

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAROLD EMMETT SHAFIER, III,

Defendant-Appellant.

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FOR PUBLICATION

October 30, 2007

9:00 a.m.

No. 267192

Allegan Circuit Court

LC No. 05-014062-FC

Advance Sheets Version

Before: Schuette, P.J., and O'Connell and Davis, JJ.

DAVIS, J. (*dissenting*).

I respectfully dissent.

I fully agree with the majority's recitation of the facts in this case and of the applicable law. However, the majority reaches an anomalous conclusion on the basis of those facts and law. The majority's conclusion is wrong.

The majority's decision apparently rests on the feeble fulcrum of defense counsel's having only objected twice to the prosecutor's constitutionally impermissible references, made on three separate occasions.

The trial court sustained defense counsel's initial objection but apparently did not give a curative instruction. The second objection was dealt with at the bench, and there is no record of what was said by and between counsel and the court. The third, and probably most egregious, breach occurred in the prosecutor's closing argument. It was not objected to by defense counsel, but neither was it addressed by the trial court.

The constitutional rights we are charged with preserving under the Fourteenth Amendment are not those of the trial judge or defense counsel. They are rights afforded to *all* defendants under our system of criminal justice, no matter how odious the alleged crime. The majority correctly observes that this is a tragic case. But it is impermissible to abrogate constitutional rights for that reason. Those rights were impermissibly breached in this case, and as the majority notes, those breaches were neither minor nor accidental. There is no way to know what effect those breaches had on the jurors' minds, particularly considering the jurors' initial announcement that they were deadlocked. In the parlance of the trial bar, this amounted to a bell that could not be unrung.

I believe that defendant has made the requisite showing of constitutional error requiring a new trial.

/s/ Alton T. Davis