

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD ALAN GREEN,

Defendant-Appellant.

UNPUBLISHED

January 25, 2005

No. 256117

Iosco Circuit Court

LC No. 01-004288-FH

Before: O’Connell, P.J., and Bandstra and Donofrio, JJ.

BANDSTRA, J. (*dissenting*)

I respectfully dissent.

As noted in the per curiam opinion, we review factual findings underlying an order denying a motion for a new trial for clear error, meaning that we reverse if we have a definite and firm conviction that a mistake has been made. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). The trial court’s denial of defendant’s motion here was premised on the determination that Gilbertson’s post-trial confession was inconsistent with two established facts: that an accelerant was used in starting the fire and that it was started in more than one location. That determination was based only on a part of the written trial record, the judge deciding the motion not having presided at the trial. Based on my review of the complete record, I conclude that the trial court was mistaken in that conclusion.

This is not to say that the trial court used the wrong framework of analysis. As noted by the per curiam opinion, our Supreme Court reasoned in *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) that a confession “that does not coincide with established facts” will not warrant a new trial. In *Cress*, our Supreme Court affirmed the denial of a motion for a new trial because of the stark contrast between the record evidence and the account of the confessor:

Ronning’s confessions sharply deviated from the established facts regarding the crime: (1) he stated that Rosansky did not struggle or resist, but the evidence at trial showed that she had defensive wounds and extensive bruising; (2) he stated that he strangled Rosansky, but the medical experts testified at trial that there was no evidence of strangulation and the cause of death was brain injury caused by blunt-force trauma to the head; (3) he stated that he hit Rosansky once with a round rock, while the medical evidence tended to show multiple blows with a linear, club-like object; (4) he did not mention the tree-limb pieces placed in

Rosansky's throat; (5) he stated that Rosansky was almost completely naked, wearing only her socks, when in fact she had been found clothed from the waist up; (6) he stated that he "specifically remembered" not having or being able to have intercourse with Rosansky and denied digitally penetrating her rectum, although the medical evidence showed evidence of forced anal penetration; and (7) he could not find the location where the body was found, even when that location was shown to him and despite the fact that he claimed that he left Rosansky's body in an area that he lived near as an adult. [*id.* at 692-693.]

As the *Cress* listing shows, what was "established" there was largely a factual, objective, and uncontested account of the condition and location of the victim's body. Because the confession contradicted that account, it was considered a "false confession" that would not warrant a new trial.

In contrast to *Cress*, the inconsistencies between Gilbertson's account and the trial record here did not have to do with objective and uncontroverted *facts*. Instead, the trial court reasoned that Gilbertson's confession was false because it was inconsistent with two *opinions* held by two trial experts: that the fire started in more than one location and that an accelerant was used.

While these opinions were obviously not facts in the *Cress* sense, they were also not "established" at the first trial. Instead, again in contrast to *Cress*, they were controverted by others who were eyewitnesses at the fire scene.¹ Based upon their after the fact examination of the remains of the fire, the experts concluded that an accelerant had been used. When confronted with the fact that no evidence of such an accelerant was found, the experts countered that it had completely burned away or had been ventilated out of the area. However, one eyewitness who entered the house during the fire said he did not smell any gasoline, fuel oils, or anything similar. Further, the experts' after the fact analysis suggested that the accelerant was used in the hall and in two bedrooms, contrary to Gilbertson's account that she started the fire in only the southeastern bedroom. But various eyewitnesses testified that when they arrived at the fire scene, only the southeastern corner of the home was on fire. Most notably, the neighbor who entered the house looked into the hall and saw no flames. The experts' only response, in defense of their opinion, was that the eyewitness must simply be mistaken.

This brief summary of only some of the trial evidence that undermined the experts' opinions amply illustrates that they were not the kind of "established facts" that definitely made Gilbertson's contrary account incredible. Further, these opinions were not "established" in the sense that the jury necessarily found them credible in reaching the convictions. The jury only had to decide that the fire was intentionally set to reach a conviction, not determine how or where it was set.

¹ The trial court indicated that he reviewed this other testimony but did not "feel that it is important to the issue based upon the experts' testimony." Further, the trial judge deciding the motion for a new trial was not the trial judge that heard the various witnesses testify at trial and, accordingly, could not determine their relative credibility apart from reviewing written transcripts.

Of course, a jury considering all of the evidence, including Gilbertson's testimony, might well reject her confession and again convict defendant. In judging Gilbertson's credibility, the fact finder would have to weigh her account of why she started the fire, how she did it, why she did not initially come forward, and why she later decided to do so.² Nonetheless, her confession,

² The handwritten letter Gilbertson wrote to her attorney the day after the trial stated:

In a nutshell, - I - Barb Gilbertson-alone-set the fire that burned the residence of Richard Green at 3745 Jackpine Dr. in Hale MI on 9-9-99.

I was very upset because of the fact that we couldn't move closer to my children. We've had many discussions concerning this. Richards [sic] reasons were 1. It is my fathers house-if we're suppose to move it would have sold & besides I just got it remortgaged thru [sic] Tom. 2. Do you know what it would take to move all our stuff?

I sat there basically starring [sic] at the computer screen & drinking another beer getting more depressed & upset. When he hollered it was time to leave I reached up to put the candle out. I didn't think I just reached the candle over & touched it [to] the newspaper article hanging on the wall & the curtains next to it & to the wastebasket under the desk. Then blew the candle out cause [sic] I knew he would ask and I could say yes. Then I ran for the door. When we backed out of the driveway I glanced over my shoulder & saw flames thru [sic] the window.

When the call came in to the alley and we left I was very nervous but when they said they thought it was electrical I said nothing. Insurance started to pay & everything seemed fine.

Then we got arrested & it was said there was flammable chemicals. Since there wasn't [sic] any used-just the candle I lit above & below the desk I was confused. I didn't know what to think or do right then.

I really never thought it would go all the way thru [sic] a trial let alone come back guilty on both of us.

I couldn't say anything in the court room because I owed it to Richard to explain it to him first.

He knew nothing about any of this until the night of 5-22-02. I couldn't deal with the look on his face anymore. I knew he was innozent [sic]. And didn't deserve to feel the way he was feeling.

I was very selfish and torn between my love for him & my love and need to be closer to my children & grandchildren.

I'm very sorry for putting everyone thru [sic] all this, especially Richard.

(continued...)

directly contrary to the earlier finding that defendant was criminally culpable and at least arguably consistent with other evidence available, certainly “makes a different result probable on retrial.” *Id.* at 692.

I do not reach this conclusion lightly. As noted by the Supreme Court of Connecticut, requests for a new trial on the basis of newly discovered evidence must be closely examined so that we do not “render judgments of conviction unduly susceptible to collateral attacks, thereby giving insufficient weight to the state’s legitimate interest in finality.” *Shabazz v State*, 792 A2d 797, 806 (Conn, 2002). Nonetheless, in the appropriate case, we must not impede “the [defendant’s] legitimate interest in establishing that a wrongful conviction does not stand.” *Id.* This is one of those cases where “the newly discovered evidence is sufficiently credible and of such a nature that, in order to avoid an injustice, a second jury, rather than the trial court should make the ultimate assessment of credibility.” *Id.*

I would reverse and remand for a new trial at which Gilbertson’s confession could be considered by the fact finder.

/s/ Richard A. Bandstra

(...continued)

I prayed to God and this is what my conscience told me to do. To take responsibility for my actions and tell the truth. Start somewhere!

I’m attaching this to the back of my evaluation form.