

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD L. PACK,

Defendant-Appellant.

UNPUBLISHED

February 24, 2005

No. 250935

Wayne Circuit Court

LC No. 03-005338-01

Before: Talbot, P.J., Whitbeck, C.J., and Jansen, J.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82, for which he was later sentenced to two years' probation. Defendant's postjudgment motion for a new trial, which was based on newly discovered evidence, was denied. Defendant appeals that ruling as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes the verdict has resulted in a miscarriage of justice. MCR 6.431(B). The trial court's ruling on a motion for a new trial is reviewed for an abuse of discretion, but its factual findings are reviewed for clear error. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000).

A new trial may be granted on the basis of newly discovered evidence, *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993), although such motions are not favored. *Kroll v Crest Plastics, Inc*, 142 Mich App 284, 291; 369 NW2d 487 (1985). Our Supreme Court provided:

For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) "the evidence itself, not merely its materiality, was newly discovered; (2) "the newly discovered evidence was not cumulative"; (3) "the party could not, using reasonable diligence, have discovered and produced the evidence at trial"; and (4) the new evidence makes a different result probable on retrial. [*People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), quoting *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996).]

“[W]here newly discovered evidence takes the form of recantation testimony, it is traditionally regarded as suspect and untrustworthy.” *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992). “Michigan courts have expressed reluctance to grant new trials on the basis of recanting testimony.” *Id.* at 560. “Newly discovered evidence is not ground for a new trial where it would merely be used for impeachment purposes.” *People v Davis*, 199 Mich App 502, 516; 515 NW2d 457 (1993). The appellant has the burden of showing that the evidence is both newly discovered and material. *People v Van Camp*, 356 Mich 593, 602; 97 NW2d 726 (1959).

Eileen Sweeney, the complainant who was defendant’s live-in girlfriend at the time, testified at trial that during an argument, defendant brandished a large stick, threatened to kill her, and hit her in the elbow with the stick. After defendant was convicted but before he was sentenced, she wrote to the trial judge recanting her testimony. Sweeney proclaimed defendant’s innocence and said, “He did not hit me or anything.” However, an investigating officer who appeared at the scene testified at trial that Sweeney appeared genuinely fearful and had a reddish knot on her elbow. Sweeney offered no alternate explanation for her injury in her recanting statement and, unlike the situation in *People v Smallwood*, 306 Mich 49; 10 NW2d 303 (1943), she was cross-examined extensively regarding possible fabrication in retaliation for defendant’s unfaithfulness. Moreover, Sweeney did not expressly deny that defendant had brandished the wooden object and threatened to kill her. Such evidence, as the trial court pointed out, was itself sufficient to justify a conviction. *People v Pace*, 102 Mich App 522, 534; 302 NW2d 216 (1980). The trial court did not abuse its discretion in denying defendant’s motion. *People v Harris*, 31 Mich App 100, 102-103; 187 NW2d 502 (1971); *People v Jimmerson*, 30 Mich App 147, 148-149; 186 NW2d 37 (1971).

Affirmed.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Kathleen Jansen