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STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

DIALLO CORLEY,

Defendant-Appellant.

Supreme Court No. **155276**

Court of Appeals No. **328532**

Lower Court No. **14-007466-01-FC**

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ARGUMENT

I. JUDGE CALLAHAN CLEARLY ERRED IN FINDING THAT JOHNSON'S TESTIMONY WOULD NOT MAKE A DIFFERENT RESULT PROBABLE ON RETRIAL.

At the outset, it is notable that the prosecution in their Brief in Opposition, concede that Judge Callahan's opinion and reasoning are seriously flawed.[1] Of importance, regarding the sole basis of Judge Callahan's credibility determination of Johnson, the prosecution agrees that Johnson's conviction for armed robbery "is not, alone, dispositive or inherently more probative than prejudicial on the issue of credibility."[2] As the prosecution acknowledges, Johnson's prior armed robbery conviction is not outcome determinative.[3] Moreover, the prosecution admits that Judge Callahan "did not provide the necessary on-the-record analysis" for the possible admission of the conviction.[4] Whether Johnson "could" be impeached by use of the conviction, as Judge Callahan determined,[5] is not an established fact. And even if it

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[1]The prosecution refers to Judge Callahan's analysis as "incomplete," adding, "A detailed discussion from the court would surely have assisted in appellate review." and that "Judge Callahan's opinion in this matter could have been better, and, perhaps, should have been." (People's Supplemental Brief in Opposition to Defendant's Application for Leave to Appeal, p. 5, 19, 20).

[2]*id*. at p. 13.

[3]Jansen, P.J. (Appendix, p. 35a)

[4]Brief, p. 13.

[5]Opinion and Order (Appendix, p. 15a)

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was admitted at trial, the jury would be instructed to treat Johnson's testimony "the same way you judge the testimony of any other witness" considering the conviction along with all the other evidence.[6] Again, in his credibility determination, Judge Callahan *focused exclusively* on Johnson's conviction, without addressing the substance of his testimony. Judge Jansen succinctly addressed this failure.

> Instead, I believe that the trial court abused its discretion by basing its decision on Johnson's prior criminal history, rather than on the substance of Johnson's testimony. Indeed, Johnson's testimony was consistent with regard to the facts of the shooting. Johnson testified that he saw the shooting, the shooting occurred in a different manner than Wray described, and defendant was not the shooter. (Appendix, 34a).

This solitary focus on the possible impeachment of Johnson with his prior conviction, flies in the face of the trial court's duty to consider all of the relevant evidence.

> In making this [credibility] assessment, the trial court should consider *all relevant factors tending to either bolster or diminish the veracity of the of the witnesses testimony*. *People v. Johnson*, __ Mich __ 2018 WL 354338, at p. 13, July 23, 2018 citing to *People v. Cress*, 468 Mich 678, 692-694 (2003).

In light of the prosecution's concessions, they argue that Judge Callahan "came to the right result, albeit for the wrong-or incomplete-reasoning,"[7] and this Court should affirm his conclusion to deny a new trial. While such a proposition may find

[6]M. Crim. JI 5.1

[7]Brief, p. 13.

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some support in the law, allowing an appellate court to affirm a trial court's decision if the right result was reached for the wrong reason, there is no precedent for affirming a lower court's wrong result based on the wrong reasoning, as here. Nor does the clear-error standard permit the appellate court to attempt to discover a "correct" or "right" factual finding to support the trial court's end result. See, *Hill v. City of Warren*, 276 Mich App 299, 308-309 (2007). As this Court recently stated in *People v. Johnson*, __ Mich __ 2018 WL 354337 at p. 12, "appellate courts need not refrain from scrutinizing a trial court's factual findings, nor may appellate courts tacitly endorse obvious errors under the guise of deference" (cites omitted). Rather, the review is whether this Court has a definite and firm conviction that Judge Callahan made a mistake. That mistake(s), does not appear to be in dispute.[8], [9]

The prosecution in their Brief also advocates for a new higher and more stringent standard for the fourth prong of the *Cress*[10] test. Under *Cress*, the standard is whether the new evidence makes a different result probable on retrial. 468 Mich

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[8]Neither Judge Callahan nor the majority of the Court of Appeals found Johnson's testimony to be "patently incredible" as the prosecution now argues. As such, no response to that assertion is required.

[9]Regarding the standard for review of a witnesses credibility, the prosecution suggests this Court's analysis in *Johnson, supra* should be adopted regarding newly discovered evidence. Corley agrees that the test is an *objective* test, that is, "that *no* reasonable juror would consciously entertain a reasonable belief in the witnesses veracity" and "not what the trial court itself might decide" (*id*. at p. 13).

[10]468 Mich 678 (2003).

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at 693. It appears that the prosecution proposes that an "actual" probability must exist, that is a certainty of acquittal on retrial, as the prosecution states, "that acquittal *would* occur."[11] The existence of a certainty, is something not recognized in the law, and those who rely on a certainty in everyday life are often surprised by the outcome.[12]

The prosecution proffers two grounds to conclude that Johnson was "patently incredible," neither of which were relied on by Judge Callahan. The prosecutor argues that Johnson's testimony is not credible because: (1) of a perceived difference in accounts from Johnson whether the shooter came from the second and third house off Second Street *or* the first and second house, and (2) his admitted reluctance not to initially be involved because he did not "trust the system". Neither argument carries much, if any, weight given the detailed description Johnson gave of the incident and the obvious weaknesses in the credibility of the prosecution's witnesses.

Initially, the claim that Johnson gave "inconsistent" statements that the shooter came between one set of houses *or* the next adjacent houses is easily explained. The

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[11]Brief, p. 9. But see, the American Heritage Dictionary of the English Language (1996) (defining "probable," in part, to mean "[L]ikely but uncertain").

[12]The only recognized standard for probability is a *reasonable* probability. See, *United States v. Basley*, 473 US 667, 687; 105 S Ct 3375; 87 L Ed 2d 481 (1985); *Strickland v. Washington*, 466 US 668, 694; 104 S Ct 2052, 80 L Ed 2d 674 (1984); *People v. Fink*, 456 Mich 449, 454 (1998); *People v. Johnson*, 451 Mich 115, 122 (1996). See, *Sutter v. Biggs*, 377 Mich 80, 89 (1996) ("probable" means "more likely than not").

first account was given to Investigator Cole, wherein Johnson stated “The shooter came from in between 2 houses about a house or 2 down from the house the victim was at” (Appendix, Exhibit K-J, p. 197a). Cole had Johnson mark the location on a Google map that is hardly a model of clarity (Appendix, Exhibit K-F, p. 193a). Johnson testified that there was confusion about what exactly this map depicted and the various symbols, and Cole tried to interpret it for him (Appendix, Exhibit G, p. 128a). When an actual close-up, overhead view of the houses was shown to Johnson for the first time at the hearing (Appendix, Exhibit K-I, p. 196a), he immediately identified the two houses that the shooter came from in between (Appendix, Exhibit G, p. 106a-108a).[13] This so-called inconsistency is of no consequence.

The second ground asserted for rejecting Johnson’s testimony is equally far-fetched. First of all, it is not uncommon for people to not want to get involved,

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[13]Looking at Exhibit K-L, Johnson testified: “. . . I can actually see houses and streets, so I’m able to tell you exactly where it was” (EH, p. 53). “I couldn’t really figure out the map that he (Cole) brought. If he would have brought this (Exhibit L) in, I would have been able to do it like this” (EH, p. 55).

> Q. Now, as I understand, too, when you were talking to Detective Cole and there was some confusion about Exhibit F, you said that the man came from in between the houses, and it was either the first or second house, but you weren't sure?
>
> A. That is correct.
>
> Q. Okay. And now that you see Defendant’s Exhibit L, you can be more certain, correct?
>
> A. That’s correct (Appendix, p. 128a).

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regardless of their prior contact with "the system."[14] And as a prior defendant, it would not be unlikely that a person may not trust "the system." However, the prosecutor's rationale for rejecting Johnson's testimony is baseless. The prosecutor argues on appeal that Johnson did not "trust the system" and then extrapolates from that, that Johnson completely fabricated everything ("created accounts from whole cloth") to express his "disrespect of the system." That position is simply creative imagination. Why would a person, who has no vested interest in the outcome, knows neither the complainant or defendant, expose himself to the ridicule of a failed homosexual rendevous, provide a detailed description of the shooting and the shooter (not having *any* information about the prosecution's versions of the events to contradict)[15] and make up a complete story to vindicate his general distrust of the system? Why would Johnson completely cooperate with Investigator Cole from the prosecutor's office, agree to voluntarily meet him, give a 1-2 hour taped interview and written statement, if his animus was so great against "the system"?

Finally, the prosecution concedes that the prosecution's witnesses, both Wray and Day, "were not-by any means-perfect witnesses; they had their share of credibility

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[14]This was particularly true for Johnson who had to disclose a homosexual rendevous as the reason he was in the area.

[15]The prosecution agrees. "It is true that there was no evidence the witness (Johnson) saw trial documents or spoke to individuals who attended the trial . . ." (Brief, p. 18).

issues."[16] The prosecution then suggests that in a clash between the prosecution's witnesses and Johnson, the "credibility equation" would be a "wash" between the parties.[17] If true, it seems logical to conclude that on retrial, Corley would be acquitted, the prosecution having failed to establish beyond a reasonable doubt the charges.

Notwithstanding the prosecution's concessions, they fail to recognize that Johnson's testimony represents material exculpatory evidence from an independent eyewitness that goes to the heart of the case. There are diametrically opposed versions of how the shooting occurred and who the shooter was. As a matter of fairness alone, a jury should resolve that conflict.[18]

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[16]Brief, p. 19. Stanley Davis Jr. lived across the street from Wray. At the post-conviction hearing, Davis testified he was the only civilian to offer assistance to Wray, that no one else tried to speak to Wray, who was in no condition to talk, and that Wray never said who shot him (Appendix, p. 159a-162a). This was in direct contradiction of Day's version at trial.

[17]*id.*, p. 20.

[18]One is left to wonder about the prosecutor's opposition to a new trial if they are convinced a different result is not likely on retrial.

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RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Defendant-Appellant, DIALLO CORLEY, requests this Court to reverse the trial court and remand for a new trial.

Respectfully submitted,
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CERTIFICATE OF SERVICE

STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

CRAIG A. DALY, P.C., being first duly sworn, deposes and says that on the 7th day of **September 2018**, he did serve a true copy of **Appellant's Reply Brief** electronically upon **Jonathan Mycek and the Wayne County Prosecutor's Office, Appellate Division, 1441 St. Antoine, 12th Floor, Detroit, Michigan 48226** utilizing the true filing system.

Respectfully submitted,

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