STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 22, 2013
v	No. 311745 Emmet Circuit Court
MARVIN DALE VANLIEW, Defendant-Appellant.	LC No. 11-003513-FH

Before: SAAD, P.J., and K. F. KELLY and GLEICHER, JJ.

GLEICHER, J. (*concurring in part and dissenting in part*).

I concur with the majority's conclusions that the evidence sufficed to support defendant's conviction, that defense counsel's performance did not fall below an objective standard of reasonableness, and that the trial court did not abuse its discretion when it denied a new trial based on juror misconduct. I respectfully disagree with the majority's holding that the term "attorneys" in MCR 2.511(D)(8) "refers only to the attorneys that actually try the case."

MCR 2.511(D) sets forth the grounds underlying for-cause juror challenges. One such ground is that a potential juror "is related within the ninth degree (civil law) of consanguinity or affinity to one of the parties or attorneys[.]" MCR 2.511(D)(8). A juror selected to hear defendant's trial, Clarice Wells, is the first cousin of the elected prosecutor for Emmet County, James Linderman. During voir dire, Wells was not asked whether she was related to "one of the parties or attorneys." Rather, the trial court inquired whether any member of the venire was "acquainted with" the trial attorneys or "closely related to or close friends with a law enforcement officer." Wells denied any acquaintance or relationship. As the jury returned its verdict, Linderman entered the courtroom and noticed Wells. Linderman revealed his familial relationship with Wells in a letter to the trial court.

Defendant contends that MCR 2.511(D)(8) required Wells to disclose that Linderman was her first cousin. Because Wells was not asked whether she was related to "one of the parties or attorneys," MCR 2.511(D)(8) bears no relevance to this case. Simply put, juror Wells committed no misconduct. Given the questions posed by the trial court and the attorneys, Wells had no reason to think about her familial relationship to Linderman.

Instead of rejecting defendant's argument based on Wells' honest answers to the questions posed, the majority opines that "[a]t issue [in this case] is the interpretation of 'attorneys'" in the court rule. I respectfully disagree. Neither the prosecutor nor defense counsel

raised "the interpretation of 'attorneys'" in their briefs. The interpretation of "attorneys" as used in MCR 2.511(D)(8) is wholly unnecessary and, in my view, not properly before this Court.

Moreover, the majority's sweeping holding that "'attorneys' in MCR 2.511(D)(8) refers only to the attorneys that actually try the case" is inconsistent with the court rules and published caselaw. Furthermore, if adopted, the majority's rule would pose serious due process risks in criminal cases.

MCR 2.117(B)(3)(b) provides: "The appearance of an attorney is deemed to be the appearance of every member of the law firm. Any attorney in the firm may be required by the court to conduct a court ordered conference *or trial*." (Emphasis added). In the civil realm, a client's employment of one law firm member is deemed to be the employment of the balance of the firm. *Plunkett & Cooney, PC v Capitol Bancorp Ltd*, 212 Mich App 325, 329; 536 NW2d 886 (1995). Despite that a member of trial counsel's law firm is not present in the courtroom for voir dire, law firm attorneys may be called upon to act as counsel or to assist counsel in a trial. Not infrequently, firm attorneys read depositions, handle the examination of specialized witnesses, or are called upon to stand in for trial counsel. Given these realities, the majority's pronouncement that the term "attorneys" means only the lawyers who appear in the courtroom for voir dire conflicts with MCR 2.117(B)(3)(b) as well as common sense. See *General Motors Corp v Jernigan*, 883 So2d 646, 669-671 (Ala, 2003) (in which five venire members were related to an attorney serving as "of counsel" to a firm representing the appellees, but who was not assigned to represent the party).

Criminal cases present even stronger reasons for construing MCR 2.115(D)(8) to include the office of the prosecuting attorney rather than merely the prosecutor assigned to try the case. The United States and Michigan Constitutions guarantee a criminal defendant a fair trial by an impartial jury. US Const, Am VI; Const 1963, art I, § 20. "The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury." *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441(1994). Voir dire constitutes "the only mechanism, and the only safeguard a defendant has, for ensuring the right to an impartial jury." *Id.*

MCR 2.115(D)(8) infers bias due to a juror's familial relationship with one side of a case. The rule assumes that a close relative of an attorney trying a case lacks objectivity regarding the attorney's arguments.[1] Subsection (D)(8) reflects a judgment that a prospective juror's family association with an "attorney" may render the juror partial. A close relative of an attorney who has worked on a case but does not serve as trial counsel likely harbors the same sympathies and perceptions as does the close relative of trial counsel. Or, as Chief Justice John Marshall put it in *United States v Burr*, 25 F Cas 49, 50 (D Va, 1807):

> The great value of the trial by jury certainly consists in its fairness and impartiality. Those who most prize the institution, prize it because it furnishes a

[1] That MCR 2.115(D)(8) extends to relatives within the ninth degree of consanguinity highlights that even attenuated family relationships pose bias risks.

> tribunal which may be expected to be uninfluenced by an undue bias of the mind . . . . The jury should enter upon the trial with minds open to those impressions which the testimony and the law of the case ought to make, not with those preconceived opinions which will resist those impressions. All the provisions of the law are calculated to obtain this end. Why is it that the most distant relative of a party cannot serve upon his jury? Certainly the single circumstance of relationship, taken in itself, unconnected with its consequences, would furnish no objection. The real reason of the rule is, that the law suspects the relative of partiality; suspects his mind to be under a bias, which will prevent his fairly hearing and fairly deciding on the testimony which may be offered to him. The end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose connexion [sic] with a party is such as to induce a suspicion of partiality. The relationship may be remote; the person may never have seen the party; he may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice.

The majority expresses no disagreement with the principles identified by Justice Marshall, which in turn guided the common-law rule permitting disqualification of jurors related to parties or attorneys within the ninth degree of consanguinity. Rather, the majority rests its holding on the "burden" that would be placed on attorneys to obtain this information during voir dire. In my view, the inquiry involved is not in the least "burdensome." As anyone who has tried a case knows, the information can be gained quite simply by asking, "Are any of you related to an attorney? Where does he or she work?"

In *People v Macrander*, 828 P2d 234 (Colo, 1992), the Colorado Supreme Court considered whether a member of the prosecuting attorney's office qualified as an "attorney of record" for the purposes of a for-cause challenge. The Court interpreted the Colorado statute at issue in that case to include "any deputy district attorney serving in the office of the district attorney at the time of the voir dire examination," including those who had not appeared or participated in the case being tried. *Id.* at 241. The Court elaborated:

> We would substantially depreciate the role assigned to the challenge for cause in a criminal case were we now to hold that, notwithstanding the pervasiveness of the agency relationship between an elected district attorney and members of the district attorney's prosecuting staff, only those deputy district attorneys who formally appeared or participated in the case qualified as attorneys of record . . . .
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> We cannot ignore the practical consequences of the construction urged by the People, which would limit an "attorney of record" to a deputy district attorney who formally appeared or participated at some stage of the criminal prosecution. Under that construction, a deputy district attorney who conducted a lengthy investigation of the case and recommended the filing of criminal charges against the defendant, or who undertook significant legal research on critical issues involved in the prosecution, would lack the direct and formal involvement in the case essential to a challenge for cause, despite the fact that the deputy district

> attorney well might have a much greater interest in the outcome of the case than a deputy who formally appeared on behalf of the People at an arraignment or some other routine phase of the criminal prosecution. A mother, father, wife, or husband of the deputy district attorney who investigated the case or researched legal issues would not be challengeable for cause under the People's proposed construction, while the same relatives of a deputy district attorney whose only role in the case consisted of appearing at a routine arraignment would be subject to a challenge for cause. The consequences of the People's proposed construction, in our view, would compromise the appearance if not the reality of fairness in a criminal prosecution and would weaken to a significant degree public trust and confidence in the criminal justice system. [*Id.* at 241-242.]

See also *Taylor v State*, 656 So2d 104, 111 (Miss, 1995) ("While we cannot guarantee a defendant a perfect trial, we must endeavor to ensure that every defendant receives a fair trial free of implied bias that arises from the presence of a juror who is related to an attorney employed by the district attorney's office that is prosecuting the defendant."); *State v Beckett*, 172 W Va 817, 822; 310 SE2d 883 (1983) ("Generally speaking, a potential juror closely related by blood or marriage to either the prosecuting or defense attorneys involved in the case or to any member of their respective staffs or firms should automatically be disqualified.).

As this Court recognized in *People v Eccles*, 260 Mich App 379, 383; 677 NW2d 76 (2004), "it is the prosecuting attorney who represents the people in each and every criminal prosecution." This Court characterized the relationship as a "'oneness' of party and attorney." *Id.* Bias should be presumed when a relative of an elected prosecuting attorney is asked to sit in judgment of a case by the prosecutor's office. Bias should similarly be inferred on the part of a close relative of an attorney associated with the law firm handling a case. To hold otherwise risks partiality and an easily avoidable *appearance* of bias, and diminishes public confidence in our jury system.

/s/ Elizabeth L. Gleicher