

NOT DESIGNATED FOR PUBLICATION

No. 125,020

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JAMES M. PHILLIPS,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JEFFREY SYRIOS, judge. Opinion filed April 7, 2023.
Affirmed.

Mark Severt, of Derby, for appellant.

Kristi D. Allen, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before GREEN, P.J., GARDNER, J., and PATRICK D. MCANANY, S.J.

PER CURIAM: James M. Phillips appeals the denial of his motion for new trial based on newly discovered evidence. Phillips was convicted of attempted first-degree murder, attempted second-degree murder, attempted aggravated kidnapping, criminal damage to property, fleeing or attempting to elude an officer, two counts of attempted kidnapping, and two counts of attempted aggravated robbery. The parties are well acquainted with the underlying facts so we need not recount them here. Phillips represented himself at his jury trial, and his defense focused on his intent at the time of the crimes. He appealed his convictions and one of his convictions was determined to be

multiplicitous and reversed, but his sentence did not change. *State v. Phillips*, No. 117,566, 2018 WL 3673181, at *4 (Kan. App. 2018) (unpublished opinion).

Thereafter, Phillips moved for a new trial. He contended that at the time of his crimes until December 2020, a month before the filing of this motion, his mind was under the control of an "illusory male creature known to [him] as "The Blue Man"" who caused him to commit the crimes that resulted in his convictions. He contended that he was unable to tell others about the Blue Man because the Blue Man threatened Phillips and his family if he told anyone about the Blue Man's existence. According to Phillips, he did not know he was suffering from a mental illness that was embodied in the Blue Man until December 2020.

The State responded that the Blue Man was not newly discovered evidence and, in any event, there was no reasonable probability that the evidence, if introduced at a retrial of Phillips' case, would likely result in a different outcome because Phillips' motion contained nothing more than "self-diagnosed and unsupported" statements regarding his mental health.

The district court summarily denied Phillips' motion, and this appeal followed. Phillips argues on appeal that the district court abused its discretion in summarily denying the motion. We review the district court's decision for any abuse of discretion. *State v. Breitenbach*, 313 Kan. 73, 97, 483 P.3d 448 (2021). The district court abuses its discretion if its decision is arbitrary, fanciful, unreasonable, or based on an error of fact or law. *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021). Here, Phillips has the burden of showing such abuse of discretion. See *State v. Crosby*, 312 Kan. 630, 635, 479 P.3d 167 (2021).

To prevail on his motion Phillips had to establish that the claimed newly discovered evidence could not have been produced at trial with reasonable diligence, and

that if now admitted at a retrial of his case, the evidence is of such materiality that the outcome of the case likely would be different. *State v. Dean*, 310 Kan. 848, 856, 450 P.3d 819 (2019). In determining whether new evidence is material, the district judge must assess the credibility of the newly proffered evidence. *State v. Warren*, 302 Kan. 601, 615, 356 P.3d 396 (2015). On appeal we do not reassess the district court's credibility determination. *State v. Ashley*, 306 Kan. 642, 650, 396 P.3d 92 (2017).

Here, as the district court found, the proffered evidence was not newly discovered. Phillips, by his own admission, was aware of the Blue Man prior to his trial. Phillips represented himself at trial. His trial strategy was to admit to having committed the two attempted murders but to deny that he had the required mental state to support convictions. He now contends that his mental state at the time of these crimes—and at the time of his trial—was under control of the Blue Man. He knew this at the time of his trial but chose not to introduce this evidence.

The district court also found that evidence of the Blue Man was not of such materiality that it would likely produce a different result upon retrial. The district court made this finding based on its credibility determination of Phillips' claim after considering Phillips' motion and his supporting affidavit. We do not revisit on appeal the district court's resolution of matters of credibility.

That Phillips suffered from a mental disease or defect at the time of these crimes is not supported by any evidence in the record other than Phillips' own lay assertion. He does not state that he was examined by a psychiatric professional who concluded that Phillips had a mental disease or defect at the time of these crimes. It is now too late for any such evaluation of his condition because, according to Phillips, he was released from the control of the Blue Man shortly before filing this motion. Thus, if Phillips were granted a new trial, the only evidence before the jury would be Phillips' unsupported claim of the existence and control of the Blue Man and Phillips' lay self-diagnosis that at

the time of these crimes he was suffering from a mental disease or defect. The district court concluded that Phillips' claimed new evidence "is not of such materiality that it would likely produce a different result at trial."

Phillips has failed to meet his burden to show that the district court abused its discretion in denying his motion. To prevail, he needed to establish that his Blue Man evidence could not have been produced at trial with reasonable diligence, and that this evidence was sufficiently material that it was likely to change the outcome of his case if he were granted a retrial. He has failed to satisfy either of these elements. We find no abuse of discretion in the district court's ruling on Phillips' motion.

Affirmed.