

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE LAMAR JACKSON,

Defendant-Appellant.

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UNPUBLISHED

July 8, 2004

No. 247079

Wayne Circuit Court

LC No. 01-012804-01

Before: Murphy, P.J., and Jansen and Cooper, JJ.

COOPER, J. (*concurring in part and dissenting in part*).

I must respectfully dissent from the majority opinion of my esteemed colleagues. I would find that defendant is entitled to a new trial, as the errors of defense counsel and improper rebuttal closing argument of the prosecutor were critical in defendant's conviction in this close evidentiary case.

I. Sufficiency of the Evidence

I cannot agree with the majority that the evidence against defendant was "compelling." The prosecution presented evidence that defendant owed Marcalan Dalton money in a drug-related debt and called Mr. Dalton several times before the murder regarding the payment. Mr. Dalton told numerous people on the night of his disappearance that he and Rodney Ross were going to defendant's house to pick up the money. Defendant's sister told Mr. Dalton's mother-in-law that defendant left with Mr. Ross and Mr. Dalton. Defendant was the last known person to see Mr. Dalton and Mr. Ross alive. Following the murders, defendant took his belongings and disappeared, and was unable to credibly vouch for his whereabouts. Four days after Mr. Dalton disappeared, defendant pawned two rings that Mr. Dalton was allegedly wearing on the date of his disappearance. Mr. Ross and Mr. Dalton were found shot to death later that day.

There was no physical evidence of a weapon or anything tying defendant to a weapon. There was no evidence that defendant was present at or near the scene of the crime. There was no evidence of defendant's possible motive, other than a \$300 debt. There *was* evidence that Mr. Dalton and defendant were long-term friends. The circumstantial evidence linking defendant to these murders was attenuated at best. A rational trier of fact could possibly infer from this evidence that defendant left his house with Mr. Ross and Mr. Dalton, stole Mr. Dalton's rings, and then shot both men. Accordingly, I do not dispute the majority's finding that the evidence

was sufficient to support defendant's convictions. I would emphasize, however, that this was a very close case.

## II. Ineffective Assistance of Counsel

In light of the weak evidence linking defendant to these murders, I would find defense counsel ineffective for failing to object to testimony regarding defendant's refusal to take a polygraph examination.

The majority correctly asserts that the admission of references to polygraph examinations can be reversible error,<sup>1</sup> but erroneously determines that the error was not prejudicial, but rather inadvertent. The officer in charge of the case, Sergeant James Flemming, inappropriately and unnecessarily referred to defendant's refusal to take a polygraph examination. This was not an inadvertent reference as it was repeatedly referenced by Sergeant Flemming, an experienced officer who should know that such evidence is inadmissible against a defendant. The fact that defendant refused to take the examination certainly reflected negatively on defendant. As stated in *People v Jones*,<sup>2</sup> such improper references have a profound impact on the outcome of defendant's trial where the prosecution produced only circumstantial evidence linking defendant to the murders. Therefore, I would find that defense counsel was ineffective for failing to raise an objection to such a blatant error and that defendant is entitled to a new trial.

## III. Prosecutorial Misconduct

Further, I find that the several instances of prosecutorial misconduct in rebuttal closing argument are, in and of themselves, serious enough to warrant the granting of a new trial to defendant. The prosecutor criticized defense counsel for "stretch[ing] the truth," and cast aspersions on the defense theory that someone other than defendant committed the murders.<sup>3</sup> Such attacks are grounds for reversal.<sup>4</sup> Defense counsel did object to several of these comments, but the prosecutor was allowed to continue without ruling from the court.<sup>5</sup> The comments were unnecessarily excessive.

More egregiously, the prosecutor also improperly shifted the burden of proof by noting defense counsel's failure to produce evidence of defendant's innocence and asking defense

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<sup>1</sup> See *People v Nash*, 244 Mich App 93, 98; 625 NW2d 87 (2000), and *People v Rocha*, 110 Mich App 1, 8; 312 NW2d 657 (1981) (providing factors to determine if reference to a polygraph examination is reversible error).

<sup>2</sup> See generally *People v Jones*, 468 Mich 345; 662 NW2d 376 (2003).

<sup>3</sup> Trial Transcript, August 20, 2002, pp 53-56, 61.

<sup>4</sup> See *People v Dalessandro*, 165 Mich App 569, 578-580; 419 NW2d 609 (1988) (prosecutor improperly attacked defense counsel and referred to the defense theory as a red herring); *People v Kent*, 157 Mich App 780, 794; 404 NW2d 668 (1987) (prosecutor improperly asserted that defense counsel attempted to mislead the jury with falsehoods).

<sup>5</sup> Trial Transcript, August 20, 2002, pp 52-53.

counsel to note the significance of particular evidence in asserting defendant's innocence.<sup>6</sup> The prosecutor's comments were initially aimed at defendant's theory that there was no evidence that defendant stole Mr. Dalton's rings or that a larceny even occurred at the time of the murder. The prosecutor inferred that Mr. Dalton must have been robbed or the \$300 debt he collected from defendant would have been in his pocket. The prosecutor, however, took this argument to an extreme by literally stating that the defense counsel presented no evidence of defendant's innocence. The prosecutor opened his rebuttal by stating, "Not a single word that came from Lyle Harris's mouth during the last twenty minutes is evidence of innocence."<sup>7</sup> It should be noted that an objection was taken to this statement, but the trial court did not respond. This remark, in and of itself, was highly improper and sufficient for reversal in such a close case.

It should be noted that the prosecutor also misstated the facts in his closing when he claimed that defendant pawned Mr. Dalton's rings two days after the murders. The testimony conclusively proved that defendant pawned the rings *four* days later. The prosecution's aspersions against defense counsel and his defense theory and the prosecutor's remarks shifting the burden of proof, along with his misstatement of a critical fact denied defendant the right to a fair trial.

Accordingly, I would remand for a new trial based on prosecutorial misconduct and the purposeful references to the polygraph examination.

/s/ Jessica R. Cooper

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<sup>6</sup> *Id.* at 52, 55-56, 61. See *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983) (prosecutor may not imply that defendant has the burden of proof or must explain away damaging evidence).

<sup>7</sup> Trial Transcript, August 20, 2002, p 52.