

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ELLIS,

Defendant-Appellant.

UNPUBLISHED

August 3, 2004

No. 246709

Wayne Circuit Court

LC No. 01-007703-01

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

METER, J. (*concurring*).

I agree with the majority's opinion in all respects except for the analysis of the prosecutorial misconduct issue.

While I ultimately agree with the majority that the prosecutor's questioning of defense witnesses did not constitute an error requiring reversal, I write separately to express my belief that the holding of *People v Gray*, 466 Mich 44, 46-48; 642 NW2d 660 (2002), should be extended to non-alibi witnesses. The reasoning in *Gray* and in *People v Phillips*, 217 Mich App 489, 492-496; 552 NW2d 487 (1996), applies to non-alibi witnesses as well as alibi witnesses. I believe, despite suggestions to the contrary in *People v Grisham*, 125 Mich App 280, 287-288; 335 NW2d 680 (1983), that there simply is no persuasive reason to differentiate between the two classes of witnesses. As noted in *Gray, supra* at 48-49, "[t]he trier of fact must have the necessary information to assess the credibility of witnesses and determine the reliability of the evidence presented." Allowing the prosecutor the opportunity to impeach a defense witness regarding the failure to come forward with exculpatory evidence, while safeguarding concomitantly the defense's opportunity to bolster the witness's credibility by offering understandable reasons for the delay, comports with this statement from *Gray*. It should be left to the jury to determine the ultimate import of any failure by a witness to come forward with exculpatory evidence; no foundational burden should be imposed on the prosecutor.

I would find that the prosecutor's questions at issue were permissible impeachment devices.

/s/ Patrick M. Meter