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2011 IL App (3d) 091042-UB

Order filed October 18, 2011  
Modified upon denial of Petition for Rehearing November 28, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Plaintiff-Appellee,	)	Peoria County, Illinois,
	)	
v.	)	Appeal No. 3-09-1042
	)	Circuit No. 09-CF-206
DARRINGTON THOMPSON,	)	
	)	Honorable
Defendant-Appellant.	)	Michael E. Brandt,
	)	Judge, Presiding.

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JUSTICE O'BRIEN delivered the judgment of the court.  
Justices Lytton and Schmidt concurred in the judgment.

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**ORDER**

- ¶1 *Held:* Defendant did not establish that newly discovered evidence was of such character that it could have likely resulted in a different outcome. The trial court did not err in denying defendant's motion for a new trial based on newly discovered evidence based on its finding that the evidence was not of such character that it would have likely changed the results.
- ¶2 Defendant Darrington Thompson was convicted by a jury of aggravated battery with a firearm and unlawful possession of a weapon by a felon . Prior to sentencing, he moved for a new trial based on newly discovered evidence. He filed a supplemental motion for new trial. The trial court denied

the motion and sentenced Thompson to a 21-year term of imprisonment. We affirm.

¶ 3

### **FACTS**

¶ 4 Defendant Darrington Thompson was charged with aggravated battery with a firearm and unlawful possession of a weapon by a felon. 720 ILCS 5/12-4.2(a)(1); 24-1.1(a) (West 2008). Evidence presented at a jury trial established the following. On January 31, 2009, the victim, Derrick Thomas, was asleep in a bedroom in the home of Norene McMahan. He had a long-term, intermittent relationship with McMahan. He had been drinking all night and went to sleep at 5 a.m. His memory could be “a little fuzzy.” Some time after daybreak, he woke up to see Thompson and Thompson’s brother, Shirt, at the foot of the bed. Shirt said something that he could not remember. Shirt shot him in the head and then Thompson shot him in the stomach. He ran out of the bedroom, out the front door, and down the street. He was aided by the police and transported to the hospital. He picked Thompson out of a six-photo array presented to him in his hospital room. Thomas had two prior convictions for obstructing justice by lying to the police. He was on probation for felony possession of a controlled substance when he was shot in the instant incident.

¶ 5 McMahan hosted a party on January 31. Attendees included Thompson, Shirt, Thomas, and Marcus Jackson. McMahan knew Thompson through her previous relationship with Shirt. Thompson, Shirt, and Jackson left the party in the early morning. Thomas slept in her bedroom. She did not sleep. Around noon, she left to get McDonald’s for her children. Thompson and Shirt called her for a ride. She picked them up, and after getting lunch, they returned to her house. At that time, the following people were present: McMahan, Thompson, Shirt, Jackson, Jackson’s girlfriend, Thomas, and McMahan’s children. She fed her children in the dining room while Thompson and Shirt went into the kitchen. Her bedroom was located off the kitchen in the rear of the house. She

did not see Thompson or Shirt enter her bedroom or with a firearm. She heard someone say, “so things are going to change around here, huh bitch” and “hit him in the mouth, Bro,” but could not identify the speaker because the Thompson and Shirt sounded alike. It was not Thomas. She heard three pops and saw Thomas running from the bedroom with blood on his face. He ran out the front door. She saw Thompson and Shirt in the bedroom. Thompson grabbed her and pulled her to the bed and tightly held her. He said that “it was all an accident and that he was sorry and that he didn’t want to see my name in papers.” Thompson left the room and she saw him in the dining room hugging her daughter. He told her daughter that “he was sorry, it was an accident, [he] didn’t mean for it to happen.” Everyone then left and she took her children and left as well. She did not call the police but later contacted a detective after being told he wanted to talk to her. McMahon told the police that she had not been at the house but discovered blood upon arriving home with her children after picking up McDonald’s for lunch. She then told them that her children were not present for the shooting. She said she lied because she was scared and did not want her children involved.

¶ 6 Officer Craig Hightower took pictures of the house. The bedroom showed little blood while the kitchen and hallway had greater amounts. A shell casing and bullet were recovered from the bedroom. Several teeth and bone fragments were recovered on the bed. Thomas’s doctor at the hospital treated him for wounds to the head and abdomen. The head wound caused Thomas to lose several teeth. The parties stipulated that Thompson had a prior felony conviction. The defense presented via stipulation one photo of McMahon’s kitchen. The jury found Thompson guilty of both counts.

¶ 7 Following the trial, defense counsel received a letter from Kevin Turner that stated, “Darrington Thompson did not commit the crime in which he is charged. I, Kevin Turner, did the

crime on the 31<sup>st</sup> of January.” Turner made a written statement and taped statement that he stopped into McMahon’s house on January 31, for a pit-stop in order to check his pockets for drugs and money. He was in a bedroom there where he confronted by a man questioning him as to his presence. The man pulled a gun, they struggled, and the gun went off. Turner pulled out his own gun, shot the man, and fled. He did not see Thompson there. Defense counsel filed a motion for a new trial and a supplemental motion. The motions stated that Jackson visited Thompson in prison and said he could not let Thompson be punished for the shooting knowing that he did not commit it. Jackson and Turner visited Thompson at the Peoria County jail. Turner said he had a problem letting Thompson going to prison for something he did not do. Turner’s statement was provided to defense counsel and then to the State. The motion also stated that Thompson was in the basement when the shooting occurred and only became aware of it when he heard gunshots. The motion includes as exhibits visitor logs from the jail, showing visits from Turner and Jackson; the handwritten statement from Turner stating Thompson did not commit the “crime in question” but that he “did the crime;” and Turner’s affidavit presenting his version of events and confessing to shooting Thomas in self-defense.

¶ 8 The trial court held a hearing and denied the motion. It stated that Thompson being in the basement and hearing the gun shots did not constitute newly discovered evidence. It further found that even if it was newly discovered evidence, it did not warrant a new trial. The trial court pointed to Thomas’s testimony at trial, his identifications of Thompson from the photo array and at trial, and acknowledged that Thomas’s veracity was suspect. It noted that McMahon’s version of the events was consistent, that she knew Thompson, identified that he was in her bedroom, and testified that he made admissions about the shooting. The trial court stated that Turner’s confession was just another version of the events that would not have likely changed the outcome of the trial. A sentencing

hearing took place and the trial court sentenced Thompson to a 21-term of imprisonment. He appealed.

¶ 9

### ANALYSIS

¶ 10 On appeal, Thompson argues that the trial court's denial of his motion for a new trial was in error because Turner's confession constitutes newly discovered evidence warranting a new trial.

¶ 11 Newly discovered evidence warrants a new trial when it (1) has been discovered since trial; (2) is of such character that it could not have been discovered prior to trial by the exercise of due diligence; (3) is material to the issue and not merely cumulative; and (4) it is of such a conclusive character that it will likely change the result on retrial. *People v. Molstad*, 101 Ill 2d 128, 134-36 (1984). New evidence is sufficient to merit a new trial if the facts and circumstances, in light of the new evidence, should be scrutinized more closely to determine the defendant's guilt or innocence. *Molstad*, 101 Ill 2d at 136. A new trial must be granted when the new evidence strengthens the notion that justice has not been done. *People v. Torres*, 47 Ill. App. 3d 101, 106 (1977). The movant bears the burden of satisfying all the requirements. *People v. Salgado*, 366 Ill. App. 3d 596, 605 (2006). This court will not disturb the denial of a motion for a new trial based on newly discovered evidence absent an abuse of discretion. *People v. Gabriel*, 398 Ill. App. 3d 332, 350 (2010).

¶ 12 Thompson failed to satisfy the requirements necessary for a new trial based on newly discovered evidence. First, as found by the trial court, Thompson's statement that he was in the basement is not newly discovered evidence. Moreover, Thompson did not state that Turner was upstairs, only that he was downstairs. The trial court further found that, assuming the evidence was newly discovered, it did not merit a new trial. Thompson did not establish that the evidence could not have been discovered by due diligence or that it would likely change the results on retrial. The

State concedes the first element, that Thompson did not know prior to trial that Turner claimed to have shot Thompson, and the third element, the evidence was material and not cumulative. The second requirement, defendant's due diligence in discovering the evidence, was not demonstrated by Thompson. The connection between Jackson and Turner, on which Thompson relies in offering Turner's confession, was discoverable before trial. Turner claimed to have gone to McMahon's house with Jackson on the date in question. Defense counsel could have further investigated whether Turner was present.

¶ 13 Even if we found the evidence could not have been discovered with due diligence, Thompson does not demonstrate a probability that it would have changed the outcome on retrial. Thomas testified that he awoke in McMahon's bedroom to Thompson and Shirt at the foot of the bed, that Shirt shot him in the head, and Thompson shot him in the stomach. He picked Thompson out of a photo array and identified him in court. McMahon testified that she picked up Thompson and Shirt the day of the shooting and brought them to her house. They went to the back of the house where the bedroom and kitchen were located. McMahon heard three shots and saw Thomas run out of the house bleeding. She went to her bedroom and saw Thompson who told her that "it was all an accident and that he was sorry and that he didn't want to see my name in papers." She heard Thompson tell her daughter, "he was sorry, it was an accident, [he] didn't mean for it to happen."

¶ 14 The evidence Thompson offers as newly discovered contradicts his and McMahon's trial testimonies. Moreover, Turner did not testify at the hearing on Thompson's motion. His confession does not specify that he shot Thomas but merely that he shot an individual in self-defense after a struggle. As determined by the trial court, Turner's confession is merely a new version of the events and is not so conclusive that it would likely change the results on retrial. We find that Thompson did

not satisfy the requirements to merit a new trial based on newly discovered evidence. The trial court did not err in denying his motion.

¶ 15 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed.

¶ 16 Affirmed.