STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 9, 1999
v	No. 202918 St. Clair Circuit Court
BRANDON MICHAEL GALLIHER, Defendant-Appellant.	LC No. 96-000070-FC

Before: Markman, P.J., and Jansen and J. B. Sullivan*, JJ.

JANSEN, J. (dissenting).

I respectfully dissent. I cannot conclude that the errors in this case were harmless and I would reverse and remand for a new trial.

Although I agree with the lead opinion that the trial court erred in allowing the other acts evidence and that the trial court erred in allowing the police officer to testify regarding the statement made by William Lee, a nontestifying codefendant, I cannot agree that these errors were harmless. The primary issue in this case was whether defendant possessed the specific intent to commit murder or great bodily harm. Defendant maintained in his police statement that his intent was not to shoot at any particular person, but that he was just firing at the house. He also stated that he did not intend to kill anyone. There was no evidence admitted at trial indicating that defendant knew, or reasonably should have known, that the house was occupied.[1] The untainted evidence relied upon by the lead opinion is not, in my mind, sufficient for a jury to conclude that defendant knew or should have known that the house was in fact occupied such that he had the specific intent to commit murder or great bodily harm. Defendant's statements before the shooting do not indicate knowledge that the house was occupied. Further, codefendant Derrick Witherspoon's testimony that defendant said, "I got the mother fuckers," after the shooting was tempered by Witherspoon's testimony that he interpreted defendant's statement to mean that defendant had shot the house.[2] Moreover, this statement was made *after* the shooting and cannot really be used to establish defendant's intent at the time of the shooting.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

The prosecution offered no evidence of defendant's motive or intent when he stabbed Lewandowski (a member of a gang not involved in the present case). The evidence did not indicate whether the stabbing was a retaliatory act, whether it was done in self-defense, or any other details of the stabbing. Thus, defendant's stabbing of a gang member not a member of the gang involved in this case with no details surrounding the stabbing could not possibly establish defendant's intent at the time of the shooting. Accordingly, I cannot conclude that the admission of the other acts evidence was harmless. *People v Crawford*, 458 Mich 376, 399-400; 582 W2d 785 (1998).

I would also note that the trial court's erroneous instruction on this matter further supports a finding that the erroneous admission of the prior stabbing was not harmless. The trial court instructed the jury that the prior stabbing incident "is relevant in a limited purpose, members of the jury, only as it relates to Mr. Galliher's potensity [sic - propensity] to either act out in any type of comparable situation, or as it relates to himself, personally."[3] This egregious error was not corrected by the trial court's later instruction because the court never told the jury to disregard its prior erroneous instruction. The error in admitting the prior stabbing is not harmless.

Further, with regard to the admission of codefendant Lee's statement through a police officer, the prosecution concedes that this testimony was error.[4] I agree, and would again find that the admission of the statement was not harmless. The fact that codefendant Witherspoon testified in a similar manner is not dispositive because Witherspoon also testified that he believed that defendant meant that he had hit the house. Moreover, the statement was made after the shooting and, as such, cannot be the basis of inferring defendant's intent at the time of the shooting. The witnesses who testified at trial stated that it was defendant's intent to fight with the other gang, and that the house was shot at only after defendant's group failed to find anyone with whom to fight. Further, the jury asked to hear portions of the police officer's testimony again. Under these circumstances, I conclude that the admission of a nontestifying codefendant's statement through a police officer was not harmless error. *People v Richardson*, 204 Mich App 71, 77; 514 NW2d 503 (1994).

I would reverse defendant's convictions and remand for a new trial with specific instructions that the prior stabbing and codefendant Lee's statements cannot be admitted on retrial.

/s/ Kathleen Jansen

[1] The fact that lights were on in the house does not necessarily lead to the inference that people were there. People will leave lights on in their house when they leave for the evening for a safety measure.

[2] In this regard, the majority criticizes my reliance on this evidence as support for a finding that the error was not harmless. I do not think that Witherspoon's testimony should be termed a "red herring," because he *did testify* in this manner at trial.

[3] The prosecution's argument that the inaccurate jury instruction may have simply been a transcription error is meritless inasmuch as the trial court clearly attempted to correct the instruction on two different occasions later.

[4] I note that before trial, the prosecutor stipulated that she would not use codefendant Lee's statement as substantive evidence against defendant. The original prosecutor was later replaced and the second prosecutor informed the court immediately before trial that he intended to use codefendant Lee's statement. I find this type of "gamesmanship" to be highly offensive.