# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 17, 2009 |
| v | No. 286701<br>Wayne Circuit Court |
| KEITH BERNARD SMITH,<br><br>Defendant-Appellant. | LC No. 08-003328-FC |

Before: Shapiro, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree felony murder, MCL 750.316(b), and assault with intent to rob while armed, MCL 750.89. We affirm.

Defendant's convictions arose as the result of the death of Annette Ralston. An autopsy revealed Ralston died of a combination of multiple stab, incised, and blunt force wounds, with the most immediate cause of death likely being a severing of her left carotid artery. Defendant had been acquainted with the victim for a period of a few weeks prior to her death and he was often seen at her residence. The victim's 15-year-old son and the victim's roommate both testified that defendant was present in the victim's home the evening before her body was discovered.

At trial, two witnesses familiar with defendant testified that he had arrived at their home a few days after the murder. At some point during their conversation, defendant told both witnesses that he had done a very bad thing and eventually admitted that he had killed a woman as part of a robbery attempt. Both witnesses testified that defendant provided details of the murder, including that he had used a knife and had driven the victim's son to his foster home prior to the murder. The latter assertion was confirmed by the son at trial.

Defendant first argues that the trial court erred in denying his motion for a new trial or an evidentiary hearing to examine whether jurors had considered extraneous information when rendering a verdict. We disagree. "[A] trial court's decision whether to hold an evidentiary hearing is reviewed for an abuse of discretion," *People v Unger* (*After Remand*), 278 Mich App 210, 216-217; 749 NW2d 272 (2008), as is the court's resolution of a motion for new trial, *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). A trial court abuses its discretion when its decision falls outside the principled range of outcomes. *Unger*, *supra* at 217.

A criminal defendant is entitled to a fair and impartial jury. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). However, once a jury has been polled and discharged, its verdict cannot be impeached with a juror affidavit or testimony regarding mistakes or misconduct inherent in the verdict unless the affidavit or testimony relates to "extraneous or outside errors, such as undue influence by outside parties." *Id*. at 91. Our Supreme Court set forth a two-part test to determine whether external or extrinsic influences affected a verdict, whereby a defendant must first establish that the jury was exposed to extraneous influences and then must show that those influences created a real and substantial possibility of affecting the jury's verdict. *Id*. at 88-89. Generally, proof of the second part of the test includes a "demonstrat[ion] that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict." *Id*. at 89. If a defendant meets his burden, the plaintiff must show "that the error was harmless beyond a reasonable doubt." *Id.*

In the instant case, following the jury's verdict, but prior to sentencing, one juror contacted defense counsel and stated that he had changed his vote from not guilty to guilty based on discussions related to the penalty it was believed defendant would receive. Defendant asserts that the jury's consideration of penalty constituted an extraneous influence. Plaintiff counters that consideration of penalty was admittedly improper, but cannot be the basis for a new trial because it was part of the deliberative process.

Consideration by the jury of any possible punishment that would result from a given verdict is extraneous to the verdict in that it is beyond the evidence adduced at trial. However, expanding the concept of extraneous influence to include discussions of possible punishment stemming from a verdict is at odds with the general thrust of case law, which attempts to draw a distinction between errors or misconduct that are inherent in the deliberative process and outside corruption impacting that process:

> [T]he distinction between an external influence and inherent misconduct is not based on the location of the wrong, e.g., distinguished on the basis whether the "irregularity" occurred inside or outside the jury room. Rather, the nature of the allegation determines whether the allegation is intrinsic to the jury's deliberative process or whether it is an outside or extraneous influence. [*Id.* at 91.]

Here, there has been no allegation that a party outside the jury panel approached a member of the jury and provided information on a possible sentence. As plaintiff concedes (and the court so instructed), jurors should not let any possible punishment influence the deliberative process. However, although consideration of potential punishment "is contrary to [the jury's] responsibilities," as clearly outlined by the court, it is not the result of "conduct by others which contaminates the jury process with extraneous influence." 6 LaFave & Israel, Criminal Procedure (3d ed), § 24.9(f), p 525. Cf. *United States v Logan*, 250 F3d 350, 380-381 (CA 6, 2001) (concluding that pursuant to FRE 606(b),[1] "potentially premature deliberations . . .

[1] Michigan has no comparable evidentiary rule.

constituted a potential internal influence on the jury"). Further, the possible penalty for conviction has no bearing on whether the evidence presented at trial could establish each of the necessary elements of the charged crimes. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial or evidentiary hearing to further explore the issue. *Unger, supra* at 217.

Defendant next argues the trial court denied him a fair trial by denying the jury's request for a transcript of the testimony of three witnesses. We disagree.

About one hour after the jury began deliberation, the trial court received a note from the jury requesting a copy of the testimony of several witnesses. The trial court advised the parties' counsel:

> Counsel[,] we have received a note from the jury indicating that they would like a copy of the testimony of several different witnesses. At this juncture, I need to instruct them that it is anticipated they would use their collective memories and a transcript is not immediately available.

Defendant's counsel did not object, but stated, "Thank you, Judge." The trial court then called in the jury and informed it as follows:

> Members of the jury, I am in receipt of your note which says: Can we have a copy of [certain] . . . testimony.
>
> I have to tell you that at this juncture you cannot. As you see, the court reporter is taking down testimony, and . . . those sheets of paper are a shorthand form that would not tell you much. The testimony is being taken down in shorthand so a transcript would take some time, and it is not immediately available.
>
> It is anticipated that the twelve jurors would use their notes and their collective memories of twelve people to recall and use the testimony that was heard during the trial. I would ask you to return to the jury room and do so.

Defense counsel made no statements after the instruction was given.

Our first question is whether defendant waived or merely forfeited this issue based on his counsel's response. In *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000), our Supreme Court held that where defense counsel states that he is "satisfied" with the trial court's instruction refusing a jury's request for transcripts, that affirmance constituted waiver and extinguished any error. As noted, defense counsel made no objection either after the trial court indicated what instruction it intended to give, or after the instruction was given. Although he stated, "Thank you, Judge" after the trial court indicated the instruction it intended to give, we decline to find that this is an endorsement or agreement with the instruction as it is commonplace for counsel to say "thank you" after a trial court has announced a ruling, regardless of whether counsel agrees with the ruling. Therefore, this issue is merely forfeited, rather than waived.

To avoid forfeiture, defendant bears the burden to show that plain error occurred and that it affected defendant's substantial rights and resulted in the conviction of an innocent person or seriously affected the fairness or integrity of the judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The decision whether to allow a jury to examine transcript testimony is left to the sound discretion of the trial court. *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996). MCR 6.414(J) provides as follows:

> If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

Defendant argues the trial court's response effectively foreclosed any possibility of the jury conducting a review of the testimony. While the trial court did not provide the testimony requested, the remarks above indicate that this refusal was not absolute. Instead, the trial court noted that the testimony was not "immediately available" and the request could not be accommodated "at this juncture." See *People v Holmes*, 482 Mich 1105, 1106; 758 NW2d 262 (2008) (Markman, J. concurring) (Concluding that the trial court did not foreclose the possibility of having testimony reviewed at a later time because "the trial court's decision was clearly provisional because it made clear that the only reason it was denying the request 'at this juncture' was because a transcript was not 'yet' available.").

Even assuming that the judge's instruction constituted plain error, defendant has failed to prove that the error affected his substantial rights. Contrary to defendant's assertion, prejudice is not presumed and automatic reversal is not required. "[T]he plain error rule of *Carines*, *supra*, has superceded the automatic reversal rule of *People v Smith*, 396 Mich 109; 240 NW2d 202 (1976)." *People v Tucker*, 469 Mich 903; 669 NW2d 816 (2003). Having failed to show any prejudice, let alone outcome determinative error, we conclude that this issue is forfeited. *Carines*, *supra*; *Carter*, *supra*.

We also reject defendant's argument that the trial court should have offered to have the requested testimony read to the jury as equally unpersuasive. Defendant did not request that such an action be taken, nor has he has provided citation to authority is support of his position. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998).

Defendant also argues there was insufficient evidence to support his convictions. After considering the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could find that the essential elements of the crime were proven beyond reasonable doubt. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). All conflicts in the evidence must be resolved in the favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Defendant's argument focuses solely on the evidence identifying him as the perpetrator. Identity is an essential element of any crime. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Defendant specifically argues his convictions cannot stand because the only evidence linking him to the victim's death was the testimony of two witnesses saying that he had admitted to killing a woman during a robbery attempt. Defendant does not challenge the admissibility of this testimony and admits that it is circumstantial evidence of identity, but asserts that it is insufficient in light of the absence of any physical evidence to link him to the crime.

It is well established that circumstantial evidence and the reasonable inferences it engenders are sufficient to support a conviction, provided the prosecution meets its burden of proof. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). While the officer in charge of this case conceded at trial that there was no physical evidence to link defendant to the crime, the two witnesses testified that defendant had admitted killing a woman as part of a robbery attempt. The fact that defendant was convicted indicates that the jury found these witnesses credible. This Court, working from a written transcript, should not second-guess the jury's credibility determinations. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). Taken as a whole, and viewed in the appropriate light, the evidence presented below and the reasonable inferences stemming from that evidence was sufficient to support defendant's convictions. *Hawkins*, *supra* at 457.

Finally, we see no merit in defendant's unpreserved argument that the trial court erred in allowing jurors to question witnesses at trial. The trial court explained during its initial instructions that the jury would have the opportunity to ask questions after the witness had finished testifying and that any question would have to be written down and reviewed by the trial court prior to being submitted to a witness. Throughout the trial, this procedure was enforced. This procedure was consistent with MCR 6.414(E), and case law, see, e.g., *People v Heard*, 388 Mich 182, 187-188; 200 NW2d 73 (1972). Moreover, we note that defendant did not object to any of the jury's questions at trial, which undermines his assertion that it was reversible error for the court not to allow counsel to screen the questions before being asked. Defendant cannot establish that an error occurred, much less one that affected his substantial rights. *Carines*, *supra* at 767.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Jane M. Beckering