

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MELVIN FREEMAN,

Defendant-Appellant.

UNPUBLISHED
September 16, 2003

No. 241589
Wayne Circuit Court
LC No. 01-009667

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MELVIN FREEMAN,

Defendant-Appellee.

No. 245852
Wayne Circuit Court
LC No. 01-009667

Before: Bandstra, P.J., and White and Donofrio, JJ.

PER CURIAM.

In these consolidated appeals defendant appeals as of right his jury trial convictions for armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b, in Docket No. 241589, and the prosecutor appeals by leave granted the trial court's order granting defendant's motion for a new trial in Docket No. 245852. The trial court abused its discretion in granting defendant's motion for a new trial without an evidentiary hearing because the affidavit presented by defendant constituted inadmissible double hearsay. We also find that there was sufficient evidence adduced at trial to sustain defendant's conviction in the event that a new trial is not granted on remand. We vacate the trial court's grant of defendant's motion for a new trial, remand for an evidentiary hearing, and conditionally affirm defendant's conviction in the absence of a grant of a new trial.

The prosecution argues that the trial court erred in granting defendant's motion for a new trial based on newly discovered evidence that the victim actually faked the armed robbery for which defendant was convicted. A trial court's decision to grant a new trial based on newly

discovered evidence is reviewed for an abuse of discretion. *People v Miller (After Remand)*, 211 Mich App 30, 47; 535 NW2d 518 (1995).

Defendant's conviction for armed robbery was based solely on the victim's testimony as the prosecution offered no further evidence. The victim was a route sales representative for Frito Lay, Inc., meaning he delivered Frito Lay products to stores and restaurants. On August 10, 2001, the victim was making a delivery at a party store in Detroit. At 2:00 p.m. the victim parked his delivery truck in the party store's parking lot. The victim entered the store, told the store owner that he was making a delivery, and retrieved the written order from the store owner.

After retrieving the order, the victim walked back to his parked truck and opened its back door. With the relevant order in one hand, the victim began pulling the products that he was to deliver to the party store and dropping them on the truck's floor. At this time, the victim was carrying approximately \$672 in cash¹ that he had received earlier that day making deliveries. While he was pulling the order, the victim noticed someone, whom he later identified as defendant, pacing back and forth about eight feet away from the truck.

The victim took his eyes off defendant, and then noticed that defendant was approaching him. As defendant got closer, defendant pointed a gun at the victim and said, "[y]ou know what this is. Give me the money." The victim took his money out and dropped it onto a cardboard box that was sitting on the truck floor. Defendant picked up the money while keeping the gun pointed at the victim and told the victim to back up. Defendant eventually told the victim to lie down on the truck floor and the victim complied. Shortly thereafter, both defendant and the victim ran away from the delivery truck.

On the next day, August 11, 2001, the victim had planned on getting a haircut at a barbershop near the party store where he was robbed. As the victim drove to the barbershop that morning he noticed defendant walking alongside the road. The victim called the police with his cell phone and told them that he had just seen the man who robbed him the day before. The police arrived and arrested defendant.

Nine months after his armed robbery conviction, defendant filed a motion for a new trial based on newly discovered evidence, with an attached affidavit signed by defendant. In his affidavit, defendant claims that shortly after sentencing while being held in jail, he relayed the details surrounding his conviction to another inmate. Pee Wee Jones, another inmate, overheard defendant's conversation and asked defendant for a description of the Frito Lay driver. Jones recognized the victim's name and told defendant that he used to work at a convenience store in Highland Park, Michigan that received Frito Lay deliveries from the victim. Jones told defendant that the victim used to frequently complain about his job and said he planned on faking two robberies and then would seek worker's compensation from his employer. Jones further told defendant that the victim joked and bragged about getting away with creating the

¹ The victim testified that, ordinarily, he would not carry this much cash with him when making deliveries. When he would have about \$150 to \$200, the victim was required to "cash down," i.e., exchange the money for money orders. On the day of the alleged robbery, however, the victim was running behind schedule and decided not to "cash down" in order to save time.

fake robbery. Lastly, Jones represented that he, and his girlfriend, who was also aware of the victim's scheme, were willing to testify under oath regarding their conversations with the victim.

On appeal, the prosecution argues that the newly discovered evidence is inadmissible hearsay, and therefore, the new evidence would not yield a different verdict. 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) including the new evidence upon retrial would probably cause a different result; and (4) the party could not, using reasonable diligence, have discovered and produced the evidence at trial. [*People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996).]

In order to find that there is a reasonable probability that the result of the proceeding would have been different, we must conclude that there "is a probability sufficient to undermine confidence in the outcome." *People v Lester*, 232 Mich App 262, 280 n 11; 591 NW2d 267 (1998).

MRE 801 defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 803(3) provides an exception to the hearsay rule for "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)" Hearsay within hearsay is not admissible evidence unless each of the statements satisfies a viable exception to the hearsay rule. MRE 805; *People v Hawkins*, 114 Mich App 714, 719; 319 NW2d 644 (1982).

We find that the double hearsay rule precludes the admissibility of defendant's assertion contained in his affidavit that Jones told defendant he and his girlfriend were willing to testify under oath concerning the victim's statement that he planned to fake two robberies. Assuming an established foundation for purposes of this appeal, the victim's statement to Jones meets a hearsay exception, MRE 803(3), because the statement illustrates the victim's intent, plan, motive and design. But, defendant's recitation of the nature of the alleged conversation he had with Jones does not likewise fall under the hearsay exception of MRE 803(3). At a minimum, defendant should have submitted an affidavit from Jones himself, since there is no assurance that Jones or his unidentified girlfriend would actually testify to these facts at a new trial. Instead, defendant merely recited the nature of an alleged conversation that he had with Jones. This, in and of itself, was hearsay not falling under any exception to the hearsay rule, would not be admissible at trial, and should have been rejected as non-probative by the trial court. We find no abuse of discretion in the trial court's implied determination that if Jones were to credibly testify as defendant asserts he would, a new trial would be warranted. However, the trial court should have conducted an evidentiary hearing in order for the prosecution to challenge Jones' allegations and for the court to scrutinize Jones' credibility and the credibility of any other alleged supporting witness, which a trial court is permitted to do in deciding whether to grant a new trial. See *People v Mechura*, 205 Mich App 481, 484; 517 NW2d 797 (1994). We note that defendant did not offer any documentary evidence such as a workers' compensation claim by the victim to corroborate his assertions.

Since we vacate the trial court's grant of a new trial; we must address defendant's argument on appeal that the prosecution failed to present sufficient evidence to sustain

defendant's conviction for armed robbery. When a criminal defendant challenges the sufficiency of the evidence, this Court views the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 206 Mich App 122, 123; 520 NW2d 672 (1994). In order to sustain a conviction for armed robbery, the prosecution must prove three elements: "(1) an assault, (2) a felonious taking of property from the victim's person or presence, and (3) the defendant must be armed with a weapon described in the statute [MCL 750.529]." *Johnson, supra*, 206 Mich App 123.

The following evidence was adduced at trial. While he was pulling the party store's order, the victim noticed defendant pacing back and forth about eight feet away from his delivery truck. Moments later he noticed defendant approaching him with a gun. Defendant pointed the gun at the victim and said, "[y]ou know what this is. Give me the money." The victim took out his money and dropped it. Defendant picked up the money while keeping the gun pointed at the victim and told him to back up and lie down on the truck floor. The victim complied. After lying on the floor for a few moments, the victim got up and ran out of the truck into the party store. Defendant ran past the store.

On appeal, defendant does not argue that the prosecution failed to present sufficient evidence concerning the elements of armed robbery, i.e., that the prosecution failed to show that defendant used a weapon. Rather, defendant argues that the prosecution presented insufficient evidence of armed robbery because the prosecution's evidence rested solely on the victim's uncorroborated testimony. Because we review the evidence in the light most favorable to the prosecution, and we will not interfere with the jury's credibility determinations, this argument affords defendant no relief and we find the evidence adduced at trial sufficient to sustain defendant's conviction for armed robbery. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999); *Johnson, supra*, 206 Mich App 123.

The trial court's grant of a new trial is vacated; we remand for a full evidentiary hearing to determine if a new trial will be granted, and defendant's conviction is conditionally affirmed subject to the court's ruling on remand on the motion for new trial. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Helene N. White

/s/ Pat M. Donofrio