

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PONCIETTA ADRIENNE EARLE,

Defendant-Appellant.

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UNPUBLISHED

September 23, 2004

No. 244245

Wayne Circuit Court

LC No. 02-001674

Before: Neff, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, and felony-firearm, MCL 750.227b. She was sentenced to 8 to 20 years' imprisonment for the assault conviction and to a two-year consecutive imprisonment term for the felony-firearm conviction with credit for time served. Defendant appeals as of right. We remand.

This case arose as the result of a shooting incident at an Embassy Suites hotel in Livonia. Defendant was an independent "escort" whom the victim hired for a period for time on December 13, 2001. When defendant was ready to leave she discovered that her "donation" was \$135 short. The victim stated that he did not believe he should have to pay for two full hours because she was leaving early, albeit at his request. Most of the events of the afternoon and evening that led up to the time of the shooting are not disputed. Defendant even acknowledged that she shot the victim. But defendant claimed it was in self-defense and that she did not intend to kill the victim. The prosecution maintained that a reasonable inference could be drawn from the circumstances that defendant did indeed intend to kill the victim. The jury agreed with the prosecution. Defendant now asserts on appeal many procedural and substantive errors that she contends require a reversal of her conviction or, in the alternative, a new trial. Because we are unable to effectively review defendant's challenge to the trial court's decision on her motion for new trial, we remand to the trial court for the sole purpose of issuing a new opinion on that motion in accordance with our instructions below.

Defendant filed her motion for a new trial based on ineffectiveness of counsel. Defendant claimed that during trial a juror, through a middle-contact person, offered to ensure a hung jury for \$10,000. Defendant alleged that her trial counsel had been contacted by the contact person with the offer and encouraged defendant to pay the money. Defendant further alleged that she asked defense counsel about informing the court of the bribe offer, but her

counsel stated he did not want to antagonize any member of the jury and he would not “pimp out” a fellow attorney, who was the contact person. Defendant asserted that her trial counsel was ineffective for failing to inform the court of the juror’s offer to accept a bribe, and thus, was entitled to a new trial.

Pursuant to defendant’s motion, a *Ginther*<sup>1</sup> hearing was held. Defendant’s trial counsel, William Bufalino II, testified and denied that any conversations took place regarding a juror’s offer to be bribed. He stated that he did speak with defendant about a large sum of money, \$5,000, but that was in reference to hiring an investigator to interview the jurors to assist in defendant’s appeal efforts. Defendant presented several witnesses who testified that they were aware of the juror’s offer on the day Bufalino approached defendant with the offer. Witnesses also testified that, in post-conviction discussions with Bufalino, he verified that the offer had been made. Defendant also presented polygraph results which indicated that these witnesses were being truthful. In issuing its opinion, the court concluded that it was “not convinced that the conversations occurred, nor is the Court convinced that the defendant was prejudiced by, if in fact it did occur, that it denied her a fair trial.”

Defendant argues that several findings of fact made by the trial court were clearly erroneous and that the court erred when it declined to consider polygraph examination evidence regarding three witnesses defendant contended were aware of the offer to fix the verdict. Based on these errors, defendant asserts that the court’s ultimate conclusion, that defendant’s trial counsel was not ineffective, was also erroneous.

#### I. Standards of Review

We review for an abuse of discretion a trial court’s decision on a motion for new trial, and reversal is only warranted on finding an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). The trial court’s factual findings are reviewed for clear error, *id.*, with due regard given for the trial court’s opportunity to evaluate credibility, *People v Cress*, 250 Mich App 110, 138; 645 NW2d 669, rev’d on other grounds *Cress, supra* at 468 Mich 678.

Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different, *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). That is, defendant must show that counsel’s error was so serious that the defendant was deprived of a fair trial, i.e., the result was unreliable. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *Id.* at 579. The court must first find the facts and then decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel. The trial court’s factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

## II. Court's Findings of Fact

In regards to defendant's motion for new trial, the key issue before the trial court was whether the alleged conversations regarding a juror's offer to accept a bribe actually transpired between defendant and defense counsel. Defendant contends that the trial court clearly erred regarding several findings of fact, namely: (1) defendant testified that she had a gun in her leather jacket pocket; (2) defendant and the victim went to a bank; (3) defense counsel testified that the conversation regarding \$10,000 had to do with post-trial matters; and (4) defendant's aunt and cousin testified that they were informed of the bribe offer after defendant was convicted. We agree.

In regards to the first two claimed errors, we find that although they were in fact misstatements<sup>2</sup>, they did not form the basis of the court's opinion; therefore, the court's erroneous recitation of these facts pertaining to the case's background history were harmless error. The third statement defendant references was indeed a misstatement. Defense counsel did not testify to having any conversations regarding a \$10,000 amount pertaining to post-trial matters. But he did testify that, in connection with defendant's appeal, he discussed that it might be prudent to hire an investigator to interview the jury, at a cost of \$5,000.

The court did acknowledge that defense counsel denied that any conversation ever occurred regarding a juror offering to fix the verdict. And it is possible that the trial court merely misspoke and did not truly believe that defense counsel identified \$10,000 as the amount pertaining to post-trial matters. Yet if the court believed defense counsel's post-trial conversation had referenced \$10,000, this would give more credence to his version of events. Because the critical issue before the court was whether defense counsel did indeed speak to defendant during trial about a \$10,000 jury bribe offer, and assessment of the witnesses' credibility was crucial to the court's determination, we cannot say that this error was harmless.

And we disagree with plaintiff that the court's fourth misstatement constituted harmless error. Defendant's aunt and cousin testified that they were aware of the juror's offer on the second day of the trial. The timing of these witnesses' knowledge was germane to the court's ultimate conclusion that the alleged conversations never occurred. If these witnesses had testified that they were informed of the bribe offer only after defendant was convicted, this evidence would have supported the court's conclusion. Because the court was essentially faced with a credibility contest, we cannot deem this error harmless.

## III. Polygraph Examination Evidence

Defendant also asserts that the trial court erred in refusing to consider the results of several witnesses' polygraph examinations. Plaintiff argues that because polygraph results are permissible in the context of a motion for new trial only where the defendant's motion is based on newly discovered evidence and because the juror's alleged offer was known at the time of trial, the court properly made its determination without considering the polygraph results. We,

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<sup>2</sup> Defendant testified at trial that she had a gun in her purse. And defendant and the victim left the hotel and went to Kinko's, not a bank.

therefore, must decide whether the use of polygraphic evidence is permissible in this case where defendant's motion for new trial was based on ineffective assistance of counsel.

The benchmark case dealing with the use of polygraph evidence during proceedings outside of the trial itself is *People v Barbara*, 400 Mich 352; 255 NW2d 171 (1977). In that case, the question before the Supreme Court was "whether, in a post-conviction motion for a new trial, polygraph evidence may be admissible to help the trial judge determine the credibility of witnesses offering to testify at this new trial." *Id.* at 363. *Barbara* reaffirmed Michigan's rule that the results of a polygraph test may not be introduced into evidence at trial because the purpose of a trial is to determine the defendant's guilt or innocence. *Id.* at 411. Yet the Court also held that consideration of this type of evidence was permissible in connection with a motion for new trial in order to evaluate the credibility of a witness because the purpose of such a post-conviction hearing is preliminary, i.e., an action to determine if a new trial is warranted. *Id.* Accordingly, *Barbara* set forth the following rule as to when polygraph test results may be considered in deciding a motion for a new trial: (1) when they are offered on behalf of the defendant, (2) the test was taken voluntarily, (3) the professional qualifications and the quality of the polygraph equipment meet with the approval of the court, (4) either the prosecutor or the court is able to obtain an independent examination of the subject or of the test results by an operator of the court's choice, and (5) the results are considered only with regard to the general credibility of the subject. *Id.* at 412-413.

Although the defendant's motion for new trial in *Barbara* was based on newly discovered evidence, and thus, the discussion of the admissibility of polygraphic evidence was in this context, the Court gave no indication that consideration of this evidence should be limited to only this circumstance. Indeed, in *People v McKinney*, 137 Mich App 110; 115-116; 357 NW2d 825 (1984), this Court held that it was not error for the trial court to consider the results of the defendant's polygraph examination in relation to his pre-trial motion to suppress evidence, relying on the rationale employed in *Barbara*.

The prosecutor argues that *Barbara* stands for the proposition that polygraph examination results may not be used in any pre- or post-trial matters except a post-conviction hearing on a motion for new trial. We disagree.

In our view, the rationale of the *Barbara* decision applies equally well in this situation. A motion to suppress evidence is often a matter preliminary to trial. The question presented is not the ultimate one of defendant's guilt or innocence. Rather, the question is a legal one to be decided by the trial court. In many cases, as in this, the trial court's decision rests upon a credibility determination. While a polygraph examination result ought not be determinative, it might be useful to assist the court in determining credibility or veracity. If so, a trial court should have the discretion to consider polygraph examination results in making that determination. The trial court in this case did not abuse its discretion if it considered defendant's polygraph examination results. The trial court found the defendant and his corroborating witnesses credible and chose not to believe Officer Fraser. [*McKinney, supra* at 115-116.]

Similarly, we find that consideration of the results of the polygraph examinations was within the court's discretion in this case. The concern in *Barbara* was that polygraphic evidence

not be used in regards to witnesses or other evidence already presented before the jury at the trial. *Barbara, supra* at 415-416.

Thus, a polygraph test purporting to demonstrate that the defendant whose story the finder of fact has already rejected is actually telling the truth would not satisfy the conditions. This is as it should be, for the polygraph is not a truth machine, and the collective wisdom of the jury has already passed on defendant's story.

Where a motion for new trial is based on an allegation of ineffectiveness of counsel, it is possible, as in this instance, that the underlying issue does not relate to evidence presented to the jury.<sup>3</sup> Here, the key issue before the court was whether certain conversations occurred regarding a juror's offer to be bribed; the court's decision rested on its determination as to which witness'/witnesses' testimony was to be believed. In such a situation, we believe the court has within its discretion the ability to utilize polygraphic evidence to assist in making its credibility determination.

We are not able to determine whether the trial court recognized its ability to consider the polygraph results in this case. The court did, at various points in its opinion, reference the polygraphic evidence.

Defense counsel brought in a polygraphic examination – examiner. The Court reviewed *People v Barbara*, at 400 Mich 352 (1977), in support of her motion for a new trial based on the ineffective assistance of counsel, or the omission of defense counsel to bring certain facts before the Court.

The Court may in its discretion allow polygraphic examination evidence to verify the veracity of said conversation. The Court was cited *People v Cress*. However, *Cress* was reversed in the year 2003 at 486 Mich 678.

The Court in its opinion, the Supreme Court did not address the issue of polygraph in its reversal of *Cress*. *Cress* is found at 250 Mich App 110; 645 NW2d 669 (2002). It was reversed by the Michigan Supreme Court at 486 Mich 678 (2003).

The Court has reviewed the totality of the circumstances which the defendant was convicted, including during *Ginther*, . . . , and the Court has reached the following conclusions:

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<sup>3</sup> We find it to be an onerous burden on defendant to require her to bring the bribe offer issue to the court's attention, despite defendant's allegations that she told her trial counsel to do so and was advised by him that the court should not be informed. Such a requirement, as it appears plaintiff would impose, renders a subsequent claim of ineffective assistance of counsel a nullity. The very purpose of such a claim is to redress a counsel's performance errors in certain circumstances.

Three, that the Court may for purposes of determining credibility allow polygraphic examination [evidence], however, the Court is not convinced in this case that that is the issue, the proper issue for the Court to consider.”

The trial court seems to acknowledge its discretion in general to consider polygraphic evidence to assess each witnesses’ credibility and veracity, but appears to reject that it is a “*proper*” consideration in this case. The court’s choice of language may indicate that the court did not believe it should determine whether to extend the *Barbara* holding, and thus, dismissed the polygraphic evidence as inappropriate evidence. However, the court’s comments could also be interpreted as an acknowledgement of its discretion and a refusal to consider the evidence in this case despite its discretion. Because we cannot conclusively discern the court’s position, we remand to the court with the following instructions.

The court shall reissue its opinion, within twenty-one days from the issuance of this opinion, bearing in mind its discretion to consider the polygraphic evidence and the factual errors we have addressed in this opinion. In the trial court’s new opinion, it should: (1) delineate its findings regarding the five *Barbara* factors;<sup>4</sup> (2) specify whether its decision was made with or without consideration of the polygraphic evidence, and state its reasons for accepting or rejecting that evidence; and (3) make a factual finding whether defendant’s trial counsel was in fact approached mid-trial with an offer that a juror was willing to accept a bribe to ensure a hung jury. If the court chooses to render its opinion on the record, the court reporter shall have 21 days from the rendering of the courts opinion to produce the pertinent transcript. Because this issue is potentially dispositive, we reserve discussion of defendant’s other appellate issues to our subsequent opinion in this case.

Remanded. We retain jurisdiction.

/s/ Janet T. Neff  
/s/ Michael R. Smolenski  
/s/ Brian K. Zahra

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<sup>4</sup> *Barbara, supra* at 412-413.