

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KATHERINE SUE DENDEL, a/k/a KATHERINE
SUE BURLEY,

Defendant-Appellant.

FOR PUBLICATION

August 24, 2010

No. 247391

Jackson Circuit Court

LC No. 02-002915-FC

Advance Sheets Version

ON SECOND REMAND

Before: BORRELLO, P.J., and SAAD and WILDER, JJ.

WILDER, J. (*concurring*).

I concur in the result reached by the majority. I write separately to address the majority's conclusion that defendant's failure to object, on Confrontation Clause grounds, to the testimony of Dr. Michael Evans, founder, president, chief executive officer, and director of operations at AIT Laboratories,¹ was reasonable given the then existing state of the law and that, therefore, fundamental fairness requires that we treat this issue as though it had been properly preserved.

"Due process requires fundamental fairness, which is determined in a particular situation first by 'considering any relevant precedents and then by assessing the several interests that are at stake.'" *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993), quoting *Lassiter v Dep't of Social Servs*, 452 US 18, 25; 101 S Ct 2153; 68 L Ed 2d 640 (1981); see the observation in 16B Am Jur 2d, Constitutional Law, § 948, pp 448-449 ("That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, and thus violative of due process may, in other circumstances and in the light of other considerations, fall short of such denial."). "This Court has said that due process considerations include not only (1) the nature of the private interest at stake, but also (2) the value of the additional safeguard, and (3) the adverse impact of the requirement upon the Government's interests." *United States v Ruiz*, 536 US 622, 631; 122 S Ct 2450; 153 L Ed 2d 586 (2002).

¹ In this regard, Dr. Evans was more than a mere toxicologist at AIT.

The majority first concludes that under *Melendez-Diaz v Massachusetts*, 557 US ___; 129 S Ct 2527; 174 L Ed 2d 314 (2009), the statements concerning the toxicological testing performed at AIT Laboratories and, in particular, the glucose levels obtained as a result of the testing, were testimonial in nature and that, therefore, Dr. Evan’s testimony concerning the testing violated defendant’s Sixth Amendment right to confront witnesses. I agree. The majority then concludes that “fundamental fairness” requires retroactive application of the rights of confrontation provided by the Confrontation Clause as a remedy for the violation, so that defendant’s posttrial objection to the offending statements on Confrontation Clause grounds must be treated as having been made at trial and preserved, even though it actually was not.

I respectfully disagree that fundamental fairness requires imposition of the legal fiction proposed by the majority.

First, although defendant certainly has an interest in confronting the incriminating statements against her, there is little probative value to defendant in treating the Confrontation Clause objection as preserved, even though it actually was not, because there was more than sufficient other evidence, to which no credible challenge has been made, in support of the trial court’s finding that defendant was guilty of second-degree murder, MCL 750.317, beyond a reasonable doubt. In other words, treating the admission of the statements as something other than plain error, as we did in our previous opinion,² makes no demonstrable difference insofar as the outcome of the case is concerned.

Second, the interests of the people of the state of Michigan³ are impaired by limiting, through a legal fiction, the consideration of evidence that the prosecution might have been able to “properly” introduce by other means had it been placed on notice to consider doing so with a contemporaneously raised objection.⁴ In this regard, like the prosecutor (as well as the defense counsel and the circuit judge) so eloquently defended by Justice BLACK in his concurring opinion in *People v Shirk*, 383 Mich 180, 198-200; 174 NW2d 772 (1970), the prosecutor in the instant case was a vigorous advocate, within the rules as they then existed, in seeking and obtaining defendant’s conviction of second-degree murder. In my judgment, it would not accord with due

² *People v Dendel (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued September 11, 2008 (Docket No. 247391).

³ These interests are not expressly acknowledged by the majority in its fundamental-fairness analysis.

⁴ The Supreme Court has observed:

“It is the duty of the public prosecutor to see that the person charged with crime receives a fair trial, so far as it is in his power to afford him one, and it is likewise his duty to use his best endeavor to convict persons guilty of crime; and in the discharge of this duty an active zeal is commendable, yet his methods to procure conviction must be such as accord with the fair and impartial administration of justice” [*People v Bahoda*, 448 Mich 261, 266 n 6; 531 NW2d 659 (1995), quoting *People v Dane*, 59 Mich 550, 552; 26 NW 781 (1886).]

process, on the facts of this particular case, to retroactively apply a Confrontation Clause analysis to the laboratory evidence as though proper, contemporaneous objections had been made.

I join the majority in affirming, but I would leave to another day the question regarding under what circumstances fundamental fairness requires the retroactive application of *Melendez-Diaz v Massachusetts*. I respectfully submit that this is not that case.

/s/ Kurtis T. Wilder