

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHAN JOE JONES,

Defendant-Appellant.

UNPUBLISHED

July 17, 2001

No. 221264

Saginaw Circuit Court

LC No. 98-016374-FC

Before: Griffin, P.J., and Neff and White, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for first-degree murder, MCL 750.316, and conspiracy to commit first-degree murder, MCL 750.316. Defendant was sentenced to life imprisonment for the first-degree murder conviction and life imprisonment for the conspiracy to commit murder conviction, the sentences to run concurrently. We reverse and remand for a new trial.

Defendant raises numerous issues on appeal. We find defendant's first argument on appeal requires reversal. Defendant asserts he was denied his right to a fair trial when the prosecuting attorney elicited testimony from its key witness that he had taken and passed a polygraph examination. We agree and reverse on the basis of plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994); MRE 103(d).

This case arises out of the brutal beating death of Oliver Henderson. The only eyewitness who directly implicated defendant in the murder was Ricky Jones. The reliability of Jones' testimony was called into question by defense counsel because Jones had admitted to drinking between three and five forty-ounce beers and using crack cocaine prior to witnessing the incident. In an effort to bolster the reliability of this key witness, the prosecutor asked Jones the following questions:

Q. (prosecuting attorney) Did you take a polygraph in this case?

A. (Mr. Jones) Yes.

Q. Did you pass that?

A. Yes.

Mr. Tiderington (defense counsel): I'm going to object.

The Court: Sustained.

Mr. Sahli (prosecuting attorney): Judge, that was brought up yesterday over my objection.

The Court: Sustained. Sustained. Move on. Move on.

MRE 103(a)(1) requires timely objections to improper questions. However, as indicated above, although defense counsel objected, the objection was not timely because it was not raised until after the answers were given by the witness to the two improper questions. As we noted in *Temple v Kelel Distributing Co*, 183 Mich App 326, 330; 454 NW2d 610 (1990), such a belated objection is not timely because, “at the time the objection was raised, the statement was already in evidence.” Nevertheless, we review this allegation of error for plain error. *Carines, supra; Grant, supra.*

The present case bears striking similarity to *People v Nash*, 244 Mich App 93; 625 NW2d 87 (2000). In *Nash*, the prosecutor attempted to rehabilitate a key prosecution witness by repeatedly asking the witness why he should be believed. The prosecutor ultimately obtained the answer he solicited when the witness responded [because] “I took a lie detector test.” Although defense counsel did not move for a mistrial, this Court reviewed for plain error.

The *Nash* Court reversed and remanded for a new trial after concluding that plain, non-harmless error occurred:

Normally, reference to a polygraph test is not admissible before a jury. *People v Pureifoy*, 128 Mich App 531, 535; 340 NW2d 320 (1983). Indeed, it is a bright-line rule that reference to taking or passing a polygraph test is error. *People v Kosters*, 175 Mich App 748, 754; 438 NW2d 651 (1989); *Pureifoy, supra*. Thus, plain error occurred when the key prosecution witness mentioned having taken a polygraph test. [*Id.* at 97.]

As in *Nash*, the reference to the polygraph test in the instant case was not inadvertent.¹ In addition, like *Nash*, because Jones was the prosecution's only eyewitness, the error was

¹ In his brief, the prosecutor appears to concede that the questioning was not inadvertent. According to the prosecutor:

[T]he prosecution mentioned the [polygraph] test only to counter-act Detective Clark's cross-examination testimony. Once defendant asked Detective Clark whether the witness participated in two polygraph tests and when the detective could not respond, the jury could infer that the prosecution was objecting because Ricky Jones had failed both tests. *So, to repair the damage, the*

(continued...)

prejudicial to defendant and seriously affected the fairness of the judicial proceeding. *Carines, supra; Grant, supra; Nash, supra.*

After careful review of the record, we hold that the error of questioning the key prosecution witness regarding whether he took and passed a polygraph was not harmless error. On the contrary, it was plain error that warrants reversal of defendant's convictions and a remand for a new trial.

Next, defendant argues that there was insufficient evidence on the record for the jury to have found him guilty of first-degree murder and conspiracy to commit murder. We disagree. Premeditation and deliberation requires sufficient time to allow the defendant to take a "second look." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Viewing the evidence in the light most favorable to the prosecution, *id.*, we conclude that a rational trier of fact could have found beyond a reasonable doubt that defendant had ample time to take a "second look" after being approached by Kim Martin and before repeatedly jumping on the victim's head. Further, there was sufficient evidence that defendant agreed with Martin to murder the victim. In light of our disposition, we find it unnecessary to address defendant's additional issues.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Janet T. Neff

/s/ Helene N. White

(...continued)

prosecution asked Ricky Jones about the result of one of those tests. [Emphasis added.]

The prosecution argues that it was permissible to ask Ricky Jones regarding the results of the polygraph tests because the issue of the polygraph had been previously raised by defense counsel. However, when the polygraph exam was first raised by defendant, an objection by the prosecutor was sustained by the court. Accordingly, the prosecution was on notice when he inquired about the results of the exam that the subject of polygraph examinations was not admissible. A party is not permitted to "repair the damage" by compounding error.