[Cite as *State v. Howard*, 2015-Ohio-2053.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff - Appellee	:	Hon. John W. Wise, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
ERICK MYDELL HOWARD	:	Case No. 2014CA00136
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2011-CR-1470(B)
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	May 26, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
KRISTEN BATES AYLWARD Special Prosecuting Attorney Canton City Law Department 218 Cleveland Ave, S.W., 7th Fl. Canton, OH 44702	DONALD P. WILEY DANIEL J. FUNK ANTHONY E. BROWN Dublikar, Beck, Wiley & Mathews 400 South Main Street North Canton, OH 44720

Baldwin, J.

{¶1} Appellant Erick Mydell Howard appeals a judgment of the Stark County Common Pleas Court overruling his motion for a new trial. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} Appellant was indicted in 2011 with aggravated burglary, aggravated robbery, rape and kidnapping, all with accompanying firearm specifications. The charges arose from a late-night armed break-in of a North Canton residence, which resulted in a theft and a sexual assault on the female resident. Both of appellant's co-defendants, Mike Taylor and Seth Obermiller, waived their right to indictment and pled guilty to separate bills of information.

{¶3} Appellant's case proceeded to jury trial. Appellant was convicted of all charges. He was sentenced to an aggregate term of 30 years imprisonment. He appealed to this Court. We affirmed the convictions, but sustained appellant's assignment of error regarding his sentence, and remanded the case for resentencing. *State v. Howard,* 5th Dist. Stark No. 2012CA00061, 2013-Ohio-1972. On resentencing, the court imposed the same 30-year aggregate sentence.

{¶4} During the pendency of his direct appeal, appellant filed a motion for new trial pursuant to Crim.R. 33(A)(6) on the basis that he had newly discovered evidence which would have changed the outcome of the trial. This evidence was a letter from Seth Obermiller to appellant, in which Obermiller wrote that due to drug and alcohol use on the night in question, his memory was hazy, and he was not sure if appellant or Taylor went into the house with him. He claimed that he testified that appellant was in

the house with him because police told him if he didn't testify against appellant, he would be getting 42 years.

{¶5} The trial court held an evidentiary hearing at which Obermiller was the sole witness. Obermiller admitted that he wrote the letter, and testified initially that he believed it was appellant in the house with him. However, when asked if it could have been Mike Taylor, he asserted his Fifth Amendment rights. He testified that both he and appellant had guns that night, that both wore ski masks, and that both wore gloves. He testified that only the three of them - himself, appellant and Mike Taylor - were involved in the home invasion. While Obermiller admitted that he testified at trial that appellant had entered the house with him, he continued to assert the Fifth Amendment when asked if he was claiming now that he was not sure who was in the house with him. He testified that when he was first brought into the county jail, he was in the same cell block with Taylor, and Taylor told him that they needed to implicate appellant.

{¶6} The trial court overruled the motion for new trial, finding that the statements in the letter were not credible, and that Obermiller's trial testimony was credible. Appellant assigns two errors to the judgment overruling his motion for new trial:

{¶7} "I. THE TRIAL COURT ERRED IN FAILING TO FIND THAT IF THIS CASE WERE TO BE RETRIED, THE JURY WOULD BE MADE AWARE OF THE VAST DIFFERENCES BETWEEN THE TESTIMONY OF THE STATE'S MAIN WITNESS AT TRIAL, AND THE SWORN TESTIMONY OF THE STATE'S MAIN WITNESS GIVEN SINCE THE TRIAL, AND THAT THIS CREATES A STRONG PROBABILITY OF A DIFFERENT RESULT.

{¶8} "II. THE TRIAL COURT ERRED BY REFUSING TO DRAW ANY INFERENCE FROM A WITNESS WHO SELECTIVELY ASSERTS HIS FIFTH AMENDMENT PRIVILEGE."

I.

{¶9} In his first assignment of error, appellant argues that the court erred in overruling his motion for new trial. He argues that he demonstrated a strong probability of a different result if the case were to be retried, based on Obermiller's recantation of his trial testimony concerning whether appellant was in the house with him.

{¶10} Crim.R. 33 states, in relevant part, as follows:

{¶11} "(A) A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

> (6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may

produce affidavits or other evidence to impeach the affidavits of such witnesses.

{¶12} In order to grant a Crim.R. 33 motion for a new trial on the ground of newly discovered evidence, it must be shown that the newly discovered evidence upon which the motion is based: "(1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence." *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370, syllabus (1947).

{¶13} The defendant is not entitled to a new trial merely because an important witness recants. *State v. Brown,* 186 Ohio App. 3d 309, 927 N.E.2d 1133, 2010-Ohio-405, ¶20 (7th Dist. Mahoning). If the newly discovered evidence is a recantation by a main prosecution witness, the trial court must make two determinations: "(1) which of the contradictory testimony offered by the recanting witness is credible and true, and if the recanted testimony is to believed; (2) would the evidence materially affect the outcome of the trial?" *Id.,* citing *Toledo v. Easterling*, 26 Ohio App.3d 59, 62, 498 N.E.2d 198, (1985). Newly discovered evidence must do more than merely impeach or contradict evidence at trial, and there must be a compelling reason to accept a recantation over the trial testimony of the witness. *Id.* A recanting witness is to be viewed with extreme suspicion because the witness, by making contradictory statements, either lied at trial, or in the current testimony, or both times. *Id.*

{¶14} A motion for a new trial pursuant to Crim.R. 33 is addressed to the sound discretion of the trial court. *State v. Schneibel*, 55 Ohio St.3d 71, 564 N.E.2d 54 (1990). To constitute an abuse of discretion, a trial court's decision must be unreasonable, unconscionable, or arbitrary. *State v. Adams*, 62 Ohio St.2d 151, 404 N.E.2d 144 (1980).

{¶15} The trial court found the recantation to not be credible, and the court therefore did not need to reach the issue of whether the evidence would have materially affected the outcome of the trial. The trial court did not abuse its discretion in finding the recantation to not be credible.

{¶16} Obermiller's letter did not exonerate appellant; rather, he expressed an inability to remember whether appellant or Taylor went into the house with him. The letter further stated that the detective threatened Obermiller with 42 years of incarceration if he did not implicate appellant. However, the State submitted an affidavit of the Detective Randy Manse repudiating this claim. The State also submitted the videotape of the police interview in which Obermiller was represented by counsel, and Manse did not threaten Obermiller to get him to implicate appellant. Obermiller would not confirm this statement in his testimony at the hearing, instead testifying at the hearing that he wasn't sure from whom he heard that he might receive 42 years if he did not implicate appellant.

{¶17} As noted by the trial court, while appellant asserted his Fifth Amendment rights as to questions concerning whether appellant went into the house, he affirmed all other details of his trial testimony concerning the events of the night in question. He testified that he and appellant both had guns that night, that they both wore ski masks,

and that they both wore gloves. He confirmed his trial testimony that only he, appellant, and Taylor were involved. He further confirmed his trial testimony that he picked up Taylor at the laundromat after the home invasion, which would contradict the possibility that Taylor was with him in the house. The trial court did not abuse its discretion in concluding that Obermiller's claim in the letter that he "blacked out" after he got in the house was not credible, given that he could remember details about what happened before the crimes and after the crimes.

{¶18} Further, Obermiller's trial testimony that it was appellant who went into the house and not Taylor was supported by other evidence at trial, including Taylor's testimony. Appellant was identified by voice by one of the victims of the crime. She testified that she knew Taylor, and Taylor was not the voice she identified as appellant. Further, the victims' testimony reflected that the two masked intruders varied in size, while Taylor and Obermiller are both smaller than appellant and similar to each other in size.

{¶19} Because the trial court did not abuse its discretion in finding Obermiller's alleged recantation to not be credible, the trial court did not need to reach the issue of whether the evidence would materially affect the outcome of the trial.

{¶20} The first assignment of error is overruled.

II.

{¶21} Appellant argues that the court erred in not drawing an inference from Obermiller's assertion of the Fifth Amendment that he would have testified differently at a second trial. Specifically, appellant argues at page 13 of his brief, "Defendant most respectfully submits that the only inference that can be drawn from such refusal is that

Mr. Obermiller would be incriminating himself for perjury with regard to his testimony at trial. In other words, it was not Erick Howard who went into that house with him. It was Michael Taylor."

{¶22} Obermiller did not state in his letter that it was Taylor and not Howard who went into the house with him; rather, he stated that he could not remember. Therefore, the court did not err in drawing the inference that Obermiller's testimony at a second trial would not be that Taylor was in the house, but rather that he could not recall whether it was Taylor or appellant. Further, as the trial court found Obermiller's recantation to not be credible and found his trial testimony to be both credible and supported by other evidence at the trial, the question of what inference the court drew from his assertion of the Fifth Amendment is not relevant.

{¶23} The second assignment of error is overruled.

{¶24} The judgment of the Stark County Common Pleas Court is affirmed. Costs are assessed to appellant.

By: Baldwin, J.

Gwin, P.J. and

Wise, J. concur.