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SUPREME COURT

STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

MSC No. 159346
COA No: 338733
Lower Case No. 16-010745-01
Wayne County Circuit Court

JACQUES JEAN KABONGO,

Defendant-Appellant.
_____/

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Attorney for Plaintiff-Appellee

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Attorney for Defendant-Appellant
_____/

DEFENDANT-APPELLANT'S REPLY BRIEF ON APPEAL

*****ORAL ARGUMENT REQUESTED*****

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RECEIVED by MSC 5/17/2019 1:16:59 PM

TABLE OF CONTENTS

TABLE OF CONTENTS i

INDEX OF AUTHORITIES ii

STATEMENT OF JURISDICTION iii

STATEMENT OF QUESTIONS PRESENTED iv

ARGUMENT 1

I. DEFENDANT-APPELLANT DENIED A FAIR TRIAL BY TRIAL COURT'S REFUSAL TO PROPERLY INSTRUCT THE JURY WHICH ALLOWED A CONVICTION WITHOUT SUFFICIENT EVIDENCE. 1

II. IT WAS AN ABUSE OF DISCRETION NOT TO GRANT A MISTRIAL WHERE PROSECUTION WITNESSES DELIBERATELY VIOLATED A COURT ORDER CONCERNING IRRELEVANT, NON-PROBATIVE, AND PREJUDICAL TESTIMONY THAT DENIED A FAIR TRIAL. 3

III. PROSECUTORIAL MISCONDUCT IN MISLEADING THE JURY ABOUT AN EXHIBIT DENIED A FAIR TRIAL AND THEN FAILING TO PRESERVE THE EXHIBIT INTERFERED WITH APPELLATE RIGHTS. 5

iV. DEFENDANT-APPELLANT DENIED 14^{tH} AMENDMENT RIGHT TO TRIAL BY AN IMPARTIAL JURY BY TRIAL COURTS OBJECTIVELY UNREASONABLE APPLICATION OF *BATSON V KENTUCKY*, 476 US 79; 106 S CT 1712; 90 L ED 2D 69 (1986) AND MCR 2.511(F)(1) 6

V. DEFENDANT-APPELLANT DENIED 14TH AMENDMENT RIGHT TO TRIAL BY AN IMPARTIAL JURY BY TRIAL COURTS REFUSAL TO REMOVE JURORS FOR CAUSE. 8

RELIEF REQUESTED 9

RECEIVED by MSC 5/17/2019 1:16:59 PM

INDEX OF AUTHORITIES

Cases

Batson v Kentucky, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), ...6

Donnelly v DeChristoforo, 416 US 637; 94 S Ct 1868; 40 L Ed 2d 431 (1974). 5

Hodge v Hurley, 426 F3d 689, (6th Cir., 2005); 5

Houston v. Dutton, 50 F.3d 381, 385 (6th Cir. 1995).....2

J.E.B. v. Alabama ex rel TB, 511 US 127 (1994).....7

Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).....9

People v Alter, 255 Mich App 194, 205; 659 NW2d 667 (2003 4

People v Cooper, 236 Mich 643, 659-660 (1999).....4

People v Daoust, 228 Mich App 1, 7-9; 577 NW2d 179 (1998).....9

People v Dobek, 274 Mich App 58, 82 (2007). 2

People v Eccles, 260 Mich App 379, 383; 677 NW2d 76 (2004).....8

People v Hackney, 183 Mich App 516, 531; 455 NW2d 358 (1990).....4

People v Haywood, 209 Mich App 217, 228; 530 NW2d 497 (1995). 4

People v Miller, 482 Mich 540 (2008),.....8

People v. Knight, 473 Mich. 324 (2005).....6

United States v Smith, 500 F2d 293, 297 (CA6, 1974 5

Statutes

MCL 600.1307a(1)(e). 8

Rules

MCR 7.312(E)(3). iii

STATEMENT OF JURISDICTION

This Reply is provided pursuant to MCR 7.312(E)(3).

RECEIVED by MSC 5/17/2019 1:16:59 PM

RECEIVED by MSC 5/17/2019 1:16:59 PM

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER DEFENDANT-APPELLANT DENIED A FAIR TRIAL BY TRIAL COURT'S REFUSAL TO PROPERLY INSTRUCT THE JURY WHICH ALLOWED A CONVICTION WITHOUT SUFFICIENT EVIDENCE?

Defendant-Appellant answers "Yes".

II. WHETHER IT WAS AN ABUSE OF DISCRETION NOT TO GRANT A MISTRIAL WHERE PROSECUTION WITNESSES DELIBERATELY VIOLATED A COURT ORDER CONCERNING IRRELEVANT, NON-PROBATIVE, AND PREJUDICAL TESTIMONY THAT DENIED A FAIR TRIAL?

Defendant-Appellant answers "Yes".

III WHETHER PROSECUTORIAL MISCONDUCT IN MISLEADING THE JURY ABOUT AN EXHIBIT DENIED A FAIR TRIAL AND THEN FAILING TO PRESERVE THE EXHIBIT INTERFERED WITH APPELLATE RIGHTS?

Defendant-Appellant answers "Yes".

IV. WHETHER DEFENDANT-APPELLANT DENIED 14TH AMENDMENT RIGHT TO TRIAL BY AN IMPARTIAL JURY BY TRIAL COURTS OBJECTIVELY UNREASONABLE APPLICATION OF *BATSON V KENTUCKY*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986) AND MCR 2.511(F)(1)?

Defendant-Appellant answers "Yes".

V. WHETHER DEFENDANT-APPELLANT DENIED 14TH AMENDMENT RIGHT TO TRIAL BY AN IMPARTIAL JURY BY TRIAL COURTS REFUSAL TO REMOVE JURORS FOR CAUSE?

Defendant-Appellant answers "Yes".

RECEIVED by MSC 5/17/2019 1:16:59 PM

ARGUMENT

I. DEFENDANT-APPELLANT DENIED A FAIR TRIAL BY TRIAL COURT'S REFUSAL TO PROPERLY INSTRUCT THE JURY WHICH ALLOWED A CONVICTION WITHOUT SUFFICIENT EVIDENCE.

Plaintiff-Appellee has not responded to Defendant-Appellant's Brief in Support of Application for Leave to Appeal and instead submitted to this Court a copy of the People's Brief filed in the Michigan Court of Appeals. This Reply concerns the issues raised in this Court in response to the findings and rulings made by the Court of Appeals. As a result, Plaintiff-Appellee does not contest the issues raised to this Court.

As raised in the Brief, the evidence used to convict Defendant-Appellant did not exist until the police officers testified in court, contrary to their police reports. The police reports were introduced as impeachment evidence. Instructions were given to the jury who deliberated and then sent out a request to review the police reports. The trial court proposed to tell the jury that the police reports were not evidence. The defense objected to and requested that a specific instruction be provided on the use of impeachment evidence, so as to not confuse the jury by misleading them to take the response as an order preventing any consideration of the prior inconsistent statements in said reports.

The trial court denied the request for the instruction and told the jury that that the police reports were not admitted into evidence and the jury returned thereafter with a verdict of guilt.

The Brief sets forth all the relevant jury instructions given in this trial to permit a better view of prejudice that resulted from the error in not giving the instruction requested by counsel and the error of instructing the jury that impeachment evidence in the form of

prior inconsistent statements was not evidence admitted at trial. As a result, the jury was led to believe any consideration of the prior inconsistent statements was prohibited; the very harm sought to be avoided by the requested instruction.

The jury, without the requested instruction, could only reasonably conclude from the trial court's response, that *any* consideration of the police reports and the statements contained there were not in evidence, and, hence, improper to be considered.

> "The judge's instructions to the jury as to the law and how the evidence should be assessed are crucial to a fair trial. They should guide the jury's deliberations and are not mere technicalities in our legal system." *Houston v. Dutton,* 50 F.3d 381, 385 (6th Cir. 1995).

Thus, the jury was effectively prohibited from considering the prior inconsistent statements when determining credibility of the officers whose testimony at trial substantially differed and constituted impeachment. This error was preserved, a contemporaneous objection was made and review was not limited. In effect, the trial court told the jury that the defense's impeachment evidence did not meet legal standards of admissibility and cannot be considered when determining the only true issue-credibility. The trial court's refusal to give an instruction that is reasonable and necessary to the defense is a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment. A new trial is merited. *People v Dobek*, 274 Mich App 58, 82 (2007).

Defendant-Appellant submits relief in the form of reversing the Michigan Court of Appeals is merited where "the error affected the outcome of the lower court proceedings". *People v Cameron*, 291 Mich App 599, 617;806 NW2d 371 (2011).

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II. IT WAS AN ABUSE OF DISCRETION NOT TO GRANT A MISTRIAL WHERE PROSECUTION WITNESSES DELIBERATELY VIOLATED A COURT ORDER CONCERNING IRRELEVANT, NON-PROBATIVE, AND PREJUDICAL TESTIMONY THAT DENIED A FAIR TRIAL.

Plaintiff-Appellee claims the prohibited statements made by the two police officers were non-responsive statements and were not prejudicial. Defendant-Appellant notes the record belies those claims as the prosecutor's questions interjected the irrelevent but prejudicial statements that infected this trial.

Furthermore, the statements were prejudicial and allowed the jury to incorrectly perceive Defendant-Appellant as a bad person who was involved with narcotic and was a known felon. The first officer told the jury what he was doing when arresting Defendant-Appellant, going "for known offenders. We deal with drugs, guns, anything that comes with violent crimes." (T II, 28). The second officer was even worse telling the jury when "I advised my partner of my observations [of Defendant] and then my intention was to the narcotics location that I had a complaint on." (T II, 96).

These statements were in direct contravention of the granted in limine motion that excluded mentioning the type of work and assignment they were on and that they were on their way to a narcotics location at time of the arrest. Such references were already ruled to have been too prejudicial for the jury to have heard by the trial court. (Hrng, 3/15/2017, 15-16).

The record demonstrates the prosecutor was aware of this ruling and more importantly that the police officers were aware of the ruling as attested to by the prosecutor. Despite such knowledge, the questions asked by the prosecutor suggested and allowed the

excluded and prejudicial information to be placed before the jury. This Court should consider the prosecutor and officers were complicit and grant a new trial. *People v Hackney,* 183 Mich App 516, 531; 455 NW2d 358 (1990).

Defendant-Appellant further submits the introduction was prejudicial to his rights and requires a new trial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant . . . and impairs his ability to get a fair trial." quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

The trial court had already ruled in the motion in limine before trial that this evidence caused undue prejudice and would confuse the jury. This was improper evidence that would weigh too much on a factfinder, whether jury or judge, and deny an individual a proper hearing. *Old Chief v. United States,* 519 U.S. 172, 181 (1997). "The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." Supra.

This trial was a credibility contest between Defendant-Appellant and the two police officers. By painting Defendant-Appellant as a known violent offender involved in narcotics, without any evidence justifying the same denied the presumption of innocence, and improperly provided the jury with inaccurate, misleading, extraneous, prejudicial and specifically excluded information in this trial; a new trial with an untainted jury was warranted. *People v Cooper*, 236 Mich 643, 659-660 (1999).

RECEIVED by MSC 5/17/2019 1:16:59 PM

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III. PROSECUTORIAL MISCONDUCT IN MISLEADING THE JURY ABOUT AN EXHIBIT DENIED A FAIR TRIAL AND THEN FAILING TO PRESERVE THE EXHIBIT INTERFERED WITH APPELLATE RIGHTS.

Plaintiff-Appellee does not address the failure to preserve the court record aspect of this issue and instead claims the prosecutor was making permissible comment on an admitted exhibit. (Pl-App, 29).

The defense had used prior statements of both officers to produce a diagram of the crime scene. The entire point was to demonstrate the physical impossibility of the new testimony first heard at trial. Different diagrams were made, based upon each officer's prior statements, and then the prosecutor would comment on the diagrams during redirect. It was only after the second diagram used for the second testifying officer that the prosecutor then decided to take a picture on her phone.

During closing the prosecutor acted as a witness, introducing her own exhibit and drawing her own interpretations to be compared to earlier conclusions and statements made in relation to a different diagram, which had been used for the first officer before being erased during the testimony of the second officer. Here the prosecutor's comments adversely impacted the defendant's presumption of innocence, and reversal is proper because a cautionary instruction cannot cure the prejudice. *United States v Smith*, 500 F2d 293, 297 (CA6, 1974).*Hodge v Hurley*, 426 F3d 689, (6th Cir., 2005); *Donnelly v DeChristoforo*, 416 US 637; (1974).

RECEIVED by MSC 5/17/2019 1:16:59 PM

IV. DEFENDANT-APPELLANT DENIED 14TH AMENDMENT RIGHT TO TRIAL BY AN IMPARTIAL JURY BY TRIAL COURTS OBJECTIVELY UNREASONABLE APPLICATION OF *BATSON V KENTUCKY*, 476 US 79; 106 S CT 1712; 90 L ED 2D 69 (1986) AND MCR 2.511(F)(1).

Plaintiff-Appellee repeats the rulings made by the trial court, while at the same time ignores the actual record of the exchanges between Jurors and how that record evidence is directly contrary to the findings made by the trial court.

Prosecutor challenges:

Juror no. 2 was excluded with alleged race neutral reasons of memory problems and being an elder citizen. The memory problems claimed such as not remembering the first question and having a senior moment are mischaracterized and falsely depicted. This juror did remember the first question and acted with an awareness and acuity similar to the judge who acknowledge the same. (T I, 49-50).

Similarly, Jurors No. 3 and 14 were allegedly excused for having a complicated life and being pregnant respectively. However, in each case when asked if the complicated life or the medical status would prevent acting as a fair and impartial juror, each stated they would be fair and impartial. (T I, 35, 78).

In *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), the United States Supreme Court held that the Equal Protection Clause forbids the use of peremptory challenges to exclude members of a jury venire because of their race.

In *People v. Knight*, 473 Mich. 324 (2005), the Court expressly underscored that in the context of racial discrimination in voir dire, the Equal Protection Clause was not limited to concerns over the rights of defendants and parties, but "the focus is also on the integrity

of the judicial system, as well as the rights of the prospective jurors." *Knight*, 473 Mich at 342. The Court noted that "ensuring the integrity of the judicial process and maintaining fair jury selection procedures" was of unquestionable importance and paramount concern. *Knight*, 473 Mich at 342. The Court concluded, citing *Batson*, that "the striking of even a single juror on the basis of race violates the constitution." *Knight*, 473 Mich 337, n.9 (citing *J.E.B. v. Alabama ex rel TB,* 511 US 127, 142 n. 13).

Here the peremptory was challenged and the prosecutor provided reasons that were not supported by the record and were instead a pretext to exclude minorities from the jury. It was clear error to make findings not supported by the record, and an abuse of discretion to remove these jurors. Specifically, the reasons attributed to juror no. 2 were plain pure fabrication by the prosecutor when the actual record is compared. The wrongful exclusion of a single juror is structural error mandating a new trial. *J.E.B. v. Alabama ex rel TB,* 511 US 127 (1994).

Defense challenge:

Defendant-Appellant tried to remove a juror where she admitted to having strong and multiple association with law enforcement, has been called for jury duty in the past and always excluded from the panel, and who could only say she hoped to be fair and impartial, not that she would be fair and impartial. It is well accepted that bias can result from a connection to law enforcement so that weight given to evidence is skewed unfairly. This is a race neutral explanation. A new trial is mandated.

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V. DEFENDANT-APPELLANT DENIED 14TH AMENDMENT RIGHT TO TRIAL BY AN IMPARTIAL JURY BY TRIAL COURTS REFUSAL TO REMOVE JURORS FOR CAUSE.

Plaintiff-Appellee claims Juror No. 5 was qualified as a juror because even though her out of state felony did not show up on the inquiry made by Michigan law enforcement she stated she could still render a fair and impartial verdict. (Pl-App Br., 6-7). In other words, according to Plaintiff-Appellee, even though a person is excluded as a juror by statute, (s)he may, nevertheless, serve as a juror if (s)he promises to be fair. To extend that argument, the prosecutor appears to be claiming that convicted felons should be added to the jury rolls as long as they attest to being able to render a fair and impartial verdict.

Defendant-Appellant submits the prosecutor's position is clear error, as statutory requirements contain no exception and the language is not nugatory: that "[t]o qualify as a juror a person shall [n]ot have been convicted of a felony." MCL 600.1307a(1)(e).

Regardless of any oath of impartiality, under Michigan law, individuals convicted of a felony are ineligible to sit as jurors. This is not a question of discretion, the disqualification is mandated. *People v Eccles,* 260 Mich App 379, 383; 677 NW2d 76 (2004). Defendant-Appellant objected to the felony and also used a peremptory that was challenged and reversed/denied and juror No. 5. deliberated.

Plaintiff-Appellee claims that under *People v Miller*, 482 Mich 540 (2008), prejudice must be demonstrated.

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Initially, Defendant-Appellant submits that *Miller* is an unreasonable application of established law, as a disqualified juror deliberating on a jury is a structural error. *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

Additionally, as set forth in a previous issue, juror no. 5 was not impartial and actual prejudice has been demonstrated and a new trial is required under *Miller*. Defendant-Appellant was denied a fair and impartial jury requiring a new trial. *People v Daoust*, 228 Mich App 1, 7-9; 577 NW2d 179 (1998).

RELIEF REQUESTED

WHEREFORE, Defendant-Appellant moves this Honorable Court to make findings and rulings that Defendant-Appellant was denied a fair trial as a result of the refusal to instruct the jury properly and the error was outcome determinative and reverse the Michigan Court of Appeals and remand with instructions for a new trial.

Respectfully submitted by:

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