

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JUNIOR FRED BLACKSTON,

Defendant-Appellee.

Supreme Court No. 134473

Court of Appeals No. 245099

Circuit Court for Van Buren
County; No. 00-11976-FC;
Hon. William J. Buhl

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DEFENDANT-APPELLEE'S SUPPLEMENTAL BRIEF IN SUPPORT OF HIS ANSWER
TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL AFTER
REMAND (AS PERMITTED BY THIS COURT'S ORDER OF NOVEMBER 2, 2007)

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COUNTERSTATEMENT OF THE JUDGMENT/ORDER APPEALED FROM
AND RELIEF SOUGHT

Defendant-Appellee adopts the Counterstatement in his previously filed response.

STATEMENT OF QUESTIONS PRESENTED

I. 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?

II. 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?

III. WHETHER EXCLUSION OF THIS EVIDENCE, IF ERROR AND IF THE ERROR WAS PROPERLY PRESERVED, WAS HARMLESS BEYOND A REASONABLE DOUBT?

IV. WHETHER EXCLUSION, IF ERROR BUT THE CLAIM OF ERROR WAS NOT PRESERVED THROUGH A SUFFICIENT OBJECTION AT TRIAL, IS PLAIN ERROR REQUIRING REVERSAL?

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COUNTERSTATEMENT OF PROCEEDINGS AND FACTS

Defendant-Appellee adopts the Counterstatement in his previously filed response.

ARGUMENT

I. 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?

This Court, on Plaintiff's first application, remanded to the Court of Appeals:

. . . for reconsideration of the issue whether the trial court's error, if any, in excluding the statements in question was harmless beyond a reasonable doubt. The court should fully evaluate the harmless error question by considering the volume of untainted evidence in support of the jury verdict, not just whether the declarants were effectively impeached with other inconsistent statements at the first trial.

Order of 11/3/2005

The Court of Appeals applied the correct standard on remand by following this Court's order.

In its first opinion, the Court of Appeals was asked to reverse the trial court's decision denying Defendant's motion for new trial. At the hearing on that motion, Plaintiff agreed that the Simpson/Zantello post-testimonial exculpatory statements would have been admissible under MRE 806 (MH Tr 28), but argued for the first time that they would have properly been excluded under MRE 403 (MH Tr 30). The trial court (noting that MRE 806 had not been discussed at trial, MH Tr 34) agreed that MRE 806 "would appear to say they should come in" (MH Tr 34), but held that it would have barred them under MRE 403 (MH Tr 38-40). Neither Plaintiff nor the Court addressed Defendant's claim that MRE 806 was part of the "right to confront a witness" (MH Tr 25), which had been specifically identified as a federal constitutional right in both

his motion for new trial (p 2) and brief in support thereof (p 3).

Defendant's appeal claimed that the trial court abused its discretion by denying his motion for new trial (in addition to making numerous other claims which have never been decided). In Issues I and II, Defendant claimed that the denial of the new trial motion was an abuse of discretion because the Court abused its discretion in finding that the statements were substantially more prejudicial than probative under MRE 403, and that the Simpson/Zantello post-testimonial exculpatory statements were admissible under MRE 806 (Issue I) and that exclusion of the statements violated Defendant's constitutional right to confront witnesses (Issue II).

Plaintiff responded by arguing that the trial court properly held that the statements were inadmissible under MRE 403 (Brief, p 2), combining their arguments concerning Defendant's Issues I and II as their Issue I. They conceded that Defendant "preserved the issue for appeal" (Brief, p 2) and stated that as "a preserved claim of constitutional error, this Court must determine whether the people have established beyond a reasonable doubt that any error was harmless" (Brief, pp 2-3). The Court reversed in its first opinion, addressing only the issues concerning the Simpson/Zantello post-testimonial exculpatory statements.

Plaintiff applied for leave to appeal to this Court, arguing that the trial court was correct in concluding that the statements would have been properly excluded under MRE 403, and that any error was harmless beyond a reasonable doubt. This Court remanded to the

Court of Appeals in the order quoted above. That Court again reversed. Plaintiff again applied for leave to appeal, arguing for the first time that the issue was not properly preserved.

The time and place to argue that Defendant did not properly support his claim of admissibility of the statements was at the hearing on the motion for new trial (or in the Court of Appeals, or in the first application to this Court); see *People v Hamacher*, 432 Mich 157, 168; 438 NW2d 43 (1989); *People v Johnson*, 421 Mich 494, 496; 364 NW2d 654 (1984); *People v Tyler*, 399 Mich 564, 571; 250 NW2d 467 (1977), *aff'd* 436 US 499; 98 S Ct 1942; 56 L Ed 2d 486 (1978); *Long v Pettinato*, 394 Mich 343, 349; 230 NW2d 550 (1975). When "a court proceeds in a manner acceptable to all parties, it is not resolving a disputed point and thus does not ordinarily render a ruling susceptible to reversal", *People v Riley*, 465 Mich 442; 636 NW2d 514 (2001).

Had Plaintiff properly claimed that trial counsel's argument in support of admission was insufficient, Defendant could have argued persuasively that counsel was thereby ineffective (where she argued that public policy, rather than the United States Constitution, supported allowing a defendant to "confront" a witness with his prior inconsistent statement, III Tr 8).

Contrary to this Court's order, Defendant argued initially that MRE 613 allowed impeachment with prior inconsistent statements. The Court held that MRE 613(b) did not allow extrinsic evidence of the prior statements (which it also held were not "prior") under MRE 613(b). Defendant argued that public policy

should allow the introduction of the statements. Although neither counsel nor the Court specifically noted all of the language in MRE 613(b), that rule does allow the introduction of a prior inconsistent statement without affording the witness an opportunity to explain or deny the statement and affording the opposing party an opportunity to interrogate the witness if "the interests of justice otherwise require", MRE 613(b). A fair reading of Defendant's argument is that the interests of justice did require the admission of the inconsistent statements of Simpson and Zantello.

The determination of the applicability of MRE 806 is a question of law which should be reviewed *de novo*. Since the trial court agreed that MRE 806 allowed the impeachment, no review of this question was required.

The review of the decision (on the new trial motion) that the statements should be excluded pursuant to MRE 403 is for abuse of discretion; see *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995).

II. 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?

The trial court could exclude properly the inconsistent statements of the two witnesses, but could not do so based on MRE 613(b), because of MRE 806.

It could exclude properly the statements based on another evidentiary rule, but its decision that it would have done so on the basis of MRE 403 was an abuse of its discretion for the reasons

stated in both opinions of the Court of Appeals.

III. WHETHER EXCLUSION OF THIS EVIDENCE, IF ERROR AND IF THE ERROR WAS PROPERLY PRESERVED, WAS HARMLESS BEYOND A REASONABLE DOUBT?

Exclusion of this evidence was error and was not harmless beyond a reasonable doubt for the reasons stated in the second opinion of the Court of Appeals.

IV. WHETHER EXCLUSION, IF ERROR BUT THE CLAIM OF ERROR WAS NOT PRESERVED THROUGH A SUFFICIENT OBJECTION AT TRIAL, IS PLAIN ERROR REQUIRING REVERSAL?

MRE 103(d) provides that nothing in rule 103 "precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court". MRE 103 provides in part:

(a) **Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

* * * * *

(2) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

This rule differs in its treatment of objections to the admission of evidence which require "a timely objection or motion to strike . . . stating the specific ground of objection, if the specific ground was not apparent from the context", MRE 103(a)(1). Where evidence is excluded, the burden on the proponent is to make the substance of the evidence known to the court.

This Court has, however, held that an "objection based on one ground is usually considered insufficient to preserve an appellate attack on a different ground", *People v Kimble*, 470 Mich 305; 684

NW2d 669 (2004).

To prevail on a claim of plain error, a defendant must show a plain error that affected his substantial rights; the reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

The application of an incorrect principle of law is an error. It is also a plain error, one that requires no additional facts for the trial court to have ruled correctly.

The Defendant has the burden of showing that the error affected substantial rights, i.e., affected the outcome of the trial, *Carines*, p 763.

In the instant case, the inability to show jurors that Simpson and Zantello both had denied the truthfulness of their testimony accusing Defendant led to his conviction. Defendant relies on the same arguments of prejudice made in his response as well as the analysis made by the Court of Appeals. Most particularly, Defendant submits that knowing that Simpson and Zantello admitted they lied would have led jurors to seriously doubt the reliability of not only their testimony but that of the other witnesses who had been their friends, associates, and cotenants. This was a rare case in which testimony from witnesses whom jurors might normally be expected to believe provided no support for a finding of Defendant's guilt. All of the key witnesses came from the same milieu as Simpson and Zantello; virtually all were (in some way)

connected to one another. Most had been repeatedly questioned by police over a period of many years. Showing any flaws in this web would have caused jurors to suspect other undisclosed flaws. The exclusion of the Simpson and Zantello statements was outcome-determinative.

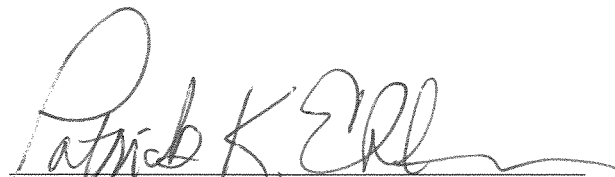
Defendant is actually innocent of this crime. Simpson's statement admits that Defendant was innocent. Zantello's statement (if believed) negates the value of her crucial incriminating testimony. Defendant's claim is based primarily on his actual innocence.

The exclusion of their statements also seriously affected the fairness of the proceedings in a common sense manner. Few, if any, jurors, would not always want to know that a witness had recanted his or her testimony. This aspect of the plain error rule is to be applied "especially in criminal cases", *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 (1936). Where the error deprives a jury of critical information supporting a finding of innocence, this Court should find that it seriously affects the fairness of the proceeding.

RELIEF REQUESTED

Defendant-Appellee prays that this Honorable Court deny Plaintiff-Appellant's application for leave to appeal or affirm the decision of the Court of Appeals.

Date: November 29, 2007


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Attorney for Defendant-Appellee