

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMUEL PANNELL,

Defendant-Appellant.

UNPUBLISHED

March 23, 2004

No. 237024

Wayne Circuit Court

LC No. 00-009498-01

Before: Murphy, P.J., and Cooper and C. L. Levin*, JJ.

C. L. LEVIN, J. (*concurring*).

I concur in general with the majority's analysis and disposition of the issues raised by defendant, Samuel Pannell, in his appeal to this Court.

I write separately because I disagree with the majority's application to the facts of this case of the rule, respecting the use of an inconsistent statement, set forth in *People v Kilbourn*, 454 Mich 677, 682-683; 563 NW2d 669 (1997) and *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994). I concur in the majority's affirmance of the defendant's convictions because it cannot be said that it appears on examination of the record, that it is more probable than not that the evidence in issue and its use by the prosecutor was outcome determinative. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999).

Dushawn Walker's home was next door to the home occupied by the victim, Bernard Thomas. Walker was walking from his home to a nearby gas station when an automobile occupied by Pannell and co-defendant Kevin Robinson pulled up in front of Thomas' home. Walker observed, as he was walking, some of what occurred.

Walker was initially a suspect and gave a statement to the police that the passenger had something shiny in his hand. Walker, a reluctant witness, testified at trial, however, that he saw the passenger, identified by other evidence as Pannell, reach into his pocket, but denied that he observed or said to the police that there was something shiny in the passenger's hand. Over objection, the judge permitted use of the statement to the police to impeach Walker's credibility, and ruled that the statement could not be used as substantive evidence that the passenger in fact had something shiny in his hand.

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

In closing argument, the prosecutor adverted to Walker's testimony that he had observed a car pull up in front of Thomas' home, and two persons get out of the car. The prosecutor asserted that the passenger had something shiny in his hands. Pannell's lawyer objected, and the judge reminded the jury that he had previously instructed that the evidence regarding the shiny object could be used only for impeachment purposes, not as substantive evidence.

In further closing argument, the prosecutor adverted again to Walker's testimony that the passenger had something shiny in his hand, adding, "this is hearsay. The testimony that you had on the record is the impeachment testimony of Mr. Walker." And, again, that Walker had observed the passenger with something shiny in his hand. Still later, the prosecutor said, "I think Dushawn Walker is telling the truth," adding that the jury may not assume that the passenger had something shiny in his hand, like a gun or a beer car, and could only use "that" to say whether they believe Walker today in what he testified.

The rule set forth in *Kilbourn* and *Stanaway* has been summarized as follows:

Where a witness' prior inconsistent statement implicates the defendant in a criminal case, its admissibility may be subject to challenge, even for impeachment purposes. Thus, where the substance of the impeaching statement is relevant to the central issue of the case, and there is no other testimony from the witness for which his or her credibility was relevant, the impeachment is not allowed. However, this is a "very narrow rule," and impeachment is generally allowed if the witness testifies to other relevant facts, and his or her credibility becomes relevant due to conflicts with the testimony of other witnesses. James K. Robinson, Ronald S. Longhofer, *Courtroom Handbook on Michigan Evidence*, 1999.

The statement that the passenger had a shiny object was relevant to the central issue in the case, whether Pannell or Robinson shot Bernard Thomas in the head, or whether both were responsible for the gunshot to his head. Although the prosecutor admonished that the jury may not assume that the passenger had something shiny in his hand, like a gun, that was the inference that he suggested.

There was no testimony from Walker for which his credibility was relevant other than whether the passenger had a shiny object in his hand. Walker provided background testimony which was undisputed, that two men drove up to Thomas's home, that he observed and heard them pounding on Thomas' front door, and, shortly thereafter, he heard a gun shot. And when he walked back to his house, possibly twelve minutes later, the car was gone. No one disputed Walker's testimony in this regard, and the prosecutor urged Walker's version to the jury, and added, "I think Dushawn Walker is telling the truth."

A prosecutor may not, in a criminal case, introduce an inconsistent hearsay statement concerning the central issue in the case, when he does not challenge the credibility of the witness in regard to any aspect of his testimony except his testimony regarding the central issue. That is the point of *Kilbourn* and *Stanaway*. The principle underlying the rule stated in those cases was, in effect, violated in this case, although a more specific objection in that regard was not made by Pannell's counsel.

Nevertheless, Pannell's conviction must be affirmed because, in addition to Ms. Brewer's testimony that Pannell told her upon returning from the scene, that he had shot Bernard Thomas, there is the expert testimony tending to show that Pannell had nitrates on his clothing, thus pointing to him as the shooter.

Brewer's testimony, to be sure, was impeached by her acknowledgment that Robinson was her long-time fiancée and the father of her baby, which made her a most interested witness in the outcome, and to some extent, undermined her testimony that, in effect, exculpated Robinson as the shooter. The nitrate evidence was persuasive, and for that reason, it cannot be said that the misuse of the inconsistent statement was outcome determinative.

/s/ Charles L. Levin