

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

November 1, 1996

Plaintiff-Appellant,

v

No. 149682; 183615
LC No. 91-003795

MARTY GADSON,

Defendant-Appellee.

Before: White, P.J., and Smolenski and R.R. Lamb,* JJ.

PER CURIAM.

In this consolidated appeal, the prosecution appeals the trial court's grant of defendant's motion for new trial based on newly discovered evidence (Docket No. 183615), and, in the event this Court reverses the trial court's grant of defendant's motion for new trial, defendant appeals his jury trial conviction of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), (Docket No. 149682), in connection with the shooting death of Michael Henderson. We affirm the trial court's order granting defendant's motion for new trial based on newly discovered evidence. The issues in Docket No. 149682 are therefore rendered moot and we do not address them.

I

Following an evidentiary hearing at which numerous witnesses testified, the trial court issued a lengthy and thorough written opinion granting defendant's motion for a new trial on the basis of newly discovered evidence. The trial court's opinion summarized the testimony of eight witnesses at the evidentiary hearing. Six of these witnesses gave compelling testimony inculpating two other men in the murder. One witness was a forensic polygraph examiner who testified that defendant voluntarily underwent a polygraph examination paid for by the defense, and answered negatively to four questions regarding whether he murdered Henderson, or was present, or had planned to do so. The examiner opined that defendant was non-deceptive in his responses. The remaining witness was defendant's trial

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

counsel. The court concluded that defendant established his entitlement to a new trial by satisfying the applicable four-pronged test as stated in *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994) and *People v Davis*, 199 Mich App 502; 503 NW2d 457 (1993), and noted, additionally, that a new trial is appropriate under MCR 6.431(B) to avoid a miscarriage of justice.

A

The prosecution first argues that the trial court improperly considered the results of the polygraph examination taken by defendant when deciding defendant's motion for new trial. It is clear from the trial court's opinion that this testimony was regarded as corroborative, but was of little importance in the court's determination to grant a new trial. The court devoted one short paragraph to the polygraph examination in its lengthy opinion,¹ which focused overwhelmingly on the testimony of the other witnesses, which exonerated defendant and implicated two other men, Christopher Mitchell and Kirkland Mosley. We therefore conclude that any error² in the admission or consideration of the polygraph evidence was harmless in light of the evidence presented at the evidentiary hearing, and the court's decision.

B

The prosecutor next argues that the court erred in granting a new trial. We disagree. A motion for new trial based on newly discovered evidence will be granted if the defendant shows 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 have caused a different result at trial. *Mechura, supra* at 483. A trial court's decision to grant such a motion is reviewed for abuse of discretion. *People v Miller (After Remand)*, 211 Mich App 30, 47; 535 NW2d 518 (1995). After a review of the record of the evidentiary hearing, we conclude that the court did not abuse its discretion.

Reginald Battle, Isaac Foster, and Lorenzo Thomas testified to Mitchell's admissions regarding the murder. Battle also testified that Mosley acknowledged being the driver. Because Mitchell's statements as reported by the witnesses were consistent with the evidence at trial and because the conditions under which the incriminating statements were made indicated their trustworthiness, the statements were admissible as declarations against interest under MRE 804(b)(3). *People v Hawkins*, 114 Mich App 714, 719; 319 NW2d 644 (1982). We therefore reject the prosecution's argument that Battle's and Foster's testimony was inadmissible.

Further, Foster and Thomas testified regarding statements that were not made until after defendant was convicted. Battle testified that he did not come forward with an account of Mitchell's statements before the trial because he was not asked and because he was afraid that Mitchell might hurt him or his family. Sometime after defendant's conviction, however, Mitchell and Mosley were given lengthy prison terms on unrelated crimes, which made Battle feel safe in coming forward with the information. Defendant also made an adequate showing that Rosalind Avery's testimony concerning her telephone call to Mitchell telling him that Henderson had hurt her and Mitchell's admissions regarding

the shooting was newly discovered. Avery invoked the Fifth Amendment at trial and was unavailable to testify. She testified at the evidentiary hearing that she feared she would incriminate herself if she testified about the telephone call and that she feared for her life if she incriminated Mitchell. Rowena Gadson's testimony concerning Rosalind Avery's telephone call to Mitchell was also newly discovered because she testified that she did not learn of the call until after defendant was convicted.

We reject the prosecution's argument that the testimony given at the evidentiary hearing would probably not have caused a different result at trial. The trial court's opinion states, with ample support in the record, that:

. . . The detailed, corroborated, compelling nature of the testimony warrants granting a new trial on the basis of newly discovered evidence. The evidentiary hearing testimony was detailed in the foregoing summaries because the substance and consistency of the evidence could not be fully appreciated otherwise. There were at least three witnesses who testified (1) that Mitchell was the shooter, (2) that he used a 9 millimeter gun (consistent with the evidence technician's trial testimony), (3) that he emptied the whole clip (again, consistent with the technician's testimony that 26 spent casings were found), (4) that a red Mustang was involved, (5) that the driver of the Mustang was Mosley, (6) that there was a woman with the victim and (7) that the victim was near or coming off a porch when he was shot.

* * *

The newly discovered evidence would probably cause a different result on retrial. Henderson and Hood's identification of Gadson was neither strong nor unimpeached, as discussed in Section I. On retrial, most of the evidence would point away from the defendant and directly to Mitchell and Mosley. In addition, while Henderson's and Hood's description of the perpetrator fits the defendant in some respects (6' - 6'3", thin build), it more closely fits Mitchell because he is a "light-skinned" black male. Defendant Gadson has a medium brown complexion.

Although some of the witnesses—Battle, Thomas and Foster may have axes to grind with Mitchell, no evidence was admitted indicating that they had spoken to Rowena or Avery to coordinate their testimony. Their testimony also was not impeached in any material respect. Essentially, the only way the various witnesses' testimony could be discounted is if one believed a huge conspiracy to implicate Mitchell occurred.

Finally, the defense counsel could not have, with reasonable diligence, produced the evidence at trial. As previously indicated, the witnesses either refused to come forward, cooperate or testify (Rowena, Avery and Battle), testified to only part of the alleged truth (D'Andra King) or only learned of the circumstances of the killing after Gadson's trial and conviction (Foster, Thomas and Nash).

Some of them (Battle, Avery and Rowena) are only coming forward now because Mitchell and Mosley are serving lengthy prison sentences for unrelated crimes.

[paragraph regarding polygraph test. See note 1.]

It should be noted that MCR 6.431 (B) provides a separate basis for a new trial. . .

The nature and quality of the evidence adduced at the evidentiary hearing virtually compels the conclusion that the verdict resulted in a miscarriage of justice.

To paraphrase Attorney Stevenson's argument at the conclusion of the hearing, this is a case where the evidence suggests not only that the defendant did not commit the crime, but virtually amounts to proof beyond a reasonable doubt that someone else, Christopher Mitchell, did.

For all the foregoing reasons, the defendants [sic] Motion for New Trial Based on Newly Discovered Evidence is hereby GRANTED.

We conclude the trial court did not abuse its discretion in granting defendant's motion for new trial based on newly discovered evidence.

Affirmed.

/s/ Helene N. White
/s/ Michael R. Smolenski

¹ After summarizing the testimony of eight witnesses, one of which was the polygraph examiner, the court's opinion in four pages set forth its legal analysis. One short paragraph at the end of this analysis mentioned the polygraph examination:

The testimony of the "new" witnesses is also corroborated by the fact that the defendant passed a polygraph test, supporting his claim of innocence. Although polygraph test results are not admissible at trial, they may be considered in deciding a motion for new trial. . . .

² We do not imply that there was, in fact, error. Rather, because it is clear that the polygraph evidence was of little consequence, we find it unnecessary to address the merits of the prosecution's argument that the court erred in failing to distinguish *People v Barbara*, 400 Mich 352; 255 NW2d 171 (1977), and *People v Mechura*, 205 Mich App 481; 517 NW2d 797 (1994) on the basis that defendant did not testify at the hearing.