

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 197792
Oakland Circuit Court
LC No. 94-131544

ALFONSO MACIAS, JR.,

Defendant-Appellant.

Before: Reilly, P.J., and Michael J. Kelly and Cavanagh, JJ.

MICHAEL J. KELLY, (dissent)

I respectfully dissent. I would find the prosecutor's reference in closing argument emphasizing that the alibi witness failed to come forward to the police before trial, inferring that her behavior was not consistent with truth or common sense and therefore she was not to be believed, is error requiring reversal. I would apply the standard enunciated in *Chapman v California*, 386 US 18, 24; 84 S Ct 824; 17 L Ed 2d 705 (1967) and find that the error was not harmless beyond a reasonable doubt in accordance with the federal standard enunciated in *Chapman*, for three reasons.

First, there is no requirement that an alibi witness seek out the prosecutor or the police in order to give his or her information. MCL 768.21; MSA 28.1044 does not establish any duty on the part of the alibi witness.

Second, the facts of this case are distinguishable from *People v Phillips*, 217 Mich App 489; ___ NW2d ___ (1996). *Phillips* held that the prosecution is under no obligation to lay a special foundation before attempting to impeach an alibi witness during cross-examination concerning the failure of the witness to inform the police or the prosecution of the alibi witness before trial. In the instant case, Brenda Ruelas was never cross-examined about her failure to bring her alibi information to the attention of the authorities. Instead, the prosecutor avoided such cross-examination and supplied her own prosecutor's version of that fatal lapse on the part of the alibi witness at closing arguments where she created the inference she wished the jury to believe; basically, that since Ruelas did not come forward in advance of trial she did not properly provide defendant an alibi and her testimony was untrustworthy.

Third, any failure to obtain Ruelas' story in advance of trial was the failure of the prosecution as Ruleas was listed as an alibi witness in defendant's notice of alibi, dated April 21, 1994, two months before trial, and the prosecutor's statement that she did not come forth until trial was irrelevant, false or misleading at best.

I would reverse.

/s/ Michael J. Kelly