

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN ALEXANDER GREENE II,

Defendant-Appellant.

UNPUBLISHED

September 10, 1996

No. 172922

LC No. 93-7791-FC

Before: Holbrook, PJ, and Saad and W. J. Giovan,* JJ.

MEMORANDUM.

Defendant was convicted by jury of armed robbery, MCL 750.529; MSA 28.797, and conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1). He appeals as of right. We remand for an evidentiary hearing on his claim of newly discovered evidence.

Two of the participants in the robbery testified against defendant at trial. At defendant's sentencing, a third individual, who had been incarcerated with the two participants, told defense counsel that he had overheard the two participants discussing their intent to lie against defendant. Defendant filed a motion for new trial based on this asserted newly discovered evidence, but it was untimely. MCR 7.208(B). Although this issue is not properly preserved for review, *People v Jackson*, 31 Mich App 276, 277; 187 NW2d 487 (1971), discovery that trial testimony was perjured may be grounds for a new trial based on newly discovered evidence. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). Accordingly, we remand for an evidentiary hearing before the circuit court, following which the court should rule on whether defendant is entitled to a new trial based on newly discovered evidence. Before a new trial would be warranted on this basis, defendant must show that the evidence is (1) newly discovered; (2) not merely cumulative; (3) probably would have caused a different result; and (4) was not discoverable and producible at trial with reasonable diligence. *People v Miller (After Remand)*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995).

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant's remaining argument is without merit because he has not shown that the prosecution knowingly used false evidence (or permitted false evidence to stand uncorrected). *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959); *People v Carter*, 197 Mich App 550, 568; 496 NW2d 336 (1992).

Remanded. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.

/s/ Henry William Saad

/s/ William J. Giovan