STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EUGENE JOUVN HALEY a/k/a BRIAN FUNDREN,

Defendant-Appellant.

UNPUBLISHED
April 8, 1997

No. 180584
Ingham Circuit Court
LC No. 93-66812 FC

Before: O'Connell, P.J., and Markman and M.J. Talbot*, JJ.

PER CURIAM.

Defendant appeals by leave granted his convictions by jury of second-degree murder, MCL 75.317; MSA 28.549, assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, discharging a firearm from a motor vehicle, MCL 750.234a; MSA 28.431(1), and two counts of possession of a firearm during the commission of a felony (felony-firearm). MCL 750.227b; MSA 424(2). He was sentenced to concurrent prison terms of two years each with respect to the felony-firearm convictions, to be followed by concurrent sentences of thirty-five to fifty years with respect to the second-degree murder conviction, six and one-half to ten years with respect to the assault with intent to do great bodily harm conviction, and two and two-thirds to four years with respect to the discharging a firearm from a motor vehicle conviction. We reverse and remand.

Defendant argues that the trial court abused its discretion in allowing the prosecution to call and examine a particular witness for the sole purpose of impeaching the witness with prior inconsistent statements allegedly made to a police detective. At the preliminary examination, the witness denied having told police officers that she had been with defendant on the night in question. The prosecutor called the witness to testify at trial, anticipating that she would again deny having made any such statements. In fact, instead of examining the witness concerning her knowledge of the night of the murder, the prosecutor asked only about the statements she had allegedly made to the detective. When the witness testified consistently with her testimony at the preliminary examination, the prosecutor called the detective to impeach the witness, thereby allowing the jury to hear what would otherwise have been

* Circuit judge, sitting on the Court of Appeals by assignment.

inadmissible hearsay. Defendant argues that the witness was called solely to elicit these denials so that her prior inconsistent statements could be admitted to impeach her, actions that defendant claims were an improper ruse designed to admit into evidence hearsay testimony identifying defendant as the shooter.

In admitting this evidence, the trial court relied on MRE 607, which provides that "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." However, "a prosecutor may not use an elicited denial as a springboard for introducing substantive evidence under the guise of rebutting the denial." *People v Stanaway*, 446 Mich App 643, 693; 521 NW 2d 557 (1994). The prosecution may not call a witness for the apparent reason of impeachment where, in actuality, the prosecution's motive is really to use hearsay as substantive evidence of guilt. *People v Jenkins*, 450 Mich 249; 537 NW2d 828 (1995).

In *Stanaway, supra*, the prosecution called the defendant's nephew as a witness in order to have him deny that the defendant made an incriminating statement to him. *Id.* at 692. After the denial, the prosecutor called the investigating police officer, who testified that the nephew had told him that the defendant had admitted committing the offense. *Id.* at 690. The *Stanaway* Court noted:

> The only relevance [the nephew's] testimony had to this case was whether he made the statement regarding [defendant's] alleged admission . . . . While prior inconsistent statements may be used in some circumstances to impeach credibility, MRE 613, this was improper impeachment. The substance of the statement, purportedly used to impeach the credibility of the witness, went to the central issue of the case. Whether the witness could be believed in general was only relevant with respect to whether that specific statement was made. This evidence served the improper purpose of proving the truth of the matter asserted. MRE 801.
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> While the prosecutor could have presented defendant's alleged admission by way of the nephew's statement, he could not have delivered it by way of the officer's testimony because the statement would be impermissible hearsay. See *People* v *Carner*, 117 Mich App 560, 571; 324 NW2d 78 (1982). Likewise, a prosecutor may not use an elicited denial as a springboard for introducing substantive evidence under the guise of rebutting the denial. *People* v *Barnett*, 393 Mich 445; 224 NW2d 840 (1975). Here, the prosecutor used the elicited denial as a means of introducing a highly prejudicial "admission" that otherwise would have been inadmissible hearsay. [*Stanaway*, *supra* at 692-693.]

In *Jenkins, supra,* the prosecution called an eyewitness who could have placed the defendant at the scene of the crime. *Id.* at 245-255. When the witness did not incriminate the defendant, the prosecutor called the investigating police officer to read the witness' prior statement. *Id.* at 255. The Supreme Court held that the trial court abused its discretion in permitting the police officer to read the statement under circumstances that created an "unacceptable risk that the jury would accept the contents of the memorandum as substantive evidence." *Id.* at 260-261. In remanding the case for a new trial, the Court stated, "special care should [be] taken to ensure that 'impeachment by prior

inconsistent statement[s] [is] not permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible.'" *Id.* at 262, quoting *United States v Morlang*, 531 F2d 183, 190 (CA 4, 1975).

We find the present case to be an even more extreme example of improper impeachment than occurred in either *Jenkins* or *Stanaway*. Here, the prosecutor anticipated that the witness would deny having made any statement implicating defendant in light of her testimony at the preliminary examination, yet chose to call her anyway. There was no reason to call this witness except to impeach her; she offered no substantive evidence. The only reasonable inference that may be drawn is that the witness was called to deny any knowledge of the crimes so that these denials could be used as a "springboard" to introduce hearsay evidence placing defendant at the scene of the crime. In fact, so openly did the prosecutor implement this strategy, there is some question as to whether she even realized this was improper. On appeal, the prosecution admits the error. Admission of the witness' testimony for the sole purpose of impeaching that testimony was an abuse of discretion. *People v McMillan*, 213 Mich App 134, 137; 539 NW2d 553 (1994).

Having concluded that error occurred, we must next determine whether the error may be considered to have been harmless. In the recent decision of *People v Mateo*, 453 Mich 203; 551 NW2d 891 (1996), our Supreme Court examined the circumstances under which an error may be deemed harmless. The Court bifurcated its analysis into constitutional error, that is, error implicating the constitutional rights of a criminal defendant, and nonconstitutional error (that has, of course, been properly preserved), with the implication being that distinct analyses would be appropriate depending on whether the error was constitutional or nonconstitutional. The erroneous admission of evidence, in general, constitutes nonconstitutional error. See *People v Humphreys*, ___ Mich App ___; ___ NW2d ___ (Docket no. 184583, issued 2/11/97, slip op at 2-3).

Unfortunately, the *Mateo* Court declined to set forth a precise test to be used in the case of nonconstitutional error. As explained in *Humphreys*, *supra*, slip op at 3 (internal citations to *Mateo*, *supra*, omitted),

> An appellate court on direct appeal, must have a "level of assurance" that the error was not prejudicial and was therefore harmless. The *Mateo* opinion does not decide the question of what that "level of assurance" must be, noting that there are at least two possibilities. The first possible test is whether it is *highly probable* that the error did not contribute to the verdict. The second is whether it is *more probable than not* that the error did not affect the verdict, a preponderance of the evidence standard.

While the *Mateo* opinion does state that "[w]here the error asserted is the erroneous admission of evidence, the court engages in a comparative analysis of the likely effect of the error in light of other evidence," *Mateo*, *supra*, at 206, the Supreme Court failed to elucidate this standard further.

In the present case, we conclude, irrespective of what level of assurance we apply, that the admission of the contested evidence may not be deemed harmless. The primary issue at trial was the identity of the shooter, and the process of identification at trial boiled down to a credibility contest. Two

witnesses at the scene of the crime could not identify defendant as being the shooter. While two other witnesses did positively identify defendant as the shooter, both admitted that they did not get a good look at the perpetrator of the crime. Further, both admitted at trial that their testimony at trial concerning the clothing of the shooter was inconsistent with their initial statements on the matter. Additionally, four of the witnesses to the crime admitted that they had lied about the events of that evening when they were initially interviewed by the police, and one of these admitted having lied under oath at the preliminary examination. Another witness who had been at the scene of the murder gave testimony supporting defendant's contention that he was not at the scene of the crime and that a third person was the shooter.

The jury deliberated over five days before finding defendant to have been the shooter. Even the court evinced substantial uncertainty concerning whether defendant was the perpetrator, stating at sentencing, "there remains a serious question whether or not [defendant] in fact committed this crime."

Therefore, given the equivocal nature of the balance of the evidence, it is at least "highly probable" that the erroneous admission of the testimony in issue contributed to the guilty verdict. Because this is the highest standard suggested by *Mateo*, a standard that is satisfied under the facts of the present case, reversal of defendant's convictions is required.

In light of our resolution of this issue, we need not address the remaining allegations of error raised on appeal.

Reversed and remanded.

/s/ Peter D. O'Connell
/s/ Stephen J. Markman
/s/ Michael J. Talbot