

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYRONE KENNEDY,

Defendant-Appellant.

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UNPUBLISHED

May 23, 2024

No. 363001

Calhoun Circuit Court

LC No. 1987-002560-FC

Before: JANSEN, P.J., and MURRAY and O’BRIEN, JJ.

MURRAY, J. (*concurring*).

I concur with the majority opinion, but write separately to make two points. First, during arguments before this Court, counsel for defendant indicated that in the 1988 trial, when Mrs. Vandevender referred to seeing defendant as he walked in front of her house and got to the end of the “drive,” she was referencing the street on which she lived, not her driveway. I was skeptical of counsel’s representation of that testimony. Upon additional review, however, it is at least ambiguous as to where Mrs. Vandevender was referring in that testimony. Although at trial Mrs. Vandevender routinely referred to the road in front of her house as either a road or alley, she also may have been referring to it as the drive. In any event, there is no dispute that Mrs. Vandevender testified that she had previously seen defendant in the neighborhood (which defendant admitted to walking through before), and that she recognized him on the night in question carrying, and ultimately throwing, the large black purse.

This brings me to the second point, which is that defendant’s new evidence arguments should be considered in context to what occurred in the 1988 trial. In his motion for a new trial, defendant was not arguing that the jury was unaware of one or more critical witnesses, or that the jury was unaware that Mrs. Vandevender’s identification of defendant as the suspect was an important part of the case. Nor could he. For, during the 1988 trial, Mrs. Vandevender was exhaustively questioned, both through direct and cross-examination, about the different views she had from her porch. There was testimony about what she could see from the porch, from what distance, the varying angles she had from the porch, and what lighting existed in the relevant area. During that testimony the jury was shown numerous photos reflecting the various views she claimed to have from the porch, and of course received the evidence about the lighting (from three

other witnesses and Mrs. Vandevender). That the validity of her identification of defendant was a major part of the trial was clear to all involved, and the properly instructed jury made its credibility determinations based on that testimony, evidence, and similar testimony from other witnesses defendant does not attack.

So why, then, does defendant claim he deserves a new trial? His answer: because the photos he has from 2019—34 years later—purport to show the scene at night, and when coupled with testimony about the lumens existing that same night in 2019, and an expert’s use of that information, this new evidence warrants a new trial. But as the majority explains, and the trial court held, much of this evidence is pure speculation and, therefore, unreliable. Of equal importance is that all these facts, save the lumen information and expert testimony, was available to the jury. As recounted above, the parties thoroughly examined the facts surrounding the identification of defendant, and the jury was aware that it was nighttime, and that it was dark. The jury was also told by four witnesses that the area was well lit, and was bright enough to recognize people and things. The jury knew that the identification may have not been correct, as so much trial time was dedicated to the issues surrounding the nighttime identification.<sup>1</sup> Setting aside the other significant problems with the expert testimony and lumen facts recounted by the majority, I posit that none of that information (assuming its validity) would have made a difference to the jury, which had a plethora of evidence to consider on the issue.

In the end, defendant is simply seeking a new trial based not on any different theory, or because of a missing but now located witness, new DNA evidence, or other similar objective and new evidence. Instead, he simply wants a second chance of presenting evidence to a new jury showing that it was dark out the night Mrs. Vandevender identified defendant, and she might have been wrong because it is harder to see at night the further away one is from the object being viewed.<sup>2</sup> Not only is this simply common sense, but the entire issue was already heavily and fairly

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<sup>1</sup> That in many cases the determination of guilt or innocence depends in large part on the credibility assigned to eyewitness identifications, and that in many instances identifications may be unreliable, is nothing new. See *United States v Wade*, 388 US 218, 228; 87 S Ct 1926; 18 L Ed 2d 1149 (1967); *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 Stan L Rev 969 (1977). That’s why lawyers have long used the art of cross-examination to test the validity of a witness’s testimony, as was done here.

<sup>2</sup> Importantly, the newly discovered evidence is essentially impeachment evidence, as it merely provides a somewhat different way in which to challenge Mrs. Vandevender’s testimony. But as the Court stated in *People v Grissom*, 492 Mich 296, 317-318; 821 NW2d 50 (2012), “[i]t bears emphasizing that, as this Court recognized more than a century ago, newly discovered impeachment evidence ordinarily will not justify the grant of a new trial.” See also *People v Rogers*, 335 Mich App 172, 198-199; 966 NW2d 181 (2020).

litigated, and nothing defendant<sup>3</sup> has presented raises a legitimate question about the jury's decision.

/s/ Christopher M. Murray

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<sup>3</sup> The burden of establishing entitlement to postconviction relief is placed on the defendant “because Michigan has a significant interest in the finality of judgments and preservation of scarce judicial resources and ‘collateral attacks threaten such finality.’ ” *People v Owens*, 338 Mich App 101, 114-115; 979 NW2d 345 (2021), quoting *People v Carpentier*, 446 Mich 19, 37; 521 NW2d 195 (1994).