

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

No. 159516

TRESHAUN TERRANCE,
Defendant-Appellee.

Court of Appeals No. 343154
Circuit Court No. 17-5253

PLAINTIFF-APPELLANT'S
REPLY BRIEF

Filed under AO 2019-6

KYM WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief of Research, Training,
and Appeals

DAVID A. McCREEDY (P56540)
Principal Appellate Attorney
1441 St. Antoine, Room 1116
Detroit, Michigan 48226
(313) 224-3836

TABLE OF CONTENTS

Table of Contents 2

Index of Authorities 3

Argument 4

I. The law allows jurors to decide criminal cases based on *their* view of the evidence, as opposed to the parties’ views of it. Here, although the parties saw the dispositive issue as one of identity, the evidence could reasonably support the view that defendant intended to *torture* Ms. Tillman, but not *kill* her. Because a reasonable jury could have acquitted him of murder on that basis, issue preclusion cannot apply. 4

Standard of Review: 4

Discussion: 4

Conclusion: 10

Relief 11

INDEX OF AUTHORITIES

Case	Page
<i>Ashe v Swenson</i> , 397 US 436 (1970)	8-9
<i>Dowling v US</i> , 493 US 342, 351 (1990)	4
<i>People v Aaron</i> , 409 Mich 672 (1980)	6
<i>People v Crawford</i> , 458 Mich 376 (1998)	9
<i>People v Gillis</i> , 474 Mich 105 (2006)	8
<i>People v Herron</i> , 464 Mich 593, 599 (2001)	4

ARGUMENT

I.

The law allows jurors to decide criminal cases based on *their view* of the evidence, as opposed to the parties' views of it. Here, although the parties saw the dispositive issue as one of identity, the evidence could reasonably support the view that defendant intended to *torture* Ms. Tillman, but not *kill* her. Because a reasonable jury could have acquitted him of murder on that basis, issue preclusion cannot apply.

Standard of Review:

A double jeopardy challenge presents a question of law that is reviewed de novo. *People v Herron*, 464 Mich 593, 599 (2001). The defendant bears the burden of proving that the issue-preclusion component of double jeopardy bars re prosecution. *Dowling v US*, 493 US 342, 351 (1990).

Discussion:

There is a reasonable basis—grounded in the evidence at trial—for defendant's jury to have doubted his *intent* to commit the murder rather than his *identity* as the perpetrator of it, and so defendant cannot show that the issue of Ms. Tillman's abuser's identity has been conclusively determined in his favor.¹ That is, despite the thrust of defendant's argument to the contrary, juries are not constrained in their findings by

¹The People also continue to maintain that defendant can be prosecuted for torturing the victim even if he did not kill her. See People's Supplemental Brief at 18-20.

the parties' arguments. Here, despite the fact that the arguments turned on whether defendant was the perpetrator of Ms. Tillman's murder, a reasonable jury could have acquitted him based on the evidence that while he killed her *he did so without the required malice*. Specifically, defendant's jury could have credited his apparent panic during the 911 call, coupled with Ms. Tillman's numerous *nonfatal* other injuries, and found these facts inconsistent with a murderous intent. This evidence would reasonably support the conclusion that defendant meant to terrorize Ms. Tillman by cutting off her air supply, but not to kill her. As such, there can be no issue preclusion as to defendant's identity as Dalona's abuser.

It is most certainly *not* the case, as defendant contends, that a ruling for the People would all but eliminate the issue-preclusion doctrine—that the People's interpretation of the law is so restrictive as to make issue preclusion inapplicable across the board in a general-verdict state such as this one. The rule advanced by the People is merely this: *when the evidence at trial reasonably supports an alternative basis for the verdict, then the defendant has not established issue preclusion*. In this vein, the People's argument rests entirely on three well-settled principles of law:

- The defendant bears the burden of proving that the initial factfinder *actually decided* the issue he seeks to preclude further litigation on.
- If there is any rational basis to conclude that the jury decided on an alternative ground, then the issue is not precluded.
- The rational basis must arise from the evidence at trial, or reasonable inferences from the evidence, and not speculation.

If the court accepts these principles, then the People are entitled to relief. That is, based on the evidence at the 2016 trial, defendant's jury could rationally have decided the case based on evidence negating his intent rather than on the issue of whether he killed her.

The People encourage this Court to review the autopsy report and the autopsy photographs admitted at trial as People's #4 and #5 (Appendix 606a-622a) and listen to the 911 recording, which was admitted at trial (see Appendix 305a) as People's #8 (a copy is being filed with this reply brief). The report, the photos, and the testimony at trial establish that someone inflicted more injuries on Ms. Tillman than could be counted. Contusions, abrasions, lacerations, incise wounds, and pressure marks literally covered her body from head to toe. But not a single one—and none in combination—was fatal. A jury could conclude from this evidence that defendant was abusing the victim but didn't want her dead.

The 911 tape, taken in this context, supports the view that defendant exacerbated his abuse by cutting off Ms. Tillman's air supply but, like his assaults to the rest of her body, without intending to kill her.² Thus, in the recording, defendant can be heard crying and panicking over Ms. Tillman's unresponsiveness. Whether this emotion was real or faked was a point of contention at trial, but if bona fide it demonstrated true angst over the medical emergency at hand. A jury could reasonably conclude from the call that defendant was truly shocked and horrified

²And without (i) the intent to do great bodily harm to her, or (ii) wantonly and willfully disregarding the natural tendency of his behavior to cause death or great bodily harm to her. See *People v Aaron*, 409 Mich 672, 728 (1980).

over Dalona’s loss of consciousness—that he had meant to intimidate her and demonstrate his power over her, but not to knock her out or kill her.³ Trial counsel highlighted in his closing argument the dissonance between the recording and the prosecutor’s claim that defendant had committed premeditated murder:

You heard that 9-1-1 tape. This man was emotionally spent by what was goin’ on. ... He’s definitely in agony, trying to do the chest compressions. ...

Appendix at 508a-509a.

It is thus not speculation, but actual evidence, that shows how jurors could reasonably have determined that defendant did not cover Ms. Tillman’s mouth with homicidal intent, but only to terrorize her, just like he had inflicted countless nonfatal injuries to her person. And if this evidence itself were not enough, the jurors were then instructed that *they* were the final arbiters of the facts, that they could draw reasonable inferences from the facts, and that they had to determine defendant’s guilt based on the facts and inferences, *not* the parties’ arguments. See Plaintiff-Appellant’s Supplemental Brief at 17. Defendant cannot possibly establish that no rational juror could have acquitted him of murder by finding a doubt that he acted with the requisite malice, as opposed to doubting that he was Ms. Tillman’s abuser.

³According to the National Coalition Against Domestic Violence, “domestic violence” includes abusive behavior “as part of a *systematic pattern of power and control* perpetrated by one intimate partner against another.” *What Is Domestic Violence?*, Nat’l Coalition Against Domestic Violence, <https://www.ncadv.org/learn-more> (accessed Feb 21, 2020) (emphasis added).

In this regard, it is *defendant's* argument that flies in the face of *Ashe*.⁴ Although he pays lip service to *Ashe's* actual holding, his de facto take on that case would restrict the rational-basis inquiry to the parties' theories of the case and their arguments: the necessary upshot of defendant's view is that no jury could ever rationally decide a case on grounds not supplied by the parties. But that is not what *Ashe* says or holds. According to the *Ashe* Court, the relevant considerations are "the pleadings, evidence, charge, and other relevant matter," and those considerations must be viewed practically and "with an eye to *all* the circumstances of the proceedings." 397 US at 444 (emphasis added). Thus, while defendant acknowledges—as he must—that *the evidence* itself must be considered in determining whether an alternative ground exists for the jury verdict, he then utterly ignores the actual facts of this case (highlighted here and in the People's supplemental brief) and presumes that the arguments are themselves dispositive. The arguments do count, of course; they are "other relevant matter" per *Ashe*, but they are not the only, or even the most important, consideration. If anything, the evidence should be primary. After all, a party is not entitled to an instruction just because it supports their theory of the case and argument, but only if a *rational view of the evidence* supports it. See *People v Gillis*, 474 Mich 105, 137 (2006).

Further, defendant's argument not only gives short shrift to the evidence, it also ignores the jury instructions. If he were correct that the only possible decision point at trial was the perpetrator's identity, then instructing on the elements of murder would have been superfluous. But even when parties *stipulate* to a fact, a jury need not regard it as true.

⁴*Ashe v Swenson*, 397 US 436 (1970).

See M Crim JI 4.7; *People v Crawford*, 458 Mich 376, 389 (1998). Defendant's jury was instructed that, to find him guilty of murder, the prosecution had to prove beyond a reasonable doubt not only his identity as the perpetrator, but his intent as well. Appendix at 543a-545a. This Court should not presume that the element instructions played no role in the jury's verdict.

Additionally, as mentioned above, defendant's argument also rests on the faulty premise that, if the People prevail in this appeal, the ruling will by necessity dispose of the issue-preclusion doctrine altogether in Michigan. In that vein, defendant maintains that there will never be a case in which an alternative ground for the jury's verdict could not be subject to post-hoc rationalization. Two things need be said in response. First, the US Supreme Court jurisprudence—set forth in the People's Supplemental Brief—is clear that issue preclusion must be narrowly drawn, that the defendant bears the burden of disproving any alternative basis for the verdict, and that the alternative basis merely has to be “rational.”⁵

Second, whether the proposed alternative ground finds a rational basis in the evidence is not a novel concept in Michigan law: as indicated above it is the same standard applied every day in the trial courts of this state to determine whether a requested jury instruction is warranted. If the evidence rationally supports the instruction (and the instruction is legally correct), then it must be given. Correspondingly, in the issue-preclusion context, if the evidence (and other relevant matter in the case) would rationally support an alternative ground for a verdict, further

⁵“Conceivable” is the US Supreme Court's term, not one inserted into this case by the People. See *Ashe*, 397 US at 445.

litigation on that issue is not foreclosed. The People do not propose to introduce unbounded speculation into the issue-preclusion analysis, and a favorable ruling here would in no way require such a dire result.

Conclusion:

Where the evidence at trial *would have been* sufficient to justify an instruction on a ground of decision other than the one the defendant seeks to preclude, there exists a rational basis for that alternative ground. Here, the evidence (in particular, the 911 call and the non-fatal wounds) would have rationally supported an instruction on manslaughter, under the view that defendant acted with gross negligence by cutting off Ms. Tillman's air supply, but not with a depraved heart to satisfy the third prong of murder. Because defendant cannot rule out this alternative basis, he cannot establish issue preclusion in this case, and the People are entitled to go forward with this prosecution.

RELIEF

THEREFORE, the People again request that this Honorable Court either (a) reverse the Court of Appeals and remand for trial or (b) grant leave to appeal.

Respectfully submitted,

KYM WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief of Research, Training,
and Appeals

/s/ David A. McCreedy

DAVID A. McCREEDY (P56540)
Principal Attorney, Appeals
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
(313) 224-3836

Dated: February 21, 2020

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with AO 2019-6. The body-text font is 12 point Century Schoolbook set to 150% line spacing. This document contains 1783 countable words.

/s/ David A. McCreedy

DAVID A. McCREEDY (P56540)
Principal Attorney, Appeals

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

vs

Supreme Court
No. 159516

TRESHAUN TERRANCE,
Defendant-Appellee.

Court of Appeals No. 343154
Third Circuit Court No. 17-005253-01

APPENDIX A

DVD/CD: 911 Audio, victim: Delona Tillman

RECEIVED by MSC 2/21/2020 3:25:47 PM



COUNTY OF WAYNE
OFFICE OF THE PROSECUTING ATTORNEY
DETROIT, MICHIGAN

1200 FRANK MURPHY HALL OF JUSTICE
1441 ST. ANTOINE STREET
DETROIT, MICHIGAN 48226-2302
TEL: (313) 224-5777
FAX: (313) 224-0974

KYM L. WORTHY
PROSECUTING ATTORNEY

RICHARD P. HATHAWAY
CHIEF ASSISTANT

DONN FRESARD
CHIEF OF STAFF

February 21, 2020

LARRY ROYSTER, CLERK
MICHIGAN SUPREME COURT
925 W. OTTAWA - P.O. BOX 30052
LANSING MICHIGAN 48909

RE: PEOPLE OF MI vs **TRESHUAN TERRANCE**
Court of Appeals No.: 343154

Dear Mr. Royster,

Enclosed, please find (1) DVD/CD: **TRESHUAN TERRANCE**, as "APPENDIX A: 911 AUDIO - VICTIM: DELONA TILLMAN" of the "**PLAINTIFF-APPELANT'S REPLY BRIEF**" eFiled in the COURT OF APPEALS by Mi-FILE at: <https://mifile.courts.michigan.gov/file> website on February, 21, 2020.

A copy of "Appendix A" has been mailed to State Appellate Defense Offenders: Angeles R. Meneses (P80146) and Jacqueline McCann (58774) at 645 Griswold Street, Ste.#3300, Detroit, Michigan 48226. If you have any questions, please contact me at (313) 224-3836.

Very truly yours,

/s/ David A. McCreedy

DAVID A. McCREEDY, P56540
Assistant Prosecuting Attorney
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
Phone: (313) 224-3836

DAM/mls
Enclosure//