norton") testified at trial about the results of the autopsy he performed and the effect of the four shots on Victim's body. First, Victim was shot in the head "above and behind the left ear," which caused a "superficial breaking of the skull" and "a little bit of a bruise on the brain." Second, Victim was again shot in the head, this time in the left cheek. Dr. Norton testified that these two shots would not have been fatal, but they would have bled "rapidly." Third, Victim was shot in the "left upper chest" and

the bullet hit "the upper lobe of the left lung." Dr. Norton described this as "a dangerous wound, one that could cause death because of the bleeding from the lung and the pressure on the lungs." Dr. Norton concluded this shot to Victim's chest ultimately caused his death. Fourth, Victim was shot "just above the belly button" and the bullet "hit the colon and the liver." Dr. Norton testified that this shot would also have been a fatal injury because it would have "caused a lot of bleeding" and "a lot of infection."

Victim was shot four times after he had been disarmed by Defendant. Two of the wounds would have been deadly: the chest wound and the stomach wound. The other two shots were to Victim's head and caused rapid bleeding. While this evidence would not have compelled the jury to find deliberation, it was sufficient to allow the jury to do so.

Other indirect evidence supports an inference of deliberation. The jury could have inferred that Defendant came to Victim's house with intent to either kill or seriously injure Victim from Pollard's testimony that Defendant "had brought extra clothes and whatnot." An intent to simply take Victim's "dope" would not have suggested the need to take a change of clothes. If, on the other hand, one were planning to commit a murder, the possibility that blood or other DNA evidence might be deposited on whatever clothing the killer was wearing at the time would suggest the need to be prepared to be able to destroy that clothing. In addition, "[d]isposing of evidence and flight can support the inference of deliberation." *State v. Tisius*, 92 S.W.3d 751, 764 (Mo. banc 2002).

According to Pollard's testimony, the clothes the intruders wore at Victim's house were burned in a barrel and thrown in a river. Defendant also gave Leo the gun he shot Victim with and instructed him to get rid of it. Finally, there was also no evidence that

anyone present at Victim's house came to Victim's aid once he had been shot and, in fact, it was Victim himself who called 9-1-1 in an attempt to summon medical help. *See Howard*, 896 S.W.2d at 481 (stating that "the inference of deliberation is strengthened by the fact that [the defendants] left the scene immediately after the shooting without checking on the victims and procuring aid for them, and [] then disposed of the weapon used in the shooting.") (internal citation omitted). Point I is denied.

Point II: Newly Discovered Evidence

Defendant's second point alleges that "[t]he trial court . . . abused its discretion in overruling [Defendant's] motion for a new trial based on the post-trial discovery of [Tim's] confession to the murder ... in that the newly-discovered evidence would likely result in Defendant's acquittal on retrial as it pointed to Tim, not [Defendant], as the one who killed [Victim]."⁴

"We review the trial court's decision to deny a motion for new trial based on newly discovered evidence for an abuse of discretion." *State v. Ryan*, 229 S.W.3d 281, 288 (Mo. App. S.D. 2007). An abuse of discretion occurs when the trial court's ruling "is clearly against the logic of the circumstances then before the court, and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id.* at 285.

"New trials based on newly discovered evidence are disfavored." *State v. Smith*, 181 S.W.3d 634, 638 (Mo. App. E.D. 2006).

⁴ Although the dissent asserts that this newly discovered evidence included the presence of a bloody cap found near the victim (which contained a mixture of DNA attributable to Victim, Tim, and other unidentifiable persons), Defendant did not -- and could not -- make that claim in either his motion for new trial or here on appeal. That evidence, including the absence of any DNA attributable to Defendant, was presented to the jury at trial.

A new trial is warranted based on newly discovered evidence only where the defendant shows that: (1) the evidence has come to the knowledge of the defendant since the trial; (2) it was not owing to want of due diligence that it was not discovered sooner; (3) the evidence is so material that it would probably produce a different result on a new trial; and (4) it is not cumulative only or merely impeaching the credibility of the witness.

Ryan, 229 S.W.3d at 288. To determine whether or not evidence would probably produce a different result on a new trial, "the newly discovered evidence need only be 'credible and reasonably sufficient to raise a substantial doubt in the mind of a reasonable person as to the result in the event of a new trial.'" *State v. Stone*, 869 S.W.2d 785, 787 (Mo. App. W.D. 1994) (quoting *State v. Jennings*, 34 S.W.2d 50, 54 (Mo. banc 1930)).

Defendant first acknowledges that the second-hand testimony presented at the hearing on his motion for new trial regarding Tim's alleged "confession" was hearsay -- "in-court testimony of an extrajudicial statement offered to prove the truth of the matters asserted therein, resting for its value upon the credibility of the out-of-court declarant." *State v. Harris*, 620 S.W.2d 349, 355 (Mo. banc 1981) -- and even concedes that such statements are not generally admissible as an exception to the hearsay rule even if they amount to statements against penal interest. *State v. Blankenship*, 830 S.W.2d 1, 6 (Mo. banc 1992).

What Defendant relies on is this court's statement in *State v. Robinson*, 90 S.W.3d 547, 553 (Mo. App. S.D. 2002), that due process may require the trial court to admit the statements if: "(1) the declarant is unavailable as a witness; (2) the statements, if true, would exonerate the defendant; and (3) the statements carry substantial indicia of reliability." *Id.* To "carry substantial indicia of reliability," a statement must be: 1) self-incriminatory and undeniably against self-interest; 2) made spontaneously to a close acquaintance shortly after the crime; and 3) corroborated by other admissible evidence.

Chambers v. Mississippi, 410 U.S. 284, 300-01 (1973). We will now examine the hearsay statements at issue in the light of these standards to determine whether the statements were so material that they would probably produce a different result on a new trial.

Defendant called two witnesses at the evidentiary hearing on his motion for a new trial: Robert Bales ("Bales") and Detective Wagner. When asked if Tim had said anything to him about a homicide, Bales, Tim's nephew, responded, "He just told me that he and [John] Mills were at the house where it happened, and that's pretty much it, that they saw it. He didn't mention any other names or anything like that."⁵ Bales testified that Tim did not tell him anything else and he never talked to Tim about the homicide again.

This statement, if true, was not a statement against Tim's penal interest and would not exculpate Defendant by proving that he was not present. According to Bales, Tim said that he and John Mills were merely present at a house where a homicide occurred and that they saw it take place. Even if we assume that the homicide at issue was the one involving Victim, the statement, if true, would show that Tim and Mills watched *someone else* commit the murder, not that Tim had committed it with Mills.

Detective Wagner testified that Randy Seaman told him that Tim was at Randy's house in November and they were drinking and Tim told Randy "that he had taken someone's life, and asked him how you deal with that." While this statement, if true,

⁵ Tim did not testify. Defendant said he was unable to locate Tim and was, therefore, unable to procure his testimony by having him served with a subpoena. Defendant was able to personally serve Randy Seaman, Tim's brother, with a subpoena but Randy Seaman did not honor that subpoena as he failed to appear for the hearing. The State, at least for purposes of the hearing on the motion for new trial, did not object to this testimony on hearsay grounds and "agreed to the testimony of [Detective] Wagner being admitted for what Randy and Tim would testify to if they were here."

would certainly be against Tim's penal interest, it does not indicate that the life he had taken was Victim's or indicate whether anyone else was involved.

Defendant argued that if he had known about these statements and been able to present this "evidence" at his trial, he would not have been found guilty of Victim's murder. The trial court disagreed with Defendant about the legal significance of this new evidence and denied Defendant's motion for a new trial. In doing so, we cannot say that the trial court abused its discretion.

Defendant argues that when the testimony of Bales and Detective Wagner is considered in light of the fact that Victim told the 9-1-1 operator that he saw two white males, the conclusion must be reached that Tim and John Mills were the only two people present at Victim's house when he was shot and that Tim, not Defendant, was responsible for Victim's death.

Defendant cites two cases in support of this claim. In *State v. Mooney*, 670 S.W.2d 510 (Mo. App. E.D. 1984), the defendant was convicted of child molestation. *Id.* at 511. "The only witness who testified to the facts of the molestation was the minor ... and his testimony was the only evidence to support the conviction." *Id.* After the defendant's trial, the minor "recanted his trial testimony." *Id.* at 513. The case was remanded to the trial court to allow Defendant to file a motion for a new trial on the grounds that there was no substantial evidence to support the verdict because of the minor's recanted testimony. *Id.* at 516.

In *State v. Phillips*, 940 S.W.2d 512 (Mo. banc 1997), the defendant was convicted of first degree murder. *Id.* at 515. The State did not disclose to the defendant that the defendant's son had made the statement that he committed the murder and was

the one that "cut up 'all of 'em.'" *Id.* at 516. The Court stated that the defendant's son's comment "that he was the one who cut up the bodies is exculpatory ... because it tends to clear [the defendant] of involvement in that aspect of [the] murder -- the disposition of the body." *Id.* at 517. The Court found that "a new penalty phase is required to entertain this evidence." *Id.* at 518.

The present case is distinguishable from both *Mooney* and *Phillips*. Unlike *Mooney*, this case does not involve a situation where the State's sole witness -- and sole source of evidence -- recanted his testimony. Unlike the defendant's son's comment in *Phillips*, Tim's comments do not explicitly take responsibility for Victim's death. Bales testified, at best, that Tim said he was at Victim's house when Victim was killed. Detective Wagner testified that Tim said he had taken "someone's" life. These comments do not constitute a claim by Tim that he was responsible for Victim's death and Defendant was not.⁶ Unlike in *Phillips*, Defendant would also be offering them as evidence of Defendant's innocence -- not for the limited purpose of determining the appropriate punishment in a bifurcated capital murder case.

As to whether the new "evidence" Defendant wished to offer would probably produce a different result on a new trial, first, while Victim did say in his 9-1-1 call that he saw two white males, he did not say that there were *only* two white males present. It

⁶ We differ with the dissent's conclusion that Bales's statement -- that Tim said he and Mills witnessed the murder -- "makes two at the murder scene." Additionally, even if we ignored the part of the statement that the two of them "saw" the murder take place, Tim's identifying Mills as the other person with him would not be admissible as a statement against *Tim's* penal interest. As to Victim's telling the 9-1-1 operator that one of the men who shot him said that he was "the Eby girl's boyfriend," that connection would apply to Tim, not Mills. As a result, even if the newly discovered "evidence" was sufficient to indicate that Tim was responsible for Victim's murder, it would not be admissible to show that Mills, not Defendant, was the other person (and only other person) involved. Finally, the dissent argues that the trial court abused its discretion in refusing to grant a new trial based on the "evidence" presented at the motion hearing because "Defendant may find alternative methods of offering it or simply use it to gather admissible evidence." We believe this would be a significantly lower standard than that currently used in considering whether to grant a new trial based on newly discovered evidence, and we decline to adopt it here.

would also not be unreasonable to conclude that Victim might not have been able to give a full account of his situation after having just been shot four times -- including twice in the head. As previously stated, Tim's comments also did not indicate that he was taking sole responsibility for Victim's murder and that Defendant was *not* involved in its commission. Because the trial court's refusal to grant Defendant's motion for a new trial on the basis of newly discovered evidence was not clearly against the logic of the circumstances, it did not constitute an abuse of discretion. Point II is denied.

Point III: Reference to Confidential Informant

Defendant's final point alleges:

The trial court plainly erred in permitting Detective Wagner to testify that before Parker and Pollard approached him he had presented a sealed probable cause affidavit requesting charges against [Defendant]; that [Defendant] had mentioned the name of Detective Wagner's confidential informant; and that he had kept it sealed for his informant's safety, because this evidence a) was irrelevant and b) called for hearsay testimony, in violation of [Defendant's] right to confront and cross-examine witnesses against him and a fundamentally fair trial in violation of the Sixth and Fourteenth Amendment of the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution in that this had no bearing on Pollard and Parker's lack of independent knowledge and was gratuitous information that someone had implicated [Defendant], providing extrajudicial statements of evidence in a case that otherwise rested solely on jailhouse snitches who concededly coached and took advantage of [Defendant].

"Under Rule 30.20, we may grant plain error review if we find that the action or inaction at issue resulted in manifest injustice or a miscarriage of justice." *State v. Fackrell*, 277 S.W.3d 859, 862 (Mo. App. S.D. 2009). Our review for plain error is a two-step process. *State v. Millsap*, 244 S.W.3d 786, 789-90 (Mo. App. S.D. 2008). In the first step, we ascertain "whether substantial grounds for plain error have been facially

established by the party's allegation." *Id.* at 790. Only if this predicate step is satisfied will we then proceed to determine whether plain error actually occurred. *Id.*

Detective Wagner testified that before he had ever been contacted by Pollard and Parker he had received information from a confidential informant and, based upon that information and Victim's statements in his 9-1-1 call, had requested that the prosecutor file charges by submitting a probable cause affidavit. Detective Wagner also requested that the probable cause affidavit be sealed so that it would not be made public. We will address the issues raised regarding this testimony in the same order in which they were raised in Defendant's point relied on: relevancy, hearsay, and the right of confrontation.

First, the fact that the probable cause affidavit was sealed was relevant to the State's case. "Evidence is relevant and material if it tends to prove or disprove a fact at issue or corroborates other relevant evidence." *State v. Williams*, 277 S.W.3d 848, 852 (Mo. App. E.D. 2009). The fact that the probable cause affidavit had been sealed tended to prove law enforcement's claim that Pollard and Parker could not have acquired their knowledge about the killing from any public sources because the government was not releasing any such information. The fact that the affidavit had been sealed was therefore relevant.

"Hearsay is any out-of-court statement that is offered into evidence to prove the truth of the matter asserted." *State v. Reed*, 282 S.W.3d 835, 837 (Mo. banc 2009). In support of his argument that the complained-of testimony was hearsay, Defendant cites *State v. Garrett*, 139 S.W.3d 577 (Mo. App. S.D. 2004). In *Garrett*, a police officer testified on direct examination "that a confidential informant told him that [Defendant] was selling drugs from his home at 1624 Virginia." *Id.* at 581. The State also made

reference to the confidential informant's statement in both its opening statement and closing argument. *Id.* at 580-81. While the State argued that the confidential informant's statement was necessary to explain subsequent police conduct and supply relevant background information, the court held that its admission was erroneous because the State could have accomplished its purpose by having the officer simply say that he was acting upon information he had received. *Id.* at 582.

Here, Detective Wagner did not relay the statements made by the confidential informant. Detective Wagner's testimony only revealed that he had been in contact with an informant and had used the information provided by that informant in the probable cause affidavit he had submitted in support of his request that charges be filed against Defendant. The referenced testimony was not hearsay because: 1) it was not a "statement;" and 2) it was offered not for the truth of what was said but only to show why the officer had requested that the affidavit be sealed.

Finally, while "[t]he Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him,'" *Crawford v. Washington*, 541 U.S. 36, 42 (2004), that safeguard applies only if the out-of-court statement was "testimonial" in nature. *Id.* at 68. The Court in *Crawford* did not give a "comprehensive definition of 'testimonial'" but stated that "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* As previously indicated, Detective Wagner did not testify about what the informant said. He mentioned it only to explain what he had done in response to having received it. Because there was no statement, no right to confront the maker of it was implicated. Defendant also does

not explain why an accusation made by an unnamed confidential informant would carry more weight with the jury than one made by a "jailhouse snitch."

Because no manifest injustice or miscarriage of justice facially appears, no further review for plain error is necessary. Point III is also denied, and the judgment of conviction is affirmed.

Don E. Burrell, Presiding Judge

Lynch, C.J. – Concurs

Rahmeyer, J. - Concurs in part; Dissents in part

Attorney for Appellant - Rosalynn Koch, Columbia, MO.

Attorney for Respondent - Chris Koster, Attorney General, and Karen L. Kramer, Assistant Attorney General, Jefferson City, MO.

Division II



Missouri Court of Appeals
Southern District

Division Two

STATE OF MISSOURI,)	
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Defendant – Appellant,)	

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY

Honorable Timothy W. Perigo, Circuit Judge

CONCURS IN PART; DISSENTS IN PART

I concur with the majority's opinion that the trial court committed no error in denying Defendant's motion for judgment of acquittal or permitting Detective Wagner's testimony regarding the sealed affidavit, but I respectfully dissent from the opinion that the trial court did not err in denying Defendant's motion for new trial. As the majority notes, in order to determine that new evidence would probably produce a different result at a new trial, the new evidence "need only be 'credible and reasonably sufficient to raise a substantial doubt in the mind of a reasonable person as to the result in the event of a new trial.'" *State v. Stone*, 869 S.W.2d 785, 787 (Mo. App. W.D. 1994) (quoting *State v.*

Jennings, 34 S.W.2d 50, 54 (Mo. 1930)). In light of the new evidence in this case, I would hold that Defendant is entitled to a new trial. There was evidence which, if believed by the jury, would be reasonably sufficient to raise a substantial doubt. Specifically, I am concerned that it is not possible to connect Defendant with the newly discovered evidence and, as such, there is no nexus between Defendant and Tim. Several facts brought to light in the motion for new trial and at the hearing convince me that a jury should hear the new evidence.

First, as the parties stipulated at trial, the bloody cap found near Victim's body at the scene in fact contained Tim's DNA. While the parties stipulated that the DNA on the cap was Tim's and that stipulation was presented to the jury as the majority notes, in its closing argument the State called into question the validity of the initial test results and noted that additional testing would be necessary to confirm that it was in fact Tim's DNA. This testing has now been completed and confirmed the DNA as Tim's, which would leave no room for the jury to doubt the test results at a new trial. In addition, at the hearing on the motion for new trial, Detective Wagner testified that several of Tim's acquaintances told him that Tim owned a hat identical to the one found near Victim's body. He further testified that Tim denied ever owning such a cap or that he knew Defendant. The cap also contained the DNA of Victim.

Second, new evidence came to light that Tim admitted to Bales that he and John Mills witnessed the murder--causing Mills to vomit the next morning. That, combined with the DNA of an unknown person on dentures found, makes two at the murder scene, which is what Victim described in his 9-1-1 call. Detective Wagner testified that Tim also confessed to Randy Seaman that he had taken a life. Those statements, if believed,

certainly have enough reliability as the two jailhouse witnesses who claimed Defendant confessed to them. They were also self-incriminatory statements made spontaneously to close acquaintances shortly after a crime that were corroborated by confirmed DNA evidence and, thus, "carry substantial indicia of reliability." *State v. Robinson*, 90 S.W.3d 547, 553 (Mo. App. S.D. 2002).

Third, Detective Wagner testified that Randy Seaman told him Tim drove a light tan or white vehicle. Defendant's sister, Christy, owned a Ford Escort and pictures of that vehicle were admitted at trial during Detective Wagner's testimony regarding his search and observations of the Escort. Victor Parker testified that Defendant told him that Defendant, his sister, and Leo rode together in a white Escort to Victim's house and "that him and Leo was the only ones in the white Escort" when they left Victim's house.

Finally, Victim stated in the 9-1-1 call that one of the men who shot him said he was "the Eby girl's boyfriend." Tim is married to Candy Seaman, who could be said to be an "Eby girl." It is interesting that Parker, a witness for the State, could not identify which "Eby girl" had a connection to the murder.

Therefore, the new evidence consisted of confirmed DNA test results, testimony from Tim's brother and nephew, and testimony from Detective Wagner. The State has not suggested that this evidence is not credible, but instead argues that the testimony of Bales and Detective Wagner would be inadmissible hearsay at a new trial.⁷ This theory assumes that the evidence would be presented in the same manner it was presented at the hearing and ignores the possibility that Defendant may find alternative methods of offering it or simply use it to gather admissible evidence. Without knowing the manner in which new evidence would be offered it is impossible to determine its admissibility

⁷ The State agreed not to object on the basis of hearsay at the hearing for a new trial.

and, therefore, impossible to determine the likelihood it would produce a different result on that ground alone.⁸

The majority opinion discusses the new evidence in terms of what it is not, and reaches the conclusion that it would not lead to a different result because it does not prove that Defendant was not involved in the commission of the murder. I disagree. The prosecution did not present a case that involves Tim. If someone else committed the murder with one other person, who was not Defendant, then the evidence is exculpatory. At the very least, the new evidence potentially places two witnesses to the murder at the scene, one of whose DNA was found on a blood-soaked hat next to Victim's body--a hat his own brother attributed to him but he later denied ever owning. The new evidence allows for alternative inferences to be drawn regarding who the two men Victim told the 9-1-1 operator he saw were, who owned the light-colored vehicle seen down the road from Victim's house following the murder, and which "Eby girl" Victim was referring to in his 9-1-1 call.

While the majority is correct in stating that the new evidence does not prove that Defendant was not involved the crime, its conclusion overlooks the fact that this evidence presents an alternative theory of the case--one that could very well leave a reasonable doubt as to Defendant's guilt in the mind of a reasonable juror. The majority seems to evaluate the new evidence based on the answers (or lack thereof) it provides, but I am concerned with the substantial questions it raises. Where new evidence raises substantial questions, as it does in this case, the answers to those questions should be determined by

⁸ The majority states that this "would be a significantly lower standard than that currently used in considering whether to grant a new trial based on newly discovered evidence," but I am not advocating for a new "standard" for the court to reject or adopt. I simply decline to base my opinion solely on the ground that it would be inadmissible at a new trial if presented in the same manner as at the hearing, and believe the new evidence entitles Defendant to the opportunity to present an alternative theory of the case to a jury.

a jury. Finding the new evidence in this case sufficient to raise substantial doubt as to Defendant's role in the murder at a new trial, I respectfully dissent.

Nancy Steffen Rahmeyer, Judge