

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

AZIZUL ISLAM,

Defendant-Appellee.

UNPUBLISHED
December 6, 2005

No. 257288
Wayne Circuit Court
LC No. 00-002335

Before: Gage, P.J., and Hoekstra and Murray, JJ.

Gage, P.J. (*concurring*).

The prosecution appeals by leave granted the trial court order granting defendant's motion for relief from judgment and his motion for new trial. We reverse.

In October 2000, defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(a), and mutilation of a body, MCL 750.160, in the death and dismemberment of his estranged wife. The trial court sentenced him to life in prison for the murder conviction and four to ten years for the mutilation conviction. Defendant previously appealed as of right to this Court, which affirmed his convictions in an unpublished, per curiam opinion. *People v Islam*, unpublished opinion per curiam of the Court of Appeals, issued December 13, 2002 (Docket No. 231264).¹

Sandra Anderson, who was employed by a private company in Midland, handled a dog that was trained to locate human remains. At defendant's trial, Anderson testified that the dog performed a search of defendant's home. The dog indicated the presence of human remains in the washer/dryer area of defendant's basement, where a broken and bloody hacksaw blade was found. It should be noted that Anderson never testified about this broken hacksaw blade. The dog also gave positive indications for human remains next to a paint tray and roller, a workbench, a wet/dry vacuum cleaner, a mop, and numerous other areas on the basement floor. A forensic scientist with the state police laboratory testified that she found blood on all these

¹ This Court denied defendant's motion for reconsideration, *People v Islam*, unpublished order of the Court of Appeals, entered January 28, 2003 (Docket No. 231264), and the Michigan Supreme Court denied defendant's application for leave to appeal, *People v Islam*, order of the Supreme Court, entered July 28, 2003 (Docket No. 123286).

items. A trace evidence analyst from the state police laboratory testified about paint chips found in the victim's severed right arm and the garbage bag that contained the victim's torso. The recovered paint chips were consistent with scrapings taken from defendant's basement floor.

While defendant's prior appeal was pending, the prosecution learned that the blood on the broken hacksaw blade was Anderson's. Anderson pleaded guilty in federal court to five felonies, admitting that she planted the hacksaw blade in the instant case, as well as falsifying evidence in several other investigations. Defendant moved the trial court for a new trial, which the trial court treated as a motion for relief from judgment and granted.

The prosecution argues that the trial court abused its discretion in granting a new trial. We review for an abuse of discretion a trial court's decision to grant or deny a motion for new trial. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003); *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). We likewise review for an abuse of discretion a trial court's decision on a motion for relief from judgment. *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003). "A mere difference in judicial opinion does not establish an abuse of discretion." *Mechura, supra* at 483. An abuse of discretion may be found only where an unprejudiced person, considering the facts on which the trial court relied, would find no justification or excuse for the ruling made. *McSwain, supra* at 685.

We review de novo questions of law, including the interpretation of a court rule. *People v Kimble*, 470 Mich 305, 309; 651 NW2d 798 (2004). We review a trial court's factual findings for clear error. MCR 2.613(C). A trial court's findings of fact are clearly erroneous "if, after a review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *McSwain, supra* at 682.

As an initial matter, the prosecution argues that the trial court erred in reviewing defendant's claim as a motion for relief from judgment under MCR 6.508(D)(3).² Although defendant labeled his motion as a motion for new trial, I believe the trial court properly treated it as a motion for relief from judgment. MCR 6.431(A)(4), which governs motions for new trial, dictates that MCR 6.508 applies when a defendant is no longer entitled to appeal by right or leave. *McSwain, supra* contained a similar scenario. In *McSwain*, this Court considered the trial court order granting the defendant's 1998 motion for relief from judgment, in which she claimed that she found newly discovered evidence that was not available at the time of her 1988 trial. *McSwain, supra* at 657-659.

MCR 6.508(D), which governs motions for relief from judgment, provides that the trial court may not grant defendant relief if the motion:

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

² The prosecution contends, and the majority agrees, that the appropriate test is the four-part test for a motion for new trial on the basis of newly discovered evidence. See *Cress, supra* at 692. I disagree.

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief.

...

Because defendant did not discover Anderson's misconduct until his prior appeal was pending, I believe he has established good cause for failure to raise this ground in his prior appeal. The inquiry thus focuses on the "actual prejudice" requirement of MCR 6.508(D)(3)(b). For the purposes of this appeal, "actual prejudice" is defined to mean that "in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal" or "the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case." MCR 6.508(D)(3)(b)(i), (iii).

Anderson was employed with a private company, and there was no evidence that the police were aware of her misconduct. She was not a forensic scientist, but a dog handler. Thus, she was not acting as an agent of the police. Anderson did not testify regarding any saws, but the one she later admitted to planting with her blood was a broken hacksaw blade.

At trial, the prosecution presented considerable circumstantial evidence linking defendant to the victim's murder. He rented a minivan and drove it for 213 miles. He requested a neighbor's assistance loading a very heavy garbage can into the van, the floor and seats of which were protected by a sheet of plastic. On the day defendant rented the minivan, a man dressed similarly to defendant, looking similar to defendant, and driving a vehicle similar to the rented minivan, was seen standing in a field in the Toledo area. The torso was found on nearby property. Blood was found in defendant's basement, on the paint roller, mop, wet/dry vacuum cleaner, carpeting, boots, and sink pump. Paint chips consistent with paint scrapings from defendant's basement floor were found on one of the severed arms and in the bag that contained the torso.

Furthermore, defendant's own statements cast serious doubt on his actions. He provided inconsistent reasons for renting the van. He told the manager of the car rental office that he needed the minivan to pick up relatives from the airport. He told his neighbor that he was taking the garbage can to a Christmas party, and he told the police that he wanted to test-drive the minivan for a trip. Defendant initially told the police that the victim had departed while he was out doing errands but later admitted some involvement. While defendant never confessed to personally killing the victim, he admitted that he had hired someone to hurt her. Although he said that he was not the one who actually killed the victim, he referred to himself as a "bad person," a "criminal," and stated that he had disgraced his family and had done a "bad thing." Given the amount of circumstantial evidence implicating defendant and his own admission of involvement, I am not persuaded that defendant would have had a "reasonably likely chance of acquittal" but for Anderson's misconduct. See MCR 6.508(D)(3)(b)(i).

The "actual prejudice" definition contained in MCR 6.508(D)(3)(b)(iii), that "the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case," has been referred to as a "harmless error rule." See *People v Clark*, 220 Mich App 240, 246; 559 NW2d

78 (1996). In its opinion, the trial court stated, “Expert testimony regarding the finding of a broken bloody saw blade as well as expert testimony supporting the consistency of such a weapon with the dismembering of a body in this case was presented and argued by a prosecution team wholly unaware of its false and fabricated nature.” Thus, the trial court concluded that the evidence was inflammatory and persuasive and could not be regarded as harmless.

However, we have reviewed the record and note that the prosecution never mentioned the planted saw blade during the opening statement, closing argument, or rebuttal argument. Furthermore, the prosecution’s expert opined that the saw used to sever the limbs was a “dovetail carpenter’s saw.” The expert further explained that a saw could have one of three different sets of teeth: alternating, racker, and wave. The dovetail’s teeth comprise an alternating set, but a hacksaw’s teeth comprise a racker set. While the forensic scientist was testifying about the findings from defendant’s basement, the prosecution asked her if she found a broken saw blade. She responded affirmatively, describing the blade as a “hacksaw blade.”³ Although this question and answer may have violated the trial court’s order prohibiting the admission of evidence of any saws found in defendant’s home, it was not “consistent” with the expert’s testimony about the tool that was used to sever the limbs from the torso. Thus, the trial court erred in its factual findings when it found that the testimony of the prosecution’s expert about the tool used to sever the limbs was consistent with the broken hacksaw blade planted by Anderson. The trial court also erred in concluding that the prosecution made arguments about any consistency between the tool used to sever the limbs and the planted hacksaw blade. Accordingly, we are left with “a definite and firm conviction that a mistake has been made.” I further conclude that defendant failed to prove actual prejudice under MCR 6.508(D)(3)(b)(iii).

Given the trial court’s commission of clear error in its findings of fact, the substantial circumstantial evidence implicating defendant, and defendant’s own admission of his involvement in the victim’s murder, we conclude that an unprejudiced person, considering the facts on which the trial court relied, would find no justification or excuse for granting defendant a new trial. See *McSwain*, *supra* at 685. Accordingly, the trial court abused its discretion in granting defendant relief from judgment and a new trial.

/s/ Hilda R. Gage

³ Defense counsel objected to the forensic scientist’s testimony about the broken hacksaw blade, and the trial court instructed the jury that none of the saws found in defendant’s basement were relevant because they did not contain any evidence of the victim’s tissue or hair. The trial court similarly instructed the jury on two other occasions.