

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TYON CARTER,

Defendant-Appellee.

UNPUBLISHED

September 29, 2005

No. 261681

Wayne Circuit Court

LC No. 03-011169

Before: Fort Hood, P.J., and White and O’Connell, JJ.

PER CURIAM.

The prosecution appeals by leave granted the trial court’s order granting defendant’s motion for a new trial. We reverse.

The prosecution alleges that the trial court abused its discretion when it granted defendant’s motion for a new trial. We agree.

A trial court’s decision to grant or deny a motion for new trial is reviewed for an abuse of discretion, while its findings of fact are reviewed for clear error. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). A mere difference of judicial opinion does not establish an abuse of discretion. *Cress, supra*. In reviewing the trial court’s decision, due regard must be given to the trial court’s superior opportunity to appraise the credibility of witnesses. *People v Canter*, 197 Mich App 550, 560; 496 NW2d 336 (1992).

A court may order a new trial “on any ground that would support appellate reversal of the conviction or because it believes that the verdict resulted in a miscarriage of justice.” MCR 6.431(B). To establish entitlement to a new trial based on newly discovered evidence, a defendant must show that: (1) the evidence itself, and not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the defendant 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. *Cress, supra* at 692.

We hold that Marcus Gwyn’s testimony did not support entitlement to a new trial. Newly discovered evidence used merely for impeachment purposes is not a ground for a new trial. *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993); *People v Sharbnaw*, 174 Mich App 94, 104; 435 NW2d 772 (1989); *People v Stricklin*, 162 Mich App 623, 632; 413 NW2d 457 (1987). Here, Gwyn’s testimony was offered to impeach the victim’s trial testimony

regarding his knowledge of the identity of the shooter. Gwyn testified that, after the shooting, the victim approached Gwyn and wanted to know if Gwyn was involved in the shooting or if Gwyn knew who shot him. Gwyn alleged that the victim also revealed that he did not really know who committed the shooting. This evidence was offered to impeach the victim's trial testimony that defendant was the shooter. Since the trial court's decision to grant defendant's motion for a new trial was based on Gwyn's impeachment testimony, the trial court abused its discretion in so holding.

Moreover, Gwyn's testimony did not satisfy the four requirements for granting a new trial based on newly discovered evidence. The victim maintained that Gwyn and defendant were friends and were "always together." Gwyn told defendant's mother of the conversation with the victim when the trial was proceeding. He also attended the trial and was under the impression that the information he gave to defendant's mother was relayed to defense counsel. Although there was evidence that defense counsel¹ was unaware of the evidence at the time of trial, defendant could have made the evidence known to defense counsel during the trial. Since Gwyn informed defendant's mother of the information during defendant's trial, the evidence was discovered and known of at that time and could have been produced at trial. In other words, defendant could, using reasonable diligence, have discovered and produced the evidence at trial. *Cress, supra*. Therefore, the evidence was not newly discovered.²

Reversed.

/s/ Karen M. Fort Hood

/s/ Helene N. White

/s/ Peter D. O'Connell

¹ Defendant's brief on appeal alleges that the prosecutor conceded that Gwyn "was not known to the trial counsel until after the trial." However, it should be noted that two attorneys represented defendant, although apparently only one conducted the trial. The prosecutor indicated that Mr. Lorence was unaware of the potential testimony by Gwyn. The prosecutor made no representations regarding the knowledge of trial counsel, Mr. Comorski because they had not spoken regarding this issue.

² We also note that the prosecutor was prepared to call defense trial counsel at the hearing. The prosecutor intimated that, after reviewing the file, defense counsel would provide information that defendant did not suffer any prejudice. Consequently, appellate counsel withdrew the claim based on ineffective assistance. The trial court did not rule on whether the withdrawal of the motion resulting in the continued waiver of the attorney-client privilege. Based on our disposition of this case, we need not address the trial court's failure to rule on this issue.