Court of Appeals, State of Michigan

ORDER

People of MI v Jimmie Allen Nelson

Docket No. 301253

LC No. 09-004926-FC

Jane M. Beckering
Presiding Judge

Donald S. Owens

Douglas B. Shapiro
Judges

The Court orders that the motion to expand the record is GRANTED. MCR 7.216(A)(4). The Court orders that the motion to permit additional grounds for appeal and add two additional issues is GRANTED. MCR 7.216(A)(3).

The Court further orders that the motion to seal the brief and appendix in support of the motion to expand the record and add two additional issues is GRANTED and the appendix filed with the brief and motion is accepted for filing under seal pursuant to MCR 8.119(I)(1)(a). This Court finds good cause to seal the brief and appendix based on the sensitive and confidential nature of their content and determines that there is no less restrictive means to adequately and effectively protect the interest asserted. MCR 7.211(C)(9)(e).

The Clerk shall disclose or provide copies of any order or opinion in this appeal, MCR 8.119(I)(5); MCR 7.211(C)(9)(c), but the sealed brief and appendix contained within the file and any other documents previously ordered to be sealed by this Court shall not be disclosed or made available for public viewing.

The Clerk is directed to forward a copy of this order to the Clerk of the Supreme Court and to the State Court Administrative Office. MCR 8.119(I)(7).

Pursuant to this Court's concurrently issued opinion, we vacate defendant's conviction of second-degree murder and remand for a new trial before a different judge. We do not retain jurisdiction.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

FEB 25 2014
Date

Jerome W. Zimmer Jr.
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 25, 2014
v	No. 301253 Iosco Circuit Court
JIMMIE ALLEN NELSON, Defendant-Appellant.	LC No. 09-004926-FC

ON REMAND

Before: BECKERING, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

This case returns to this Court on remand from the Michigan Supreme Court. After a bench trial, the trial court convicted defendant, Jimmie Allen Nelson, of second-degree murder, MCL 750.317, and sentenced him to 25 to 50 years' imprisonment. This Court then reversed defendant's conviction on the basis of insufficient evidence. The Michigan Supreme Court disagreed and, thus, reversed and remanded for this Court to consider the remaining issues raised by defendant on appeal. We now consider these remaining issues together with additional issues pertaining to newly discovered evidence, which we have allowed defendant to raise pursuant to MCR 7.216(A)(3)-(4). Both defendant and the prosecutor urge this Court to grant defendant a new trial before a different judge because of newly discovered evidence. We agree that such relief is warranted. Therefore, we vacate defendant's second-degree-murder conviction and remand for a new trial before a different judge.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case arises from the disappearance of Cherita Thomas on August 3, 1980. She has not been seen or heard from since. Her body has not been found. Although she is presumed dead, no one has come forward as a witness to her death or the disposal of her body. And no one has admitted responsibility for her disappearance or death. The investigation into Thomas's disappearance continued for nearly 25 years and developed various suspects but did not initially focus on defendant. In December 2004, the police arrested defendant for Thomas's murder.

After a lengthy appeal regarding the *corpus delicti* rule, the trial court conducted a two-day bench trial in October 2010. The court convicted defendant of second-degree murder and sentenced him to 25 to 50 years' imprisonment.[1]

Defendant appealed his conviction as of right. In August 2012, we held that there was insufficient evidence to establish beyond a reasonable doubt that defendant caused Thomas's death with malice; therefore, we reversed defendant's conviction and remanded for entry of a judgment of acquittal. *People v Jimmie Allen Nelson*, unpublished opinion per curiam of the Court of Appeals, decided August 23, 2012 (Docket No. 301253).

In February 2013, the Michigan Supreme Court issued an order reversing this Court's decision, stating only that "the circumstantial evidence was legally sufficient, when viewed in the light most favorable to the prosecution, to prove beyond a reasonable doubt that the defendant caused the victim's death with malice." *People v Nelson*, 493 Mich 933; 825 NW2d 581 (2013). The Supreme Court remanded the case to this Court "for consideration of the defendant's remaining issues." *Id.* In June 2013, we granted a motion by the prosecutor to hold defendant's appeal in abeyance for six months.

In August 2013, the trial court conducted a hearing to address a stipulated motion for bond pending appeal. See, generally, MCL 770.9a; MCR 7.209. At the hearing, defense counsel indicated that information had come to light calling into question the factual basis underlying the state's circumstantial case against defendant; the prosecutor agreed, stating that the information raised a substantial question of law and fact. The trial court denied the motion for bond pending appeal, finding that there was a lack of clear and convincing evidence that defendant would not pose a danger to others or that there was a substantial question of law or fact. In September 2013, defendant filed in this Court a stipulated motion for bond pending appeal. We granted the motion and remanded the case to the trial court to determine a reasonable bond amount. At a hearing before the trial court the following month, defendant requested that he be granted a personal recognizance bond. The prosecution did not oppose defendant's request. However, the trial court set the bond at $1,000,000 cash or surety, finding that defendant posed a danger to the public for the reason that his conviction for second-degree murder had not been vacated. Defendant then moved this Court to amend the bond, and the prosecutor confirmed its stipulation to a personal recognizance bond. In November 2013, we issued an order amending the bond and ordering that defendant be released on personal recognizance.

After the expiration of an extended abeyance period, defendant filed a motion with this Court in January 2014 to request the following: (1) expansion of the record to include information filed under seal; (2) permission to raise, as additional grounds for appeal, claims of newly discovered evidence and a *Brady*[2] violation; and (3) a new trial before a different judge.

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[1] The evidence produced at defendant's trial, which we do not discuss in this opinion, is discussed extensively in *People v Jimmie Allen Nelson*, unpublished opinion per curiam of the Court of Appeals, decided August 23, 2012 (Docket No. 301253).

[2] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

On the same date, the prosecutor filed a concurrence requesting that this Court grant defendant's motion. Defendant's motions to expand the record and permit additional grounds for appeal have been granted by this Court. See, generally, MCR 7.216(A)(3)-(4). We now address both the remaining issues raised by defendant that our Supreme Court directs us to consider and, pursuant to MCR 7.216(A), the additional issues raised by defendant.

II. ANALYSIS

A. *CORPUS DELICTI*

Defendant argues that his inculpatory statements were inadmissible under the *corpus delicti* rule. In response, the prosecution insists that the law of the case doctrine applies.

Generally, we review a trial court's decision regarding *corpus delicti* for an abuse of discretion. *People v King*, 271 Mich App 235, 239; 721 NW2d 271 (2006). "Whether the law of the case doctrine applies is a question of law that we review de novo." *Duncan v Mich*, 300 Mich App 176, 188; 832 NW2d 761 (2013).

> Generally, the law of the case doctrine provides that an appellate court's decision "will bind a trial court on remand and the appellate court in subsequent appeals." *Schumacher* [*v Dep't of Natural Resources*, 275 Mich App 121, 127; 737 NW2d 782 (2007)]. . . . The law of the case doctrine has been described as discretionary—as a general practice by the courts to avoid inconsistent judgments—as opposed to a limit on the power of the courts. *Foreman v Foreman*, 266 Mich App 132, 138; 701 NW2d 167 (2005). However, these decisions also acknowledge this Court's mandatory obligation to apply the doctrine when there has been no material change in the facts or intervening change in the law. *Id.*; see also *Reeves v Cincinnati, Inc. (After Remand)*, 208 Mich App 556, 560; 528 NW2d 787 (1995) ("[T]he doctrine of law of the case is a bright-line rule to be applied virtually without exception."). Even if the prior decision was erroneous, that alone is insufficient to avoid application of the law of the case doctrine. *Bennett v Bennett*, 197 Mich App 497, 500; 496 NW2d 353 (1992); see also *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997). [*Duncan*, 300 Mich App at 188-189.]

We conclude that the law of the case doctrine applies in this case. In *People v Nelson*, unpublished opinion per curiam of the Court of Appeals, decided December 23, 2008 (Docket No. 271768), citing *People v Porter*, 269 Mich 284, 289, 292; 257 NW2d 705 (1934) and *People v Rockwell*, 188 Mich App 405, 407; 470 NW2d 673 (1991), this Court concluded that the *corpus delicti* rule required a showing, independent of a defendant's *confession*, that the victim died as a result of some criminal agency. We rejected the notion that the rule required such a showing independent of inculpatory statements shy of a confession. Defendant now argues that this issue was incorrectly decided. However, he acknowledges that this Court's prior decision is the law of the case and raises the issue merely to preserve it for review in the Supreme Court.

Accordingly, we conclude that defendant is not entitled to relief on this issue as the law of the case doctrine applies.

B. CONFRONTATION

Defendant also argues that the trial court violated his constitutional right to confrontation by admitting the preliminary-examination testimony of Detective Raymond Knuth and Shonda Champine. We disagree.

At trial, defendant objected to the admission of the preliminary-examination testimony under MRE 804(b)(1); however, he did not raise an objection on Confrontation Clause grounds. "An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground." *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Therefore, our review is for plain error. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). In *Crawford*, "the United States Supreme Court held that the Sixth Amendment bars testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness." *People v Jackson*, 292 Mich App 583, 594; 808 NW2d 541 (2011). Testimony given at a preliminary examination is testimonial. *Crawford*, 541 US at 68. The prior opportunity for cross-examination must have been "adequate," i.e., the scope and nature of the cross-examination must not have been significantly limited. *Id.* at 57; *California v Green*, 399 US 149, 166; 90 S Ct 1930; 26 L Ed 2d 489 (1970). "[T]he Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *United States v Owens*, 484 US 554, 559; 108 S Ct 838; 98 L Ed 2d 951 (1988).

In this case, both Detective Knuth and Champine died in the time between the preliminary examination and trial. Therefore, they were unavailable at trial for Sixth Amendment purposes. See *Green*, 399 US at 166. Further, a review of the preliminary examination illustrates that defendant had a prior opportunity to adequately cross-examine Detective Knuth and Champine during the preliminary examination. See *id.* The preliminary examination was for defendant's charges of perjury and open murder. The open-murder charge was explored at the preliminary examination. The record does not indicate that defendant's cross-examination of either Detective Knuth or Champine was limited in any significant way. Indeed, defense counsel cross-examined Detective Knuth and Champine extensively. Although defendant attaches to his appellate brief the transcripts of the cross-examinations of these two witnesses at defendant's separate perjury trial, apparently to demonstrate inadequacy of the opportunity to cross-examine at the preliminary examination given that the cross-examination at the perjury trial was more involved, referencing a more comprehensive cross-examination at the perjury trial does not establish a lack of an opportunity to cross-examine at the preliminary examination. Accordingly, there is no plain error.

C. NEWLY DISCOVERED EVIDENCE

Defendant also argues that he should be granted a new trial on the basis of newly discovered evidence. The prosecution concurs, stating that "a new trial should be granted on the basis of newly discovered evidence as it is in the interest of justice." Upon review of this issue in the first instance, we agree. See, generally, MCR 7.216(A)(7) (stating that this Court may, at any time and on terms that it deems just, "enter any judgment or order or grant further or different relief as the case may require").

For a new trial to be granted on the basis of newly discovered evidence, a defendant must show the following: "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *People v Grissom*, 492 Mich 296, 313; 821 NW2d 50 (2012); see also *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003). Evidence is newly discovered if the defendant and defense counsel were not aware of the evidence at the time of trial. See *People v Rao*, 491 Mich 271, 281; 815 NW2d 105 (2012) ("Michigan caselaw makes clear that evidence is not newly discovered if the defendant or defense counsel was aware of the evidence at the time of trial."). "[W]hat constitutes reasonable diligence in producing evidence at trial depends on the circumstances of the case." *Id.* at 283-284.

The evidence at issue has been filed under seal with this Court pursuant to MCR 8.119(I). To protect the confidential nature of this evidence, we note only that the evidence implicates another person as the perpetrator of Thomas's death. First, we conclude that this evidence is newly discovered. There is no indication that defendant or his trial counsel was aware of the evidence at the time of trial. Indeed, the evidence apparently came as a surprise to both defendant and the prosecutor. Second, the evidence is not cumulative; there was no mention at defendant's trial of the newly alleged perpetrator or the source of the newly discovered evidence. Third, there is nothing to support the conclusion that defendant, using reasonable diligence, could have discovered the evidence and produced it at trial. There is no indication that reasonable diligence would have led defendant to the source of the newly discovered evidence. And there is nothing establishing that defendant was with the alleged perpetrator when Thomas disappeared or knew of the alleged perpetrator's involvement. Finally, the newly discovered evidence would make a different result probable on retrial. Again, the evidence implicates another person as the perpetrator of Thomas's death. Without disclosing the details of the evidence, we conclude that it is probable that a trier of fact would entertain a reasonable doubt about defendant's guilt.

Accordingly, we agree with both defendant and the prosecution that defendant is entitled to a new trial on the basis of newly discovered evidence.[3] See, generally, *Grissom*, 492 Mich at 313.

[3] We decline to address defendant's claim of a *Brady* violation. Defendant's entitlement to a new trial on the basis of newly discovered evidence affords him the remedy that he seeks.

D. REMAND TO A DIFFERENT JUDGE

As a final matter, defendant requests that any new trial be before a different judge. Although it is questionable whether the prosecutor will pursue the prosecution of this case on remand, the prosecutor concurs in the request for a new trial before a different judge. When determining whether a case should be assigned to a different judge, this Court considers the following:

> "'(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.'" [*People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997), quoting *People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986), quoting *United States v Sears, Roebuck & Co*, 785 F2d 777, 780 (CA 9, 1986).]

Here, the trial judge sat as the finder of fact in defendant's bench trial. Although there was evidence calling the verdict into question and the prosecutor agreed to bond pending appeal, this Court had to direct the trial judge to set bond in a reasonable amount. The judge then set bond at $1,000,000 cash or surety—when the prosecutor agreed to a personal recognizance bond—on grounds that defendant's conviction established that he was dangerous. The trial judge's insistence that defendant posed a danger because of his conviction is troubling because evidence was presented to the judge that should have resulted in him questioning whether there was a sound basis for the conviction. The trial judge appears to be wedded to his determination that defendant is guilty. The appearance of justice would be well-served if the case were retried before a judge who would not appear to have prejudged defendant's guilt. Moreover, this was originally only a two-day bench trial; although it is unlikely that defendant would again opt for a bench trial before this same judge and there might be some waste and duplication of effort in bringing a new judge up to speed, the inefficiencies of a retrial before a different judge would not be out of proportion to the gain given the judge's apparent predisposition. Accordingly, we conclude that retrial before a different judge is warranted. See *id.*

We vacate defendant's conviction of second-degree murder and remand for a new trial before a different judge. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Donald S. Owens
/s/ Douglas B. Shapiro

Moreover, resolution of the *Brady* issue would require a factual finding better addressed by a trial court.