

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2011-L-166
DONTEL G. CRENSHAW,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 11 CR 000085.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Karen A. Sheppert*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Michael A. Partlow, 112 South Water Street, Suite C, Kent, OH 44240 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Dontel G. Crenshaw, appeals his conviction in the Lake County Court of Common Pleas, following a jury trial, of multiple counts of aggravated burglary, aggravated robbery, and kidnapping as a result of his participation in a home invasion in Willowick, Ohio. At issue is whether appellant’s conviction was against the manifest weight of the evidence. For the reasons that follow, we affirm.

{¶2} Appellant was indicted in a 13-count indictment and charged with two counts of aggravated burglary, felonies of the first degree; five counts of aggravated robbery, felonies of the first degree; five counts of kidnapping, first-degree felonies; and one count of grand theft with the combined value of all property stolen being \$5,000 or more, but less than \$100,000, a fourth-degree felony. Each count included a firearm specification. Appellant pled not guilty. The case was tried to a jury.

{¶3} Kathy Snyder testified she is a nurse and resides at 30204 Gebhart Place in Willowick with her children, Michael, Dan, Kelsea, and her twin sons, Jon and Joe. On Tuesday, January 11, 2011, Ms. Snyder left home at 6:30 a.m. to go to work. Dan, Kelsea, and the twins were still asleep. Kelsea's boyfriend Mark Castillo had stayed overnight. Mike was not home because he had spent the night with his girlfriend. At about 9:30 a.m., Dan called Ms. Snyder at work. He sounded panicky and told her that the house had just been broken into; that he called the Willowick Police Department; and that police officers were at the house. She left work and went home.

{¶4} Jon, age 13, testified that he and his twin brother Joe did not go to school that day because they were sick. Jon said that at about 9:15 a.m., he was awakened by a loud knock at the front door. Joe was still sleeping. Jon went to the door thinking it was their brother Mike coming home from his girlfriend's house. When Jon opened the door, he saw it was not Mike. Instead, there were two black males, one of whom was appellant. Both males were wearing black hoodies and sweat pants. Jon said he had never seen either of these males before. When Jon opened the door, appellant asked Jon if they could use a phone because they needed to call for a ride. Jon left the males at the door and went to his room to get his cell phone.

{¶5} As Jon returned to the door, the two males walked in the living room without being invited. Jon gave his phone to the second male, but he returned it without making a call. At the same time, appellant asked to use the bathroom.

{¶6} Appellant walked past Jon and Joe's room and went into the bathroom. A third black male then came into the living room from the front door. He also wore a black hoodie and sweat pants, and was much bigger than the other two. Jon had never seen him before either. The two black males sat in the living room with Jon.

{¶7} Appellant then walked out of the bathroom and went into the twins' bedroom. Jon walked to his room, and saw Joe lying in bed with appellant holding a gun to Joe's head. Appellant was yelling at Joe wanting to know where "the money" was. Joe told appellant the money was in their closet. The second male then went into their bedroom. Both suspects searched the closet and found \$170, which was the boys' Christmas money, and put it in their pockets.

{¶8} Jon and Joe testified that appellant and the second male stole their two X-Box video game players that they received for Christmas by putting them in the twins' book bags. The two males also stole Jon's cell phone and Jon and Joe's Nintendo Wii videogame system, which was in their closet, and put them in the book bags.

{¶9} Jon and Joe said the men led them into the hallway where the twins saw the third black male. The twins were told to lie on the floor and they complied.

{¶10} Jon said that he got a good look at appellant while he was in their home. He said that at times he was as close as one foot away from him and that he was "certain" that appellant was one of the gunmen. Joe said he had never seen any of

these males before. He said that while appellant was holding a gun to his head in his bedroom, he got a good look at him.

{¶11} Kelsea, age 18, testified that she woke up to her dog barking and went to the bathroom. When she came back to her room, Mark was sleeping and there was a black male in her room going through her closet. He was very big and wearing a hoodie. When he saw Kelsea, he came toward her, pulled out a gun, and asked her where the money was. She said she did not have any. The male then woke up Mark by hitting him on the chest with his gun. He asked Mark where the money was and Mark said he had no money. The male took \$5 and Kelsea's cell phone from her dresser. Suddenly, there was a noise in the hallway and the male left the room.

{¶12} Mark shut the door and locked it, not knowing the twins were home. Then, more than one person started pounding on the door telling them to open the door or they would shoot Kelsea's little brothers. That was the first time Kelsea realized there was more than one intruder in the house.

{¶13} Kelsea said she was terrified and as Mark went to unlock the door, it was kicked open. Two males then came into her room. One was the same big black male she had seen in her room earlier. He came after Mark pointing his gun at his head. The second male in her room pushed Kelsea on her bed and put his gun to her head. Kelsea and Mark identified the second male in her room as appellant.

{¶14} Kelsea said both males led her and Mark into the hallway. Appellant told Mark to open the safe. Mark said he did not have the combination. Appellant said you better open the safe if you want to see your b _ _ _ _ again. At the time, the twins were lying on the floor and all three suspects were in the hallway with them.

{¶15} Kelsea and Mark said they had never seen either male before. Kelsea said that she got a good look at appellant and could see his face clearly. She said there was “no doubt” that appellant was the male holding a gun to her head in her bedroom. Mark said he also got a good look at appellant and will never forget his face.

{¶16} Mark testified he went downstairs to get Dan. The big male and another male followed him. The big male held his gun to the back of Mark’s head. Mark yelled for Dan to wake up. Dan jumped up and he and Mark went back upstairs with the two males behind them.

{¶17} Mark testified the suspects stole his cell phone and his Wii system, which was in the living room. Mark said that later that day, he saw a piece of the sensor cord of his Wii that was left behind in the living room. He said the police returned the night of the robbery with a piece of the cord that matched the piece he found.

{¶18} Dan, age 20, testified he shares a bedroom with his older brother Mike in the basement. He said that on the morning of January 11, 2011, he woke up to Mark calling him, saying there’s people here robbing the house and they want the safe. Dan jumped out of bed and started walking to the stairs when a big black male pointed a gun in his face and said, “where’s the safe at?”

{¶19} Suddenly, there were two black males in the basement with Dan and Mark. They asked Dan why he was walking up the stairs, and he said that’s where the safe is. When Dan went into the hallway upstairs, he saw Kelsea, Mark, Jon, and Joe lying on the floor.

{¶20} While appellant was pointing a gun at Dan, the three suspects told him to open the safe and he complied. When Dan was opening the safe, he recognized two

of the males, appellant and the big black male. At first, he only remembered the first name of the big male, which was Robert.

{¶21} After Dan opened the safe, appellant ordered him to lay down on the floor with the others and he did. Appellant asked Dan where the rest of the money was and he said there was no more. Dan said that appellant confused him for Mark and thought that Kelsea was Dan's girlfriend because appellant told Dan he was going to blow Kelsea's p _ _ _ _ off and Dan would never be able to have sex with her again unless he produced more money. However, Dan said there was no more money.

{¶22} Dan said that appellant then went in the safe and took all the money in it. Dan said that about two years after his father died, he bought the safe and he and his mother use it. He said there was \$15,000 in the safe that was comprised of his savings from his job at Progressive Insurance and from his part-time landscaping work; his social security survivor benefits, which he has received since the death of his father; and \$5,000 belonging to his mother.

{¶23} The males told the family to count to 100, and as they were counting, the suspects ran out the front door.

{¶24} Dan jumped up; made sure no one was hurt; locked the front door; went downstairs to get his cell phone; and at 9:36 a.m., called the police. He reported that three black males had just robbed his house at gunpoint. He said they were all wearing black; were carrying two grey book bags; and were armed with guns.

{¶25} Officer Olup arrived while Dan was still on the phone with the dispatcher. Dan told Officer Olup he recognized two of the males. He said that Robert was the name of the large black male, but he could not remember appellant's name. Dan told

Officer Olup he believed a male named Tyrese Johnson was also involved. Dan said his friend Kenny is friends with Tyrese. Dan said he knows Tyrese from high school, but never socialized with him. Dan said he had seen Tyrese and Robert together and he knew they were friends. Dan said he also knew that appellant is Tyrese's brother, but Dan never met or talked to appellant. Dan told Officer Olup that about two weeks before the robbery, he was with Kenny at a card game at Kenny's cousin's house and Robert and appellant were there. Dan said that was the only other time he ever saw appellant. Dan said Tyrese had to be involved because Dan had only seen appellant and Robert when they were with Tyrese. Also, Robert and appellant live in Cleveland and would not have known where Dan lives unless Tyrese told them.

{¶26} At about 10:00 a.m., Dan went to the police station with Detective LaForge. Dan told the detective about Robert and Tyrese. While at the police station, Dan remembered appellant's first name as Donnie and gave it to Detective LaForge. The detective told Dan a neighbor had seen a vehicle the suspects may have been driving and took its license plate number. The car was listed to a Justine Dougher. Dan said that Tyrese Johnson's girlfriend was named Justine and this might be her car. Dan said he never met Justine, but knew of her and had seen her before. The detective asked Dan to return to the police station to view photo lineups. On the next day, Dan returned and identified Robert and appellant.

{¶27} James Franklin, who lives on Vineyard Road, which is one street over from Gebhart Place, the street on which the Snyders live, testified that on January 11, 2011, sometime after 8:30 a.m., he took his usual morning walk. As he was heading home on Vineyard, he saw three black males get out of a gold Nissan and walk away

from it. They were all wearing dark clothes with hoods. They walked several houses away from their car and then walked up the driveway at 30209 Vineyard, which abuts the backyard of the Snyder residence.

{¶28} Mr. Franklin said that when he got home, the lady who lives next door to 30209 Vineyard came outside and said she had just seen three black males walk up the driveway. She said she thought this was suspicious and was going to call the homeowner at work and have him come home to see if they had broken into his house.

{¶29} Mr. Franklin then walked up the driveway to 30209 Vineyard. He said there is a fence around the backyard with a gate, which the homeowner keeps closed, but it was now open. He saw footprints in the snow from the driveway to the back yard.

{¶30} Mr. Franklin then walked over to the Nissan, which was still parked on Vineyard, and wrote down its license plate number on his newspaper. He took the number because it seemed “very odd” to him that people would walk up a driveway after parking their car several houses down the street.

{¶31} After Mr. Franklin returned to his house, he saw two police officers and the owner of 30209 Vineyard pull into his yard. Mr. Franklin gave the license plate number to the police. At that time the Nissan was gone.

{¶32} Willowick Police Officer Christopher Olup testified that at about 9:30 a.m., he was assigned to respond to the Snyder robbery. He was the first officer on the scene. He gave the occupants statement forms and asked them to explain what happened. He said Kelsea was visibly upset and crying. The two young boys were wide-eyed and appeared to be in shock. Dan and Mark were upset and angry. Dan

said the name of one of the suspects was Robert, who he recognized from a card game he had recently attended at a friend's house.

{¶33} Officer Olup said that same afternoon officers from the Mentor Police Department contacted the Willowick Police Department and advised they had stopped a Nissan with the reported license plate number in Mentor. Officer Olup went to that location with Detective LaForge. Upon stopping the car, Mentor Police found a male named Tyrese Johnson and the car's owner Justine Dougher inside. Mentor Police arrested them and placed them in separate cruisers. Officer Olup transported Tyrese, and Detective LaForge transported Justine to the Willowick Police Department. Justine's car was towed to the station.

{¶34} Officer Olup testified that Justine gave consent for officers to search her car. Inside they found a small grey wire in the back seat. One end was broken and the other end was attached to a plug bearing the brand name Nintendo.

{¶35} Willowick Police Officer Steven Fellingner testified he was assigned to the Snyder robbery. On arrival at the scene, a male approached him and said he lives at 30209 Vineyard. He said his neighbor had called him at work saying she saw three black males enter his back yard. Officer Fellingner went to the resident's house and found it had not been entered.

{¶36} Officer Fellingner testified there were three distinct sets of footprints in the snow going up the resident's driveway, through a gated area in his back yard, through his back yard, and beyond the rear fence into the Snyder's back yard.

{¶37} Officer Fellingner said that Mr. Franklin then approached him and said he had seen three black males get out of a Nissan that was parked in the street and walk

up his neighbor's driveway. By then the car was gone, but Mr. Franklin provided its license plate number to the officer. Officer Fellingner gave the license plate number to dispatch to determine the owner of the plate and to broadcast it.

{¶38} After the Nissan was stopped and Officer Olup located the broken cord, Officer Fellingner recognized it as the cord that is plugged into the Wii console system from the sensor bar. Officer Fellingner went to the Snyder residence and retrieved a Wii gaming sensor bar with a broken cord that Mark found in the living room. A trace evidence expert testified the broken cord found in the living room matched the piece of cord found in the Nissan and that before being torn apart, the two pieces were one.

{¶39} Justine Dougher testified she owned the subject Nissan. She said she lives with Tyrese Johnson in Mentor. She said that on January 11, 2011, she had to be at work in Willoughby at 8:00 a.m. She said that Tyrese does not have a driver's license, but needed her car that day so he had his friend Robert Jackson drop her off at work and then take her car. She described Robert as a big black male. She said that at about 11:30 a.m., Tyrese called her at work and said he needed to go to his doctor. Robert picked her up in her car and drove her home. He then left and Justine drove Tyrese to his doctor. En route, they were pulled over by Mentor Police. Tyrese and Justine were detained. She said that Robert Jackson is Tyrese's friend; that appellant is Tyrese's brother; and that appellant and Tyrese see each other regularly.

{¶40} Willowick Detective Bruce LaForge testified that on the morning of the robbery, he took Dan Snyder to the police station. The first name Dan mentioned was Robert. He was trying to remember the name of the second male and recalled it was

Donnie. Detective LaForge was advised regarding the Nissan stopped in Mentor, and asked Dan to return to the station the following day to view photo lineups.

{¶41} After the Nissan was stopped in Mentor, Detective LaForge and Officer Olup went to the scene. Officer Olup transported Tyrese to the Willowick police station, while Justine stayed with Detective LaForge. Justine asked the detective for her apartment key. When the detective went to get it in her purse, he noticed it was filled with cash. He asked Justine if she had any money and she said \$15. When he showed her the \$3,285 he found in her purse, she seemed surprised. Detective LaForge asked her who had her car that day and she said Robert Jackson.

{¶42} Prior to being placed in a Mentor Police cruiser, Tyrese was patted down and police recovered \$1,420 in his pockets. At the Willowick police station, Detective LaForge interviewed Tyrese. After waiving his rights, the detective asked him who had Justine's car earlier that day. At first he would not provide any names. He eventually said that Robert Jackson, appellant, and Dre had the car. The detective asked him how the money got into Justine's purse. He said he put it there as they were being stopped by Mentor Police. As to the \$1,420 found in his pockets, at first Tyrese said that was his paycheck money. Then he said that he knew Justine's car was going to be used for a robbery and that the \$1,420 was his "percentage of the money taken."

{¶43} Tyrese was held for this investigation. Justine returned the next day asking to visit Tyrese. After Tyrese provided Detective LaForge with the suspects' names, he showed pictures of appellant and Robert Jackson to Justine and she identified them.

{¶44} On the day after the robbery, January 12, 2011, Dan Snyder returned to the station to view photo lineups. Dan identified Robert Jackson and appellant as two of the men who held him at gunpoint.

{¶45} Based on the identifications provided by Tyrese, Justine, and Dan, Detective LaForge obtained arrest warrants for Robert Jackson and appellant.

{¶46} One week later, on January 20, 2011, Dan Snyder called Detective LaForge and said he had found pictures of the two suspects he identified on Facebook and showed them to Kelsea and Mark. As a result, Detective LaForge decided not to show photo lineups to them.

{¶47} Two weeks after the robbery, appellant was arrested in Cleveland on the warrant. Detective LaForge transported him to the Willowick jail. After appellant waived his rights, he said he knew Dan and that he went to the Snyder residence on the day of the robbery to buy drugs from him. Appellant said that Dan did not have any drugs so they got into an argument and appellant left. Detective LaForge asked appellant why he parked on the next street over and appellant said, because Dan told him to. The detective asked him who he was with when he went to the Snyder home, and appellant said Robert and Dre, but that he did not know their last names.

{¶48} Appellant testified he has previously been convicted of robbery with a gun and receiving stolen property. He said he has sold drugs with Dan for two years. He said he has been to Dan's house in the past playing video games with the twins and flirting with Kelsea and that he is close with them. He said he did not go to the Snyder house on the day of the robbery.

{¶49} Appellant said that Detective LaForge lied when he testified appellant told him he went to the Snyder residence on the day of the robbery. Appellant said Detective LaForge never asked him why he parked on the next street over and he never said Dan told him to park there. Appellant also said he never told the detective he went to Dan's house with Robert Jackson and Dre. Instead, appellant said he told Detective LaForge that he sells drugs with Dan. He said he told the detective that a day *before* the robbery, he went to Dan's house and they got into an argument because appellant did not have money he said he owed Dan for selling drugs for him.

{¶50} Appellant said that Dan lied about appellant committing the robbery because he owes Dan money for drugs. Appellant said that Kelsea, Jon, Joe, and Mark lied about his involvement in the robbery and about not knowing him, and that he is the only one telling the truth. He said the victims and Detective LaForge are all lying because they are in a conspiracy against him.

{¶51} On cross-examination, appellant admitted he knew Dan had a safe; that he kept money in it; and that he knew the safe was in the house.

{¶52} Detective LaForge testified on rebuttal that appellant never told him he has sold drugs with Dan, and that appellant's testimony that he told this to the detective was an "absolute lie."

{¶53} Following the submission of the case to the jury, appellant was found guilty of all counts and firearm specifications as charged in the indictment. The court sentenced appellant to a total term in prison of 21 and one-half years. The court ordered appellant to pay restitution to Dan in the amount of \$10,410, based on the amount stolen from him in the amount of \$15,000 less \$4,590 that was recovered from

Tyrese and Justine. The court also ordered appellant to pay restitution to Mark in the amount of \$750. Appellant filed a motion for a new trial, which the trial court denied.

{¶54} Appellant appeals his conviction and the court's denial of his motion for a new trial, asserting two assignments of error. For his first assigned error, he alleges:

{¶55} "The appellant's convictions are against the mainifest [sic] weight of the evidence."

{¶56} Appellant does not challenge the sufficiency of the evidence, and thus concedes the evidence was sufficient to support his convictions. Instead, his challenge is confined to the weight of the evidence regarding his identification. We may find a verdict is against the manifest weight of the evidence, although legally sufficient evidence has been presented to support it. *State v. Group*, 98 Ohio St.3d 248, 2002-Ohio-7247, ¶76. Generally, the weight to be given to the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. Thomas*, 70 Ohio St.2d 79 (1982), syllabus. When considering the credibility of the witnesses, the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its judgment for that of the fact finder. *State v. Awan*, 22 Ohio St.3d 120, 123 (1986). When considering a manifest weight challenge, we review the entire record, weigh the evidence and reasonable inferences, and consider the credibility of the witnesses. *Group, supra*, at ¶77. We then determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that we must reverse the conviction and order a new trial. *Id.* We exercise this discretionary power only in those exceptional

cases where the evidence weighs heavily against conviction. *Id.*; *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997).

{¶57} First, appellant argues that the victims other than Dan Snyder were not credible because they “could only” identify him after Dan identified him in a photo lineup and after they viewed a picture of appellant found on Facebook. However, the other victims were not present at the lineup, and appellant does not claim they knew who Dan identified. Further, in the references to the record cited by appellant, Kelsea testified she found appellant’s and Robert’s pictures on Facebook only after looking at photographs of hundreds of black males listed as “friends” on Tyrese Johnson’s account. While Kelsea said she showed appellant’s Facebook photo to Jon and Joe, she did not tell them who he was; she only asked if they recognized the male in the photograph.

{¶58} Next, appellant argues that Dan lacked credibility because he did not identify appellant when Officer Olup was interviewing the witnesses. However, Dan told Officer Olup he recognized two males, but only remembered the first name of the big male, i.e., Robert. Detective LaForge said that at the station, Dan struggled to recall appellant’s first name, but finally did.

{¶59} Next, appellant argues that Dan had a motive to implicate him, which, he claims, is evident from the disparity in the amount Dan and Ms. Snyder reported as stolen, i.e., \$15,000; the amount found on Tyrese and Justine, i.e., \$4,590; and the \$200 paid by Ms. Snyder’s insurance carrier. However, Tyrese admitted to Detective LaForge that the \$4,590 located on him and Justine was his percentage of the loot for allowing Robert and appellant to use Justine’s car to commit the robbery. Since

Tyrese said this was only his share of the stolen funds, it stands to reason that the total amount stolen was substantially more. Further, appellant failed to present any evidence regarding the terms of Ms. Snyder's insurance coverage, the insureds under her policy, the insurance investigation, or the reason that only the amount stolen from the twins was reimbursed. Consequently, the difference in the three amounts does not support any motive for Dan to implicate appellant.

{¶60} In any event, appellant does not even suggest that Jon, Joe, Kelsea, or Mark had any motive to falsely identify him. Appellant's argument that Dan had a "significant" amount of time to coach them to lie is belied by the undisputed testimony that there was no time gap between the time Dan called the police and the time Officer Olup arrived and took the victims' statements.

{¶61} Appellant argues that because he testified he sold drugs with Dan for two years and has often been at the Snyder home playing video games with the twins and flirting with Kelsea, he is somehow more credible than Jon, Joe, Kelsea, and Mark. However, appellant was unable to present even one other witness to corroborate his story. Moreover, the evidence presented by the state other than the victims contradicted appellant's claim that he was not present at the robbery. First, Mr. Franklin identified the car in which appellant's brother Tyrese and part of the stolen funds were found. Second, Tyrese, appellant's own brother, told Detective LaForge that Robert Jackson and appellant had Justine's car at the time of the robbery; that Tyrese knew Robert and appellant were using it for the robbery; and that the money found on him and Justine was his "percentage" of the take. Third, the broken cord found in the car appellant was using was torn from Mark's Wii. Fourth, appellant

admitted to Detective LaForge that he was at the Snyder home on the day of the robbery. Fifth, appellant's testimony that he was close with Dan's family was contradicted by the fact that, in demanding more money from Dan, appellant confused Dan for Mark and told Dan that if he did not come up with more money, he was going to shoot Kelsea's vagina off and Dan would never be able to have sex with her again.

{¶62} In assessing appellant's credibility, the jury was not required to ignore appellant's admission that he has previously been convicted of robbery with a gun and receiving stolen property and that he still sells marihuana, heroin, and cocaine.

{¶63} The jury was entitled to believe the state's witnesses and to find appellant's uncorroborated version of events not credible, as it obviously did. In so doing, we cannot say the jury clearly lost its way and created such a manifest miscarriage of justice that he was entitled to a new trial.

{¶64} Appellant's first assignment of error is overruled.

{¶65} For his second and final assigned error, appellant contends:

{¶66} "The trial court erred and abused its discretion by denying the appellant's motion for a new trial based upon newly discovered evidence."

{¶67} Crim.R. 33(A) provides that "[a] new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights: * * * (6) [w]hen new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial."

{¶68} Further, a new trial is allowed where the new evidence: (1) discloses a "strong probability" that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such that it could not in the exercise of due diligence

have been discovered before trial, (4) is material, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence. *State v. Rock*, 11th Dist. No. 2005-L-005, 2005-Ohio-6291, ¶24, citing *State v. Petro*, 148 Ohio St. 505 (1947), syllabus. This court has held that all six of the *Petro* requirements must be satisfied in order for the trial court to grant a new trial. *Rock, supra*, at ¶29. The trial court has discretion to grant or deny a motion for a new trial for newly discovered evidence, and absent an abuse of discretion, that decision will not be disturbed. *Id.* at ¶24.

{¶69} In support of his motion for a new trial, appellant attached the seven-line affidavit of a co-defendant, Robert Jackson, in which Jackson stated that he, one T.J., and one Lil Dre were at the Snyder residence on January 11, 2011, and that appellant was not “involved in the incident in the residence.” The trial court denied the motion without a hearing, finding the evidence was not newly discovered and did not meet the *Petro* requirements.

{¶70} We agree with the trial court’s finding that, even if Jackson could be persuaded to testify, his affidavit did not constitute newly discovered evidence. Appellant argues that because Jackson did not sign his affidavit until after trial, it was not available for trial. However, it is undisputed that appellant was aware of Jackson’s involvement in these crimes prior to trial. As the trial court noted, appellant received the police report in pretrial discovery, which identified Jackson as one of the perpetrators. And, Tyrese told Detective LaForge that he provided Justine’s car to *Jackson and appellant* to commit the robbery. Thus, appellant was aware of Jackson’s involvement in this case before trial and had the opportunity to speak with him about *the information*

in his affidavit before trial. Thus, the information contained in the affidavit was not newly discovered because appellant was required, but failed, to show it could not in the exercise of due diligence have been discovered before trial. *State v. Wilson*, 10th Dist. No. 02AP-1350, 2003-Ohio-5892, ¶17.

{¶71} We also agree with the trial court's finding that appellant failed to show a strong probability that Jackson's testimony would change the result if a new trial was granted, as required by *Petro, supra*. First, we note that Jackson's affidavit is devoid of any detail. Jackson does not admit that he committed any crime. Further, Jackson does not provide the full name of either of his alleged accomplices. Moreover, the five victims testified that appellant was one of the three gunmen. Appellant testified that he was not present during the home invasion. The jury obviously did not believe him, and there is nothing about Jackson's affidavit to show there was a "strong probability" that the jury would find him more credible than appellant.

{¶72} We note that appellant does not challenge the trial court's additional finding that Jackson's affidavit did not meet the requirement of *Petro* that the new evidence not merely impeach or contradict the former evidence. The five victims testified that appellant was present and committed these crimes; Jackson merely denied that appellant was present. Thus, his affidavit did nothing more than impeach or contradict the victims' testimony.

{¶73} We therefore hold the trial court did not abuse its discretion in denying appellant's motion for a new trial.

{¶74} Appellant's second assignment of error is overruled.

{¶75} For the reasons stated in this opinion, appellant's assignments of error are not well taken. It is the order and judgment of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.