STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 12, 2011
v DANIEL ANTONIO BUTLER, Defendant-Appellant.	No. 295176 Oakland Circuit Court LC No. 2009-225279-FC

Before: GLEICHER, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

A jury convicted defendant of first-degree premeditated murder, MCL 750.316(1)(a), assault with intent to commit murder, MCL 750.83, two counts of assault with intent to commit great bodily harm less than murder, MCL 750.84, and four counts of possessing a firearm during the commission of a felony. MCL 750.227b. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent terms of life imprisonment without parole for the premeditated murder conviction, 40 to 60 years in prison for the assault with intent to murder conviction, and 12 to 30 years in prison for the assault with intent to commit great bodily harm convictions, all to be served consecutively to a two-year term of imprisonment for the felony-firearm convictions. Defendant appeals as of right, and we affirm.

Defendant's convictions stem from a January 20, 2007 shooting at a Pontiac after-hours establishment called the Night Riders Club. The shooting left one man, Cameron Lardell, dead from a single, close-range gunshot wound to the head, and three other people, Kandesha Glenn, Eric Lewis and Cornelius Payne, wounded. None of the three survivors of the shooting could positively identify their assailant, who had approached them suddenly and worn a mask or scarf over most of his face. Although the trial testimony reflected that many cars were in the Night Riders Club parking lot around 4:30 a.m. on January 20, 2007, the shooter attacked a discrete group of people clustered near Lardell's car: the assailant shot Lardell in the head first on the driver's side of his car; then shot at Lewis, who sat in the back seat of Lardell's car; fired at Payne as he sat in the driver's seat of his car parked directly adjacent to Lardell's car; and shot Glenn in the head behind her left ear. Lewis and Payne were cousins of Lardell, and Lardell had a past romantic relationship with Glenn.

The police recovered four .9-millimeter bullet cartridges and an intact .9-millimeter bullet, all fired from the same weapon, which they never located. The police also retrieved

deformed bullet fragments from Lardell and the roof of Lardell's car. In the course of an interview with the police after the shooting, defendant denied involvement in the attack,[1] leaving the police without evidence linking defendant to the shooting until August 2008, when Johnny Hodges came forward. Hodges recalled being a passenger in a car in the Night Riders parking lot between 4:15 a.m. and 4:30 a.m. on January 20, 2007, when the driver of the car decided to leave the club. The car stopped at a fenced gate, intending to turn onto Raeburn Street, when Hodges spotted defendant, whom Hodges knew as "Little Dog," standing alone alongside a white, rusty van and holding a black handgun. Hodges described that defendant walked toward the gate still holding his handgun, and that defendant with his left hand "pull[ed] a [dark] scarf over his face." Hodges testified that defendant had approached "real close" to the car occupied by Hodges, close enough that the driver of the car inquired of defendant, "What's up[,]" before defendant continued through the gate, into the club parking lot, and toward Lardell's car.[2]

Hodges related that the driver of the car in which he rode pulled out onto Raeburn Street, but parked just outside the gate where Hodges still had an unobstructed view of defendant through the chain-link fence surrounding the parking lot. Hodges watched as defendant shot "at everybody that was right there" in the area of Lardell's car, initially at one person before approaching and shooting two or three others. The driver of the car in which Hodges rode drove away from the club to a residence on Emerson Street in Pontiac. Hodges recalled that within 15 to 30 minutes after his arrival on Emerson Street, defendant, still alone, drove up in a white van, got out carrying a handgun resembling the one Hodges had seen defendant holding minutes earlier. Hodges heard defendant announce to other people present at the Emerson Street address that "[h]e had the [sic] hammer n***er down," which Hodges translated as meaning defendant had shot someone. Hodges also heard defendant mention that "Cam [Lardell] had made him strip down in front of some girls." Defendant left the Emerson Street address five or six minutes later, having exchanged the handgun he had brought for a Desert Eagle semiautomatic handgun and the rusty white van for a Gray Ford Explorer. Hodges attributed his delay in reporting defendant to his continuing presence "in the streets" "thugging," when he "wasn't going to tell

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[1] A short while after the shooting, the police also spoke with Latonya Newbern, who had a child fathered by defendant. Newbern told the police that defendant had spent the entire morning of January 20, 2007 with her in her Pontiac residence. At trial, Newbern acknowledged that she had not seen defendant between the evening of January 19, 2007 and sometime after 5:00 a.m. on January 20, 2007. Newbern testified that defendant had called her cell phone at 4:45 a.m. and asked her to "unlock the door for him." Following defendant's arrival, Newbern received more than one phone call referencing the shooting, which Newbern then mentioned to defendant. Defendant responded by asking Newbern "[t]o say that he was at my house" "[t]hat whole day."

[2] At some point around this time, defendant motioned with one of his hands to indicate "it ain't nothing."

on nobody."[3] Before trial, Hodges identified defendant with certainty from a photographic lineup.

Two other witnesses saw defendant near the club in the early morning hours of January 20, 2007. Helen Alexander, an acquaintance of defendant and shooting victims Lardell and Glenn, testified that at defendant's request, she met him outside the Night Riders Club between 3:30 a.m. and 4:00 a.m., intending to purchase crack from defendant. Alexander first encountered defendant outside the club and fence, on the Raeburn Street side of the building, but decided to go inside the club before securing her crack because she saw some cars she recognized in the parking lot. As Alexander circled around the block looking for a parking spot, she heard four or five gunshots from the area of the club. When Alexander made it around the block, she saw defendant again, "standing at the corner . . . fidgety-like," "like he had been running or something." Alexander asked defendant "what was up," and he replied that Alexander should "[m]eet him on East Pike . . . at his grandmother['s] house," two to three blocks away. Defendant and Alexander consummated the crack sale at the East Pike address. Alexander recounted noticing that defendant had put in a coat pocket a black scarf or something "like a skull cap," and that at some point defendant had turned his back to Alexander and pulled out from the waistband of his pants an item Alexander thought resembled a black handgun.[4]

With respect to the stripping incident Hodges had heard defendant mention, Miesha Dexter elaborated that in the summer of 2006 she had dated and lived with Lardell in a Pontiac apartment complex. One day that summer, some crack, ecstasy and marijuana "came up missing out of [Lardell's] truck," and someone advised Lardell that defendant had taken them. Dexter testified that Lardell became "very upset" and confronted defendant when he visited the apartment complex around a half-hour later. Lardell asked defendant to empty his pockets, but defendant refused, prompting Lardell to produce a gun and demand that defendant strip down to his boxer shorts and a t-shirt. Lardell found what he believed were the missing drugs in a pocket of defendant's jeans. Dexter recalled that other people witnessed the event, defendant appeared embarrassed, and before departing defendant announced he would kill Lardell "and his bitch."[5]

Katrina Caples, who knew defendant as "Little Dog" for more than 20 years, and her husband, Milton Caples, testified to an encounter with defendant as they drove around Pontiac on a summer evening in 2006. The Caples recounted seeing defendant, who seemed upset, walking down the street; Katrina Caples remembered observing defendant holding a black handgun. As Katrina Caples remembered at trial, defendant explained that he and Lardell "had got into it,"

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[3] Defense counsel elicited at trial that Hodges had five or six convictions of breaking and entering motor vehicles and unlawfully driving away motor vehicles.

[4] Shanita Cooley also remembered seeing defendant in the vicinity of the club around 3:30 a.m. on January 20, 2007, as she walked toward her parked car. Cooley testified that defendant asked her for a cigar, Cooley gave him one, and the two went their separate ways.

[5] Dexter and Lardell ceased their relationship in September 2006 or October 2006.

"something about [Lardell] making him strip" and "something about . . . [a] girl." Both Caples recalled defendant voicing an intent to shoot Lardell.

Regarding a girl as a potential motivation for the shooting, several witnesses testified at trial that one of the shooting victims, Glenn, had dated Lardell, and then subsequently dated and cohabited with defendant in Auburn Hills. Glenn confirmed that in January 2007, defendant moved out of her apartment at her request. Glenn authored a January 6, 2007 report to the Auburn Hills Police Department concerning a breaking and entering of her apartment and several texts and phone messages that she viewed as threatening. The officer who received Glenn's report testified that she seemed frightened, nervous and upset over the threatening messages she had received; one text, sent at 11:23 p.m. on January 5, 2007, read, "211 [police code for robbery], 187 [police code for murder], 357 [a gun caliber], you're cooked." The texts and an unpleasant voicemail left by a male came from the same phone number. The officer went to Glenn's apartment on January 6, 2007 to find it completely in disarray, and remembered Glenn advising him that defendant had moved some things out earlier that morning.

We initially address defendant's appellate contention that the jury verdicts rested "upon legally insufficient evidence." Notably, defendant does not specifically contest the adequacy of prosecution proofs concerning the elements of first-degree murder or the different assault convictions, he instead challenges only the proof of his identity as the shooter. When reviewing a criminal defendant's challenge to the sufficiency of the evidence, this Court considers all the evidence presented in the light most favorable to the prosecution to determine whether a reasonable juror could find the defendant's guilt proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). This Court must draw all reasonable inferences and make credibility choices in support of the jury's verdict; the Court should not interfere with the factfinder's role in determining witness credibility or the weight of the evidence. *Nowack*, 462 Mich at 400; *People v Elkhoja*, 251 Mich App 417, 442; 651 NW2d 408 (2002), vacated in part on other grounds 467 Mich 916 (2003).

The evidentiary shortcomings defendant perceives consist of his attacks on the credibility of multiple witnesses. Defendant primarily complains about inconsistent, "highly suspect and barely credible" evidence of defendant's motives for the shooting, and the incredible nature of Hodges's eyewitness testimony, which Hodges offered only "after he himself was arrested." Three trial witnesses testified that defendant had expressly threatened to shoot or kill Lardell, and the evidence established that defendant had more than one motive for doing so: the summer 2006 occasion on which Lardell caught defendant stealing drugs by making him remove his clothing in public, and the fact that both Lardell and defendant had romantic relationships with Glenn. The shooting took place just two weeks after defendant moved out of Glenn's apartment and essentially threatened to kill her. Hodges offered his detailed recollections of (1) the moments leading to the shooting, including defendant's donning of a mask and possession of a black handgun, details consistent with those recalled by surviving victims Lewis and Payne, (2) the actual shooting, and (3) defendant's admission minutes after the shooting and his exchange of the black handgun and white van. And Alexander saw defendant just outside the club immediately before the shooting began, and several minutes later spotted a dark-colored scarf in his pocket and what she believed to be a black handgun in his waistband. Viewing this testimony in the light most favorable to the prosecution, ample evidence substantiated defendant's identity as the shooter. *Nowack*, 462 Mich at 399-400. In light of defense counsel's

elicitation from Hodges that he had multiple prior convictions, at least some of which involved an element of theft, and delayed reporting defendant to the police, the jury had before it the facts pertinent to an informed credibility determinations concerning Hodges, and we will not revisit the jury's credibility assessments of Hodges or the other prosecution witnesses. *Id*. at 400; *Elkhoja*, 251 Mich App at 442.

Defendant additionally avers that the trial court should have granted his motion for a new trial, which he supported with an affidavit by Newbern casting doubt on her trial testimony. We review for an abuse of discretion a trial court's ruling on a motion for a new trial. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). "An abuse of discretion occurs only when the trial court chooses an outcome falling outside the principled range of outcomes." *Id*. (internal quotation omitted). When the trial court makes findings of fact, we review the findings for clear error, which exists if a court reviewing the entire record is left with the definite and firm conviction that the trial court made a mistake. *Id*.

Defendant's posttrial motion invoked "newly discovered evidence" as a ground for a new trial, specifically an affidavit of Newbern attesting that "defendant never asked me to vouch for him having stayed at my apt[.] overnight, nor during the time of the alleged crime," and that he "never at any given time asked me to 'lie' for him regarding anything." Newbern attributed her false trial testimony to police threats that she would "go to prison for a long time on . . . [a] larceny case" and the police would take Newbern's children from her. The trial court denied a new trial, and defendant's alternative request for an evidentiary hearing, finding Newbern's posttrial affidavit not credible. The court also noted that "there was other testimony, too, from other witnesses indicating that they saw him at the scene. And one person even said he actually saw him shooting."

> 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).]

But "[w]here newly discovered evidence takes the form of recantation testimony, . . . Michigan courts traditionally regard it as suspect and untrustworthy and only reluctantly grant new trials on the basis of recanting testimony." *People v Cress*, 250 Mich App 110, 138; 645 NW2d 669 (2002), vacated in part on other grounds 466 Mich 883 (2002), rev'd in part on other grounds 468 Mich 678. "In reviewing a trial court's decision [regarding a motion for new trial premised on recanted witness testimony], due regard must be given to the trial court's superior opportunity to appraise the credibility of the recanting witnesses and other trial witnesses." *People v Canter*, 197 Mich App 550, 560; 496 NW2d 336 (1992).

The trial court did not clearly err in its determination that Newbern's posttrial affidavit lacked credibility. *Canter*, 197 Mich App at 560. "[N]either the veracity of [Newbern's] recanting testimony nor the falsity of her trial testimony has clearly been established." *Id*. Newbern offered varying accounts of early January 20, 2007 beginning with her statement to the police within days of the shooting that defendant had stayed with her the whole morning.

Newbern changed her account in her preliminary examination and trial testimony, in which she recalled that defendant had not stayed with her throughout the early morning of January 20, 2007, but had arrived sometime after calling at 4:45 a.m., and then asked her to vouch for his whereabouts. Newbern's posttrial affidavit merely returns to the initial thrust of her statement to the police. *Id*. at 560-561 (observing that although the defendant insisted "that the credibility of [a witness's] recanting testimony is established because she had given prior statements consistent with such testimony, she had also given several prior statements . . . consistent with her trial testimony"). And Newbern had a close association with defendant, who fathered a child with Newbern. *Id*. at 562 (emphasizing that a court assessing the veracity of recanting testimony may take into account "the close association between [the] defendant and" the recanting witness).

Furthermore, even were we to accept as true Newbern's affidavit, the facts therein would not entitle defendant to a new trial.[6] No reasonable probability exists that the averments contained in Newbern's posttrial affidavit would make a different result probable on retrial. *Cress*, 468 Mich at 692. Newbern's trial testimony that defendant asked her to lie about his location at the time of the crimes certainly incriminated defendant. However, Newbern's fairly brief trial testimony did not relate to the elements of any of the charged offenses. Viewed in the context of the other, properly admitted direct and circumstantial evidence of defendant's identity as the shooter early on January 20, 2007, which the jury evidently credited, it appears highly unlikely that Newbern's recantation would render likely a different result on retrial. We conclude that the trial court acted within its discretion in denying defendant's motion for a new trial or evidentiary hearing. *Miller*, 482 Mich at 544.

Lastly, we consider defendant's assertion that the trial court should have granted his pretrial motion to exclude testimony by Katrina Caples on the ground that she violated a sequestration order in place during defendant's preliminary examination. As contemplated in MRE 615, "At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses." "The purposes of sequestering a witness are to prevent him from coloring his testimony to conform with the testimony of another, and to aid in detecting testimony that is less than candid." *People v Meconi*, 277 Mich App 651, 654; 746 NW2d 881 (2008) (internal quotation omitted). "It is well settled that the decision to exclude the testimony of a witness who has *violated* a sequestration order is within the trial court's discretion. A defendant who complains on appeal that a witness violated the lower court's sequestration order must demonstrate that prejudice has resulted." *People v Solak*, 146 Mich App 659, 669; 382 NW2d 495 (1985) (emphasis added). Although a court may preclude testimony by a witness who has violated a sequestration order, "courts have routinely held that

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[6] One significant aspect of Newbern's brief affidavit, its mention of police threats, does not constitute newly discovered evidence. In the course of defense counsel's cross-examination of Newbern at trial, he prompted her testimony that the police returned to ask more questions after they found cell phone records of calls between Newbern and defendant at 4:45 a.m. on January 20, 2007, and that the police accused Newbern of having lied in her initial discussion with them and threatened that she would go to jail and lose custody of her child.

exclusion of a witness's testimony is an extreme remedy that should be sparingly used." *Meconi*, 277 Mich App at 654.

In this case, the parties agree that no sequestration order violation ever occurred. Defendant did not dispute before the trial court that when Caples attended a portion of the three-day preliminary examination, before giving her testimony on the final day, the prosecution did not know Caples might possess information relevant to the case. Defendant additionally conceded before the trial court, and our review of the preliminary examination transcripts confirms, that the content of Caples's testimony did not duplicate in any respect the testimony by any of the other preliminary examination witnesses. The trial court nonetheless afforded defense counsel an opportunity to cross-examine Caples at trial with respect to the extent of her attendance at the preliminary examination. See *Meconi*, 277 Mich App at 654 (recognizing as another potential "sanction[] . . . available to a trial court to remedy a violation of a sequestration order" "permitting cross-examination concerning the violation"). We conclude that the trial court acted within its discretion in denying defendant's motion to preclude Caples from testifying at trial because our review of the record reflects that no violation of a sequestration order took place, defendant has not substantiated any likelihood that Caples might have fabricated or fashioned her trial testimony on anything she saw or heard while attending the preliminary examination, and defendant did question Caples at trial about the extent of her attendance at the preliminary hearing. *Id*. at 654-655; *Solak*, 146 Mich App at 669.[7]

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Jane E. Markey

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[7] Defendant raised in the trial court no constitutional objection in support of his motion to preclude testimony by Caples. In light of defendant's inability to show sequestration-related error or prejudice arising from Caples's testimony at trial, we detect no adverse impact, let alone plain error, affecting defendant's right to a fair trial. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).