

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JUNIOR FRED BLACKSTON,

Defendant-Appellee.

Michigan Supreme Court No. 134473

Court of Appeals No. 245099

Van Buren County Circuit Court
No. 00-11976-FC

PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF

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QUESTIONS PRESENTED

In an order dated November 2, 2007, this Court directed the parties to address at oral argument the following four issues and provided the parties an opportunity to file additional briefing:

- "(1) considering that the grounds for evidentiary error that defendant asserted at trial, citing MRE 613, differ from the grounds he now advances upon appellate review, whether the Court of Appeals applied the correct standard of review when addressing admissibility under MRE 806 and MRE 403;
- (2) whether the trial court could properly exclude two witnesses' inconsistent statements, which were made after they had testified in the defendant's first trial but before the defendant's second trial;
- (3) whether exclusion of this evidence, if error and if the claim of error was properly preserved, was harmless beyond a reasonable doubt; and
- (4) whether exclusion, if error but the claim of error was not preserved through a sufficient objection at trial, is plain error requiring reversal."

INTRODUCTION

Without restating the arguments from the brief in the application, the people have supplemented the analysis in response to the first question. For the other three questions, the people provide a short summary of argument but rely on the analysis in the application.

SUPPLEMENTAL ARGUMENT

1. **Where trial counsel failed to state the proper ground for evidentiary error at trial but raises that ground in the motion for new trial, the claim is defaulted and the proper standard of review should be the plain-error standard.**

The traditional standard of review in cases in which a defendant moves for new trial after a verdict of guilty is the abuse-of-discretion standard.¹ Generally, the Michigan courts review the claim of error underlying the trial court's decision on the new trial as a preserved claim.² This standard of review on appeal should not apply where the claim of error relates to trial error that could have been the subject of a trial objection. The standard of review would otherwise not account for the requirement that the Michigan Rules of Evidence impose, under MRE 103, for a party to make a "timely objection" stating the specific ground of the objection.³ Where the defendant at trial failed to preserve the claim but then files a motion for new trial, the trial court sits in the same position as an appellate court. The only two actions it may take are to grant a new trial, or deny the relief and allow the defendant's conviction to stand. Consequently, in the situation in which the defendant fails to object at trial and then raises this issue in a motion for new trial, the proper standard should be the plain-error standard.⁴

This is the situation here. At trial, defendant asked to introduce impeachment evidence of recanting statements against Darlene Rhodes Zantello and Guy Carl Simpson under MRE 613, not MRE 806.⁵ The trial court specifically rejected the use of the impeachment evidence because

¹ See *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

² See, e.g., *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003).

³ See also *People v Kilbourn*, 454 Mich 677, 684 n 3; 563 NW2d 669 (1997).

⁴ In previous filings, the people cited the abuse-of-discretion standard as the proper one for reviewing a decision on a motion for new trial, and argued in the application for leave for this Court to adopt additional rules to clarify this standard where there was no trial objection. For the reasons stated in this supplemental brief, the people contend that for purposes of clarity that the Court adopt the plain-error standard in reviewing these decisions.

⁵ Rhodes Zantello and Simpson refused to testify at trial and therefore their prior testimony was read into the record under MRE 804(b)(1).

the statements effectively recanting the trial testimony were not "prior" inconsistent statements.⁶ Only in a post-conviction motion did appellate counsel file a motion for new trial citing MRE 806, which provides for the use of impeachment evidence for non-testifying witnesses regardless when the other statements were made. Under Michigan law, therefore, this claim was unpreserved because the specific basis for the admission of the impeachment evidence was not cited – defendant cited the wrong ground at trial.⁷

On direct review of this claim of error, this Court would examine the issue under the plain-error standard because there was no proper contemporaneous objection.⁸ As noted by this Court in its decision in *People v Carines* in adopting the plain-error standard, the parties have a critical duty to raise the proper basis for errors at trial. The preservation obligation is a practical one. All the parties want to ensure that there are no errors at trial. Where the objection occurs at trial, the trial court has an opportunity to prevent the error or to correct it. After the trial, however, the only two basic options available for the trial court and the appellate courts are to affirm the conviction or deny relief. Consequently, for the same reason, where the issue is raised in a post-conviction motion, the matter should not be considered preserved where the party had an opportunity to object to the error at trial but failed to do so.

This Court has apparently not addressed this issue before. A decision on the issue therefore would provide guidance to the bench and bar and would also have practical

⁶ MRE 613 provides as follows:

(a) Examining witness concerning *prior* statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request it shall be shown or disclosed to opposing counsel and the witness. [Emphasis added.]

⁷ *Kilbourn*, 454 Mich at 684-685 ("The record shows that no objection was made at trial on the grounds now asserted on appeal. It is well established that objections to admissibility not properly raised at trial cannot be later asserted on appeal.").

⁸ *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

consequences for federal review of State court decisions in habeas corpus. The federal courts acknowledge that the failure of a trial counsel to contemporaneously object is a generally recognized and firmly established independent and adequate State law ground for refusal to review the merits of a claim of trial court error.⁹ The decision of the Michigan appellate courts to examine a claim of error under the plain-error standard is reviewed by the federal courts as an "enforcement of a procedural default."¹⁰ Here, the State of Michigan has an interest in ensuring that trial counsel have every reason to seek to prevent or correct possible errors during trial.¹¹ Consequently, this Court should adopt the plain-error standard for these claims of error even when they are presented to the trial court in a motion for new trial.

2. There was no plain error where the impeaching evidence was contrived to prejudice the proceedings ("epistles of advocacy for acquittal") and there was other similar evidence impeaching the trial testimony.

In light of the other similar impeachment evidence, the decision to exclude the evidence was not plain error where the witnesses were aligned with defendant and were essentially attempting to perpetrate a fraud on the court. Darlene Rhodes Zantello (defendant's girlfriend) and Guy Carl Simpson (defendant's friend and accomplice) issued statements retracting their trial testimony and then contrived to make themselves unavailable for trial. As the trial court noted, the statements were "epistles of . . . advocacy for acquittal" designed to discredit their own prior testimony (Motion hearing, pp 37-38). This contrivance then would allow them to escape

⁹ *Paprocki v Foltz*, 869 F2d 261, 284-285 (CA 6, 1989)(failure to contemporaneously object under Michigan was a procedural default even where the courts reviewed for manifest injustice). See also *Scott v Mitchell*, 209 F3d 854, 867 (CA 6, 2000)("the Supreme Court specifically found that default imposed for failure to object contemporaneously as required by Ohio's Rule 30 is an adequate and independent state ground to bar federal habeas review absent a showing of cause and prejudice"), citing *Engle v Isaac*, 456 US 107, 124-129 (1982).

¹⁰ *Hinkle v Randle*, 271 F3d 239, 244 (CA 6, 2001).

¹¹ And if unpreserved errors are reviewed for an "abuse of discretion," a federal court in habeas may undercut Michigan's interest in enforcing its procedural rules and reach the merits of the preserved claim without a cause and prejudice analysis. See, e.g., *Boyle v Million*, 201 F3d 711, 716 (CA 6, 2000).

possible perjury charges and also avoid the prosecution's examination on the subsequent statements. See the application for leave, pp 17-23 for the complete analysis. Without an opportunity to examine these witnesses' recantations, this would create the real possibility that this evidence could be used improperly by the jury for substantive, rather than impeachment, purposes. The admission of evidence is within the trial court's discretion.¹² This standard requires that the appellate court more than merely disagree with the lower court decision,¹³ but that the decision be outside the range of principled decisions. In applying this standard, the Court of Appeals erred in finding this decision to be error.

3. Even if error, the exclusion of the impeachment evidence was harmless beyond a reasonable doubt.

The people argued this point at length in their application for leave, see pp 23-29, that the evidence was harmless beyond a reasonable doubt. There were two aspects of this analysis. First, the impeachment was largely cumulative in light of the other impeachment evidence. Second, the evidence against defendant was overwhelming and was not dependent on the personal credibility of Zantello Rhodes and Simpson, but on the interlocking nature of the evidence.

4. Any possible error was not plain.

Moreover, if any possible error was harmless beyond a reasonable doubt, then it follows logically that any error could not meet the more difficult standard for defendant to meet, the plain-error standard. In other words, defendant has failed to show he was actually innocent or any error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

Defendant received a fair trial. This Court should grant leave and reverse.

¹² *People v Johnson*, 474 Mich 96, 99; 712 NW2d 703 (2006).

¹³ *Cress*, 468 Mich at 691.

Conclusion and Relief Sought

WHEREFORE, the People of the State of Michigan, Appellant, respectfully request that this Honorable Court grant leave, reverse the Court of Appeals decision, and reinstate defendant's first-degree murder conviction.

Respectfully submitted,

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