STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY LEE HORTON,

Defendant-Appellant.

UNPUBLISHED
August 5, 1997

No. 193854
Montcalm Circuit Court
LC No. 95-000076-FH

Before: Michael J. Kelly, P.J., and Wahls, and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of breaking and entering a building with the intent to commit larceny ("B&E"), MCL 750.110; MSA 28.305, supplemented by habitual offender fourth offense, MCL 769.12; MSA 28.1084. The trial court sentenced defendant to a term of sixteen to thirty years' imprisonment. Defendant appeals as of right. We reverse.

Defendant argues that he was denied a fair trial because the trial court admitted Edmore Chief of Police Timber Irwin's opinion testimony that: "In my opinion, Terry Horton and Darrel Wilson were the ones that committed the breaking and entering and were inside the Edmore Cleaner's." We agree and reverse on this ground.

It is a well-established rule of Michigan jurisprudence that a witness cannot express an opinion concerning the guilt or innocence of a criminal defendant. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985); *People v Parks*, 57 Mich App 738, 750; 226 NW2d 710 (1975). The issue of an individual's guilt or innocence is a question for jury resolution. *People v Suchy*, 143 Mich App 136, 149; 371 NW2d 502 (1985). Moreover, the prestige and experience of the police should not be used to try and establish a defendant's guilt. *People v Boske*, 221 Mich 129, 133-134; 190 NW 656 (1922); *People v Humphreys*, 24 Mich App 411, 419; 180 NW2d 328 (1970). Accordingly, the trial court abused its discretion in admitting Irwin's opinion testimony over defendant's objection.

This Court must next consider whether the trial court's error prejudiced defendant. *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). "Where 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 the other evidence." *Id.* The statutory test for harmless error is not whether the defendant is actually guilty. *Id.*, pp 214-215.

In *Mateo*, the Court concluded that, because the evidence against the defendant was overwhelming, "[b]y definition, the error was harmless under any standard other than" beyond a reasonable doubt. *Id.*, pp 220-221. Here, in contrast, the evidence against defendant was not overwhelming. No evidence was introduced at trial that conclusively placed defendant inside the cleaners on the night in question. Irwin testified that his investigation failed to turn up any fresh latent finger or hand prints inside the cleaners that could be used to identify the perpetrator or perpetrators of the crime. Although similar shoe prints were found on the cleaners' roof and outside defendant's nearby apartment window, no evidence was introduced to establish that defendant owned a pair of shoes that either did or could have made these shoe prints. As for the testimony of defendant's former cellmate concerning defendant's reputed jailhouse confession, the credibility and motivation of the cellmate's testimony was significantly challenged at trial. Finally, no one could conclusively place defendant in a car seen speeding away from the police three days after the crime. In any case, Michigan recognizes the equivocal nature of evidence of flight. *People v Cutchall*, 200 Mich App 396, 398; 504 NW2d 666 (1993).

In addition, it was likely that the testimony had a powerful effect. In *Boske, supra*, p 134, the Court stated in a similar case:

> This gave room for the jury to understand they might consider in their deliberations the fact that the sheriff knew he had the guilty man or at least give consideration to the sheriff's opinion that he had. It was the duty of the jury to pass upon the facts and decide the question of guilt or innocence uninfluenced by the opinions of others. The import of such argument was an appeal for conviction on the opinion of the sheriff.

Similarly, in *Humphreys, supra*, p 419, this Court stated:

> Because this remark may well have led the jury to suspend its own powers of judgment in reviewing the evidence before it, we hold the remark to be highly prejudicial and improper. That it had this effect seems likely in view of the experience and prestige standing behind the prosecutor's office, the police department, and, ultimately, the person who made it.
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> And because of this experience and prestige, we cannot say with any certainty that an instruction would have countered the impact and eliminated the prejudice of this remark. It seems likely that the jury, after being instructed to disregard the remark and weigh only the evidence before it, would say "yes, of course, * * * but the police and prosecution *do* believe Humphreys [the defendant] did it. . . ." In light of the closeness of the ultimate factual question in this case and our inability to say that an instruction

would have eliminated the prejudice inhering in this unfortunate remark, we hold it to be reversible error, and order a new trial.

Comparing the likely effect of the trial court's error here with the untainted evidence, we conclude that defendant was unfairly prejudiced. As was the case in *Boske*, *supra*, and *Humphreys*, *supra*, Irwin's opinion testimony was likely to have tempted the jury to disregard its responsibility to decide guilt or innocence. See also *People v Smith*, 158 Mich App 220, 231-232; 405 NW2d 156 (1987).

Because the issue may reappear on remand, we briefly address defendant's argument that the testimony concerning shoe prints on his apartment roof was irrelevant and highly prejudicial. We disagree. This evidence was relevant to the prosecution's theory that defendant walked across his apartment roof twice: first to scout out the possibility of using a tree between the apartment building and the cleaners to break into the cleaners, and second to commit the crime. MRE 401; *People v Mills*, 450 Mich 61, 67; 537 NW2d 909 (1995). In addition, the probative value of this evidence was not substantially outweighed by the danger of prejudicial effect. MRE 403; *Mills*, *supra*, p 75. Accordingly, the trial court did not abuse its discretion in admitting this testimony.

In light of our disposition, it is unnecessary to address defendant's argument regarding the sufficiency of the evidence.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Myron H. Wahls
/s/ Hilda R. Gage