No. 24-5073

ORIGINAL

FILED
JUL 08 2024
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

BILLY HAMMONDS. — PETITIONER

V.

SHARMAN CAMPBELL. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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In Pro Se

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QUESTION(S) PRESENTED

I. WAS MR. HAMMONDS DENIED EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS (U.S CONST. 1963, ART 1 § 20) WHERE TRIAL COUNSEL FAILED TO CALL A WITNESS WHO WOULD HAVE TESTIFIED THAT WHENEVER DEFENDANT SLEPT AT HER HOUSE THAT THEY WENT TO BED TOGETHER AT THE SAME TIME AND SLEPT TOGETHER ALL NIGHT. FURTHER SHE WOULD HAVE TESTIFIED THAT THE COMPLAINING WITNESS WOULD FLIP FLOP TO HER ON THE ISSUE AS TO WHETHER SHE HAD SEX WITH DEFENDANT OR NOT?

II. DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT MOTION FOR A NEW TRIAL BASED ON THE PROSECUTION'S MISCONDUCT OF SHIFTING THE BURDEN OF PROOF TO DEFENDANT DURING CLOSING ARGUMENT?

III. DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT DENIED TRIAL COUNSEL'S MOTION FOR A MISTRIAL WHERE THE PROSECUTION REPEATEDLY VIOLATED THE TRIAL COURT'S ORDER THAT THE COMPLAINING WOULD NOT BE REFERRED TO AS A "VICTIM" AND DEFENDANT'S ABILITY TO GET A FAIR TRIAL COULD NOT BE CURED BY A LIMITING INSTRUCTION?

IV. DID THE TRIAL COURT'S INTERJECTION THAT THE COMPLAINING WITNESS STATEMENTS WERE NOT INCONSISTENT STATEMENTS BUT RATHER "MISUNDERSTANDINGS" DEMONSTRATED THE TRIAL COURT'S PARTIALITY TOWARD THE PROSECUTION AND IMPROPERLY INFLUENCED THE JURY BY CREATING THAT APPEARANCE OF ADVOCACY AND PARTIALITY AGAINST MR. HAMMONDS?

LIST OF PARTIES

X	**All parties appear in the caption of the case on the cover page.**
[	All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE SUPREME COURT OF THE UNITED STATES PETITION FOR WRIT OF CERTIORARI
Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.
OPINIONS BELOW

Federal Courts.

The opinion of the United States Court of Appeals for The Sixth Circuit appears at Appendix [A] to the petition and is Unpublished

The opinion of the United States District Court appears at Appendix [B] to the petition and is Unpublished

State Courts

The opinion of The Michigan Supreme Court appears at Appendix [C] to the petition and is Unpublished.

The opinion of The Michigan Court of Appeals appears at Appendix [D] to the petition and is Unpublished.

JURISDICTION

Petitioner, Billy Hammonds is filing this Petition for Writ of Certiorari pursuant to 28 U.S.C.A. § 1254(1) and 28 U.S.C.A. § 1257(a), as a state prisoner convicted in the 50th Judicial Circuit Court for the County of Chippewa, in the State of Michigan, where his conviction for (1) count of Third Degree Criminal Sexual Conduct, MCL 750.520d(1)(a) and sentenced him as a Fourth-Offense Habitual Offender and was sentenced to 14 to 60 years. which violates his constitutional rights. And is seeking relief from an unconstitutional detention. As such, this Petition for Writ of Certiorari is being filed within the 90-day period of the final decision from the United States Court of Appeals for the Sixth Circuit denying, a Petition for Writ of Habeas Corpus. And a Certificate of Appealability on. April 26, 2024.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due process under the U.S. Const. 14th Amendment, and Const. 1963, 1, sec. 17, requires. And effective assistance of counsel under. U.S. Const. 6th Amendment and Const. 1963, Art. 1 sec. 20.

that a defendant has the right to effective assistance of counsel at trial and appeal. And right to fair trial by an impartial jury in the State and District wherein the crime was committed. The determination of whether there is reasonable provocation is a question of fact for the fact-finder. U.S. Const. V, VI, and XIV;

STATEMENT OF THE CASE

Petitioner, Billy Hammonds, was convicted by a jury before the Honorable James P. Lambros, Chippewa Co. 50th Circuit Judge of Ct. I - Third Degree Criminal Sexual Conduct, MCL 750.520d(1)(a) On February 7, 2017, The judge sentence Mr. Hammonds as a Fourth-Offense Habitual Offender and was sentenced to 14 to 60 years.

Pre-Trial

At Pre-Trial on November 29, 2016, trial counsel moved to suppress the use of the word "victim" at trial, and she requested that Alexia McMillan instead be referred to as the complaining witness. (MT, 11/29/16, pg. 11). The trial court granted the motion.

Trial.

Emily Pierce had been living in Kincheloe in 2015. Alexia McMillan was her daughter. (T, 11/30/16 pg. 82). During the summer of 2015, Alexia took a driver's education course. She spent a week staying at her older cousin's house Trisha Lavake so that she could walk to her driver's education course. The driver's education classes were scattered in segments. Her cousin, Trisha, would pick her up at her home, or Ms. Pierce's husband would drop her off at Trisha's home in between overnight stays. Ms. Pierce's had seen Billy Hammonds in Trisha's car from time to time when picking up or dropping off Alexia. He was a co-worker of Trisha's. (T, 11/30/16 pg. 86).

Madison Cox who was a close school friend of Alexia McMillan had been living in Kinross in 2015. (T, 11/30/16 pg. 101). Madison had been talking with her mother about bad decisions, and she told her mother that she had heard that Alexia had intercourse with a much older boy named Billy Hammonds. (T, 11/30/16 pg. 103). Madison's mother told Ms. Pierce. Ms. Pierce testified that she was told that her daughter Alexia may have had sex with Mr. Hammonds. (T, 11/30/16 pg. 87). Ms. Pierce went to Trisha's house and Trisha and Alexia were completely dumbfounded by the story she told them. They had no idea what she was talking about. (T, 11/30/16 pg. 89). Ms. Pierce took her daughter's phone and looked through it. She saw screenshots that Alexia had sent to Billy that confirmed her suspicions that Alexia and Billy were communicating. She took her daughter to the police. (T, 11/30/16 pg. 88).

Officer Donald Martin was working at 9:45 at night on October 23, 2015. (T, 11/30/16 pg. 74). Emily Pierce, Alexia McMillan and George Pierce walked into the station house to report a Criminal Sexual Conduct complaint regarding her fifteen-year-old Alexia. (T, 11/30/16 pg. 75). He decided not to interview Alexia, but gave her a statement form to fill out. (T, 11/30/16 pg. 76). She went into the interview room and filled out the form. He took her cellphone as evidence with the mother's consent. It was placed in airplane mode. Then it was sealed. Tagged and placed in an evidence locker at the City Police Dept. (T, 11/30/16 pg. 77).

Alexia McMillan testified that her date of birth was June 30, 2000. She had turned 15 years old in June of 2015. (T, 11/30/16 pg. 110). Alexia testified that her cousin, Trisha, had been in a romantic relationship with Billy Hammonds in the summer of 2015. Alexia testified that a week after she met Billy Hammonds that she and Bill had sexual intercourse. She testified that she found him attractive. (T, 11/30/16 pg. 118). She felt that he was cool because of his tattoos.

She stated that one night he put his hands down her pants, and then she put her hands down his pants. Then they had sex. (T, 11/30/16 pg. 119). He had not been flirting with her or doing anything that led her to believe that night he was planning on having sex with her later on. (T, 11/30/16 pg. 121). She told her cousin, Trisha, and she told her friends Madison and Sadie. (T, 11/30/16 pg. 122).

Alexia sent him a screenshot of a musician that they had discussed. She also sent him a photo of her driver's permit with the caption that she was now legal. (T, 11/30/16 pg. 128). He responded "Not for sex though." Next, she said to him via Facebook. "Just because I ain't legal doesn't mean shit." He responded "Ha ha." She responded "Just saying that didn't stop us before." Allegedly he responded "Ha ha, yup." (T, 11/30/16 pg. 129). She admitted that she liked Billy when she allegedly slept with him. On cross examination, Alexia admitted to testifying at the preliminary examination that she had viewed Mr. Hammonds Facebook page before they allegedly had sex. (P.E, 12/30/15, pg. 35). She conceded that she had recently changed her privacy settings on Facebook. In the past, everything was public. (T, 11/30/16 pg. 157). [1]. She had listed her date of birth as June 20th, 1995, which would indicate that she was 21 years old. [2]. She also conceded that she had testified that she met Billy Hammonds in June, but that she told the Detective that she had met him in August one week before they had sex. (T, 11/30/16 pg. 159). [3]. She had told Detective Harp that it was Trish and Billy that were dating at the time, and at trial she was testifying that Trish was dating both Billy and Kaldan.

Trial counsel had Detective Harp place the twenty-seven-second recording into context, and he conceded that Mr. Hammonds was reading the police report to a family member on the jail phone call. Detective Harp drew his conclusions from his interpretation of Mr. Hammonds comments. Additionally, Detective Harp did not know why an outgoing text message

showed on Alexia's phone on October 23, 2015, at 11:22 pm. When it had been seized and allegedly placed on airplane mode on October 23, 2015 at 9:45 pm. He also conceded that he had no text messages from the phones Alexia's friends. (T, 11/30/16 pg. 238). He conceded that he had looked at Alexia's Facebook page, but hadn't noted that she had listed her age as 21. (T, 11/30/16 pg. 247).

The People rested. Trial counsel moved for a directed verdict on the following basis:

MS. FRANCE: Thank you your Honor. I'd ask for a motion for a directive verdict for two reason. One we have no evidence about any type of penetration. Secondly there's been no exhibit produced to this court or to the jury to verify this young lady's age. As in any other CSC case we've ever tried and as the Court of Appeals as recognized, a birth certificate or some sort of documentation indicating a date of birth of this person is already admitted. (T, 11/30/16 pg. 251).

It was denied because the trial court felt there was sufficient evidence that Alexia's birthdate was June 30, 2015, and that she had testified that she had sexual intercourse with Mr. Hammonds. (T, 11/30/16 pg. 256). Billy Hammonds testified in his own defense. Trial counsel addressed his prior convictions for the jury. He recalled that he had met Alexia in June of 2015, at Trisha's house. (T, 11/30/16 pg. 260). Billy Hammonds stated that he and Trisha had a "friends with benefits" relationship. He would stay at her house one to two times a week. Alexia stayed in the spare bedroom with Trisha's baby. (T, 11/30/16 pg. 262). The last time he spoke to Alexia was in October of 2015. (T, 11/30/16 pg. 263). He testified that he didn't think anything more about it. He also testified that when he was arrested he had mentioned to the arresting officer that it must be about a 16-year-old girl who stated that they had sex together. That was also when he had found out Alexia's age (T, 11/30/16 pg. 271).

ISSUE I

MR. HAMMONDS WAS DENIED THE INEFFECTIVE ASSISTANCE OF COUNSEL, GUARANTEED BY THE FEDERAL AND STATE CONSTITUTION WHERE TRIAL COUNSEL FAILED TO CALL A WITNESS WHO WOULD HAVE TESTIFIED THAT WHENEVER DEFENDANT SLEPT AT HER HOUSE THAT THEY WENT TO BED TOGETHER AT THE SAME TIME AND SLEPT TOGETHER ALL NIGHT.

Discussion:

The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel when it deprives the defendant of a substantial defense. A substantial defense is one that might have made a difference in the outcome of the trial. In a case where the "key evidence that the prosecution asserted against defendant was the complainant's testimony," the reliability of defendant's convictions was undermined by "defense counsel's failure to introduce impeachment evidence. In this type of case, a defendant can be convicted based solely on the testimony complaining witness. The jury would be instructed that no corroboration of her allegations was necessary. Consequently, witnesses are critical if they can impeach the allegations. In this case, trial counsel failed to call a critical witness, Trisha Lavake, even though Mr. Hammonds specifically requested that she be called to testify. He knew that Trisha's testimony would be that whenever he slept at her house that they went to bed together at the same time and stayed in her room all night. He never stayed up later than her to watch movies with Alexia.

The police report (Attachment A) corroborates his assertion of the expected content of Trisha Lavake's testimony. Additionally, the police report indicates that Trisha asked Alexia if she and Billy had sex and Alexia stated that she had not. Then Alexia said that she did. Alexia's final answer to Trisha Lavake was that she was just kidding about having sex with Billy.

The prosecutor used this failure to call Trisha Lavake or "Rick" to testify during closing argument. She suggested to the jury in reference to the fact that the defense did not call Trisha Lavake or Rick that "if they would have said something helpful to her case could have called them. (T, 12/1/16 pg. 32-33). The prosecution's statement was pure speculation and highly prejudicial to Mr. Hammonds.

Prejudice

In addition to proving that defense counsel's representation was constitutionally deficient, defendant must show that "but for counsel's deficient performance, a different result would have been reasonably probable." *People v Armstrong,* 490 Mich 281, 290 (2011) citing *Strickland,* 466 US at 694-696, 104 S Ct 2052. A defendant may meet this burden "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." Strickland, 466 US at 694. And "where there is relatively little evidence to support a guilty verdict to begin with (e.g., the uncorroborated testimony of a single witness), the magnitude of errors necessary for a finding of prejudice will be less than where there is greater evidence of guilt." *Brown v Smith,* 551 F3d 424, 434-435 (6th Cir, 2008), citing Strickland 466 US at 696. (emphasis added).

Mr. Hammonds was denied a substantial defense when trial counsel failed to call a witness who told the investigating officers that she never recalled going to bed alone and leaving Billy awake and alone with Alexia. Her testimony would have cast doubt on Alexia's ever-changing story and there is a reasonable probability that the result would have been different. Mr. Hammonds conviction should be reversed.

ISSUE II

THE PROSECUTION COMMIT PROSECUTORIAL MISCONDUCT WHEN IT SHIFTED THE BURDEN OF PROOF TO THE DEFENSE DURING HER REBUTTAL ARGUMENT AND THE TRIAL COURT ABUSED IT" S DISCRETION WHEN IT DENIED DEFENSE MOTION FOR A NEW TRIAL BASED ON THIS MISCONDUCT.

Discussion:

A prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof. *People v Green,* 131 Mich App. 232, 237 (1983). A prosecutor may not comment on the defendant's failure to present evidence because it is an attempt to shift the burden of proof. *People v Fyda*, 288 Mich App 446, 463-464(2010).

People v Dobek, 274 Mich App 58, 63-64 (2007). Summarizes the general rules of law for issues involving prosecutorial misconduct:

Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial. *People v Jones*, 468 Mich 345, 354 (2003). *People v Watson*, 245 Mich App 572, 586 (2001). A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the defendant's guilt or innocence. *People v Rice*, (On Remand). 235 Mich App, 429, 438 (1999). Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30 (2002). A prosecutor's comments are to be evaluated in light of defense arguments and the relationships the comments bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152 (2005).

During defense closing argument, counsel did a summary of the testimony which included some people who were mentioned and never called, specifically Trisha and Bill.

Prosecutor stated the following:

But I presented you with a lot more evidence. I presented Ms. France with a lot more evidence. And she could have brought any of that evidence to trial. She says well what would Trisha have said? She could have called Trisha. She says what would Ricky have said? She could have called Ricky. I'm not the only one with the ability to call witnesses here. If they would have said something helpful to her case she could have called them. (T, 12/1/16 pg. 88).

A defendant is entitled to a fair trial with an unbiased jury. First, the prosecution structured her closing in a way that sounded as if she were responding to something that defense counsel argued in her closing. Never once did trial counsel query "what would Trisha have said? Nor did she state "What would Ricky have said?" "[a] Prosecutor may not make a statement of fact to the jury that is not supported by evidence presented at trial and may not argue the effect of testimony that was not entered into evidence." *People v Unger*, 278 Mich App 210, 236 (2008). Thus, any comment about the failure of Trisha to testify necessarily implies that defendant should have presented her as a witness, which qualifies as a comment regarding defendant's failure to present evidence. See *People v Fyda*, 288 Mich App 446, 464 (2010) and *People v Abraham*, 256 Mich App 265, 273 (2003). Such a comment is not allowed, as it attempts to shift the burden of proof.

The prosecution crossed a line when she stated that the reason the defense did not call Trisha Lavake was that her testimony would not have helped Mr. Hammonds. This was more than an inference. This was speculation. This was an incorrect statement of facts. Trisha's testimony would have, in fact, corroborated Mr. Hammonds. The true reason that Trisha wasn't called was due to trial counsel's failure to call her. Defense Counsel objected and the Court stated "there's a jury instruction on that

addressed the burden of proof." (T, 12/1/16 pg. 88). The clear impression the court gave with this comment was that the argument presented by the Prosecutor was indeed permissible and that the jury was allowed to infer that Trisha's failure to testify could be viewed against defendant. As such, the later instruction that counsel's comments were only to be considered as argument and not as evidence does nothing to address the harm that the comment caused.

There was virtually no corroborating physical evidence to support the rape allegations, and the case essentially came down to whether the jury found Alexia credible. (See, MCL 750.520h) And because the Prosecutor was allowed to argue that the jury could infer that Alexia was credible from the defense's failure to produce the evidence of Trisha Lavake-coupled with the trial court's implicit approval of such an inference-the error cannot be considered harmless. In other words, because it is not clear beyond a reasonable doubt that this constitutional error was harmless, Mr. Hammonds states that reversal for a new trial is warranted. (emphasis added).

ISSUE III

THE TRIAL COURT ABUSED IT DISCRETION WHEN IT DENIED TRIAL COUNSEL'S MOTION FOR A MISTRIAL WHERE THE PROSECUTION REPEATEDLY VIOLATED THE TRIAL COURT'S ORDER THAT THE COMPLAINING WITNESS WOULD NOT BE REFERRED TO AS A "VICTIM," AND DEFENDANT'S ABILITY TO GET A FAIR TRIAL COULD NOT BE CURED BY A LIMITING INSTRUCTION.

Discussion:

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *People v Abraham*, 256 Mich App 265, 272 (2003). The use of the term "victim" as opposed to the phrase "complainant" was improper argument and designed to play upon the jury's emotions. Labeling the complaint as a victim presupposes injury and devalues the foundational principle of presumption of innocence. The Michigan Supreme Court opined that using the word "victim" rather than as the complainant would be premature and inappropriate. In *People v Stanaway*, 446 Mich 643, 677-678 (1994), the Court stated:

Where a statute seeking to protect a victim clashes with the defendant 's federal or state constitutional rights, the statute must yield. It should be remembered that the legal status of an accuser as victim does not obtain until a conviction is entered.

Trial Counsel Specifically requested the suppression of the use of the word "Victim"

MS. FRANCE: The final thing your Honor is I'm asking that the word victim not be used by any attorneys or witness, including Detective Harp and any other law enforcement. That the word victim will not be used. I don't care if she's call complaining witness.

THE COURT: It's complaining witness that's what it is.

MS. SADLER: You're Honor I have an objection to that.

MS. FRANCE: That if that word is used-

THE COURT: No there's no objection to that. Complaining witness. We're referring to her as the complaining witness at this point in time. That's what it is. Case law is clear. It's a complaining witness.

MS. FRANCE: Such use of that word would be grounds for a mistrial or A motion for a mistrial.

THE COURT: It is the complaining. She's a victim after there's a conviction. She's a complaining witness up until there's a conviction. Its complaining witness. (MT, 11/29/16 pg. 11).

Further, Prosecutor was admonished to instruct the testifying officers to use the phrase "complaining witness." It stated:

THE COURT: And please instruct your officers to refer to her as a complaining witness. I said that in chambers and I'm not backing down. That's what it's going to be referred as a complaining witness. That's what she is. She's a complaining witness at this point in time. And that's how she should be referred to. (MT, 11/29/16 pg. 13).

Following are the many times that the Prosecutor and Detectives used the emotionally-charged conclusory word "victim."

Detectives Sergeant Mike Pins is the one who did forensic evaluation of both the defendant and the victim: I'm sorry the minor child's cellphones. (T, 11/30/16, pg. 67).

MS. SADLER: There will also be audio presented in which you'll be able to hear the defendant's own statements regarding this and his thoughts on the victim. (T, 11/30/16, pg. 70).

OFFICER MARTIN: There were three individuals. I had Emily Pierce. I had Alexia McMillan who was the victim. And Mrs. Pierce's husband, Mr. Pierce.

MS. SADLER: This is some 404 issues and she's trying to bring up drinking and smoking and partying and everything else and alleged that that's what the victim. or the young girl was doing.

MS. FRANCE: You're Honor.

MS. SADLER: What the young girl was doing.

MS. FRANCE: The word again. (T, 11/30/16, pg. 142).

Trial counsel moves for a mistrial

MS. FRANCE: Thank you your Honor. Around 10:00 the court advised counsel at the bench if the word victim was used one more time the court was going to consider dismissing this matter. It's been used twice. The last time was at 11:38 by Ms. Sadler both times during questioning. The court was very clear that that was not to be used. She's been given two warnings now and is still disregarding those warnings. I'm asking for a mistrial being that the Prosecutor, prosecution's actions causing it would be with prejudice. (T, 11/30/16, pg. 150).

The trial court denied the motion for mistrial, and stated the following:

But at this point it hasn't caused; it's not; it does not rise to the level of a mistrial certainly, but I would just caution to try to minimize the slipups if we can. And that's why I haven't made the ruling before but at this point it doesn't rise to level of a mistrial. But I will give a limiting instruction if the parties want me to.

The assurance of a limiting instruction seemed to embolden the prosecutor.

MS. SADLER: So when you say you look at corroborated statements from either side do you then make an attempt generally in these cases to interview both the victim; or the, yea the victim in a case, and a suspect in a case? (T, 11/30/16, pg. 197).

MS. SADLER: At the beginning of all of this I asking if you would be able to follow the law regardless of what you thought of the victim's feelings on it. (T, 12/1/16, pg. 58).

MS. SADLER: The jury instructions state the victim's statement is enough. That is the actual wording of the jury statement. 1 The victim's statement need not be corroborated. (T, 12/1/16, pg. 61).

MS. SADLER: Often victims do not disclose immediately. Detective Harp talked about that. (T, 12/1/16, pg. 62).

THE ALLEGED CURE-ALL EFFECT OF A LIMITING INSTRUCTION

THE COURT: Thank you Ms. Maleport. And just for the clarification of the limiting instruction I'll just do it orally on the record ladies and gentlemen. the limiting instruction that Ms. France is referring to is at several times throughout the trial Ms. McMillan's been referred to as the victim. She should be officially referred to as the complaining witness. That's the limiting instruction. So please when you're considering her, she is at this point a complaining witness. I think that satisfies the limiting instruction. (T, 12/1/16, pg. 92).

***Dunn v United States*, 307 F2d 883 (Cir 5, 1962) states:**

The paths of justice must be cut through a wilderness of facts in every case. Opinions of Prosecutors or defense counsel are not issues to be submitted to the jury. The statements made by the District Attorney could not be based on evidence to be presented or actually present. Evidence to support his statements, if tendered, could not be received. We are always concerned with guilt and innocence in criminal cases; but of equal importance is a fair trial to guilty and innocent alike. Trials are rarely, if ever, perfect, but gross imperfections should not go unnoticed. In every case involving improper argument of counsel, we are confronted with relativity and the degree to which such conduct may have affected the substantial rights of the defendant. It is better to follow the rules than to try to undo what has been done. Otherwise stated, one 'cannot unring a bell'; after the thrust of the saber it is difficult to say forget the wound'; and finally, if you throw a skunk into the jury box, you can't instruct the jury not to smell it'. The trial court abused its discretion when it did not grant Mr. Hammonds' motion for mistrial. His conviction must be reversed.

ISSUE IV

THE TRIAL COURT'S INTERJECTION THAT THE COMPLAINING WITNESS STATEMENTS WERE NOT INCONSISTENT STATEMENTS BUT RATHER "MISUNDERSTANDINGS" DEMONSTRATED THE TRIAL COURT'S PARTIALITY TOWARD THE PROSECUTION AND IMPROPERLY INFLUENCED THE JURY BY CREATING THE APPEARANCE OF ADVOCACY AND PARTIALITY AGAINST MR. HAMMONDS?

Discussion:

In this case where, pursuant to statute, that the jury would be instructed that the complaining witness testimony need not be corroborated, impeachment of the complaining witness can be the only avenue to success. In this case, during cross examination of the complaining witness, trial counsel elicited the following inconsistencies from her testimony: First, Alexia conceded that she had recently changed her privacy settings on Facebook. In the past, everything was public. [1] She had listed her date of birth on Facebook as June 20, 1995. [2] She also conceded that she had testified that she met Billy Hammonds in June, but that she told the Detective that she had met him in August one week before they had intercourse. (T 159). [3] She had told Detective Harp that Trish and Billy that were dating at the time, and at trial she was testifying that Trish was dating both Billy and Kaldan. Defense Counsel questioned the complaining witness as follows:

Q: So that would three inconsistent statements that you've given us.

MS. SADLER: Objection, your Honor. That is a very in, improper statement and it's not what has been stated.

THE COURT: Well yea I'll sustain the objection because I don't think it's inconsistency but it might just be some misunderstanding. I don't think it's intentional. I think it's just mistaken so if you want to rephrase the question. I know what you're trying to get at Ms. France. But for that point I'll sustain the objection. (T 159-160).

The four-part analysis of conduct that pierces the veil of impartiality and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury is as follows:

<u>First Question:</u> Consider the nature or judicial conduct. This inquiry requires a fact-specific analysis. A single inappropriate act does not necessarily give the appearance of advocacy or partiality, but a single instance of misconduct may be so egregious that it pierces the veil of impartiality. See, e.g., *People v Young*, 364 Mich 554, 559 (1961).

As stated above, this is a "he said/she said" type of case. Whether Alexia's statements were inconsistencies or misunderstandings would be a question of fact for the jury. When the trial court opined for the jury that they were "misunderstanding," it basically kicked the legs out from under the theory of the defense. Were then all of Alexia's inconsistencies misunderstandings? Yes, because that is how the trial court instructed the jury.

<u>Second Question</u>: Consider the tone and demeanor the trial judge displayed in front of the jury. Because jurors look to the judge for guidance and instruction, they "are very prone to follow the slightest indication of bias or prejudice upon the part of the trial judge." *In re Parkside Housing Project*, 290 Mich 582, 600 (1939) (quotation marks and citation omitted). See also *People v Bigge*, 297 Mich 58, 70 (1941). ("It is well known that jurors in a criminal case may be impressed by any conclusion reached by the judge as to the guilt of the accused.").

it is possible for a court to deprive a party of a fair trial without intending to do so if the manner in which the judge conducts the case gives "a plain exhibition to the jury of his own opinions in respect to the parties..." *People v Young*, 364 Mich 554, 559 (1961) (quotation marks and citation omitted).

In this case, the trial court gave "a plain exhibition to the jury of his own opinions in respect to the parties..." Undoubtedly, the jurors would be impressed by the authority of the trial court, since the trial court is the one who has the deciding vote whenever legal issues arise. His finding on this question of fact gave it the authority of a legal conclusion.

Third Question: A reviewing court should consider the scope of judicial intervention within the context of the length and complexity of the trial, or any given issue therein. *Freudeman v Landing of Canton, 702 F3d 318, 328 (6th Cir. 2012).*

Fourth Question: In conjunction with the third factor, a reviewing court should consider the extent to which a judge's comments or questions were directed at one side more than the other. Freudeman v Landing of Canton, 702 F3d 318, 328 (6th Cir. 2012).

The Extent of the Error.

As argued above Mr. Hammonds' only defense was impeachment of the complaining witness. Impeachment is shown through inconsistent statements. Misunderstandings presume that the facts are correct, but just in the wrong order. In this case, the trial court communicated to the jury that the complaining witness was testifying as to accurate facts, but in a round-about way. Confusion. A misunderstanding.

Remedy

"Despite the strong interests that support the harmless-error doctrine, some constitutional errors [including adjudication by a biased judge] require reversal without regard to the evidence in the particular case." *Rose v Clark*, 478 US 570, 577 (1986). *People v Anderson* (After Remand); 446 Mich 392, 404-405 (1994), recognized the deprivation of the right to an impartial judge as a structural error. Judicial bias creates a "structural defect in the constitution of the trial mechanism, which defies analysis. *People v Stevens*, 498 Mich 162 (2015). Judicial partiality can never be held to be harmless and, therefore, is never subject to the harmless-error review. *Arizona v Fulminante*, 499 US 279, 309-310 (1991), citing *Tumey v Ohio*, 273 US 510 (1927). The conviction must be reversed "even if no particular prejudice is shown and even if the defendant was clearly guilty." *Chapman v California*, 386 US 18, 43 (1967).

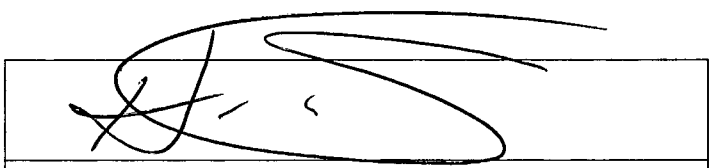
REASONS FOR GRANTING THE PETITION

Petitioner is entitled to post-conviction relief where he was deprived of his right to due process and a fair trial under the XIV Amendment to the United States Constitution and also under Mich Const 1963 art 1 sec 17. Petitioner is also entitled to relief where he was deprived of his VI and XIV Amendment rights to the United States Constitution and under Mich Const 1963 art 1 sec 20.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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