

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
September 6, 2012

v

RAY LEE DOSS,

No. 306682
Berrien Circuit Court
LC No. 2010-005133-FH

Defendant-Appellant.

Before: MARKEY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

SHAPIRO, J. (*concurring*).

I concur in the majority's decision to remand, and agree with its holdings on the double jeopardy issue and the amount of court costs. As to the retroactive application of the crime victims' rights act assessment, I agree that we are bound by *People v Earl*, ___ Mich App ___; ___ NW2d ___ (Docket No 302945, issued June 19, 2012), but I do not agree with that decision and absent it, would find that the assessment of the higher amount violates the ex post facto rule.

I disagree with the majority's conclusion that the admission of a hearsay statement of a person never called as a witness that the defendant shot himself was not error. A witness was permitted to testify, over objection, that her sister told her that the defendant shot himself, i.e., that he was guilty of possessing a weapon. The sister was never called as a witness by the prosecution and so was never subject to cross-examination. The majority is persuaded that the statement was not admitted for the truth of the matter asserted and suggests that the statement was admitted because it explained the subsequent actions of the witness. I cannot agree. First, the only subsequent action of the witness was to leave the scene after hearing a gunshot, an action which needs no other explanation. Second, the witness's reasons for leaving the scene are not relevant to any question in the case. Indeed neither the trial court nor the majority have attempted to articulate how it might be relevant.

Despite the fact that the evidentiary ruling was erroneous, however, I would not reverse. A review of the entire record reveals that the defendant told an emergency room doctor that he had shot himself and there was compelling testimony as to the presence of gun powder on defendant's boxer shorts indicating that the gun went off while in his pants. In addition, the

hearsay statement was mentioned only once by the witness and never repeated or referred to by the prosecutor in closing statement or at any other time. Based on the entire record, I conclude the error did not contribute to the jury's ultimate verdict.

/s/Douglas B. Shapiro