

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHANT MISAK ATIKIAN,

Defendant-Appellant.

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UNPUBLISHED

May 29, 2001

No. 219890

Oakland Circuit Court

LC No. 98-158611-FH

Before: Smolenski, P.J., and Jansen and Fitzgerald, JJ.

JANSEN, J. (*dissenting*).

I respectfully dissent from the majority's decision to remand this case for a new trial because I believe that retrial is barred by double jeopardy principles.

At trial, the prosecutor introduced as evidence a photocopy of the complainant's cellular telephone bill from the month of December 1997. Defendant objected to the admission of the telephone bill, arguing that "somebody from the phone company is needed here . . . to testify to the accuracy and the preparation of the phone bill." The prosecutor argued that such was not required because the complainant identified the telephone bill with his name and account number on it. The trial court admitted the photocopy of the telephone bill into evidence.

It was an abuse of discretion for the trial court to allow the copy of the telephone bill to be admitted into evidence because it was hearsay, as stated by the majority, and did not fit within the exception set forth in MRE 803(6):

*Records of regularly conducted activity.* A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of the information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The complainant could not be qualified to testify that the telephone bill was kept in the course of a regularly conducted business activity and that it was the regular practice of the business activity to make the record. The prosecutor was clearly not prepared during the trial to establish a proper foundation of the telephone bill and was incorrect in stating that the complainant could authenticate the bill.

The error in admitting the bill was not harmless. The prosecutor's case, which was entirely circumstantial, rested heavily on evidence of the telephone bill. There was no other evidence presented that defendant actually stole the complainant's cellular telephone. The use of the telephone bill was the only evidence that linked defendant to that particular cellular telephone.

Because the telephone bill was not properly admitted during trial and the error was not harmless, defendant is entitled to a directed verdict of acquittal.<sup>1</sup> I emphasize that the prosecutor was not prepared to offer a foundation for the telephone bill during the trial and without establishing such a foundation, was not able to establish an essential element of the crime. I do not believe that I am merely "conflating" harmless-error analysis and sufficiency-of-the-evidence analysis as the majority contends. This case involves more than just evidentiary error by the trial court. It is not as if the prosecutor was otherwise willing and able to lay a proper foundation for the evidence during the trial. The prosecutor wrongly argued that it was not required to lay a foundation through the testimony of the telephone company's employee and wrongly believed that the complainant could lay a foundation.

Without evidence of the telephone bill, there was absolutely no evidence presented at trial that defendant took the cellular telephone with the intent to steal it. *People v Mumford*, 171 Mich App 514, 517-518; 430 NW2d 770 (1988); CJI2d 23.4. Because in light of the untainted evidence there is insufficient evidence to sustain defendant's conviction, the conviction must be vacated by this Court. Remanding this case for a new trial violates defendant's protection against double jeopardy. *People v Watson*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 218218, issued May 4, 2001), slip op, p 11, citing *Burks v United States*, 437 US 1, 18; 98 S Ct 2141; 57 L Ed 2d 1 (1978), *People v Murphy*, 416 Mich 453, 467; 331 NW2d 152 (1982).

I would vacate defendant's conviction on the basis of insufficient evidence presented during the trial.

/s/ Kathleen Jansen

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<sup>1</sup> I note that defendant moved for a directed verdict at trial. But for the trial court's error in admitting the telephone bill, the motion should have been granted.