STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 19, 2009
v	No. 285370 Otsego Circuit Court
TROY WILLIAM CARPENTER, Defendant-Appellant.	LC No. 07-003810-FC

Before: Borrello, P.J., and Whitbeck and K.F. Kelly, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b)(*i*) (actor in same household as victim), and one count of second-degree CSC (CSC II), MCL 750.520c(1)(b)(*i*) (actor in same household as victim). He was sentenced to serve a prison term of 13 to 40 years on the CSC I convictions and a concurrent term of 7 to 15 years for CSC II. For the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

Defendant first argues that the trial court erred in failing to grant defendant a new trial after it was discovered that a dismissed alternate juror was present during a portion of the jury deliberations. This Court reviews a decision to grant or deny a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

After the trial, but before jury deliberations began, the court chose an alternate juror and then excused her. The trial judge told the alternate juror, "You're free to stay if you like…whatever's your pleasure and I appreciate your willingness to serve." The jury began deliberations around 10 a.m., however, around noon, it was discovered that the alternate juror had been sitting in during the deliberations and that she had misconstrued the judge's statement to mean that she could sit in during deliberations. After being informed that she could not participate in deliberations, the alternate juror left the courthouse before she could be questioned by the trial court as to whether she participated in the deliberations. However, the trial court did question the jurors collectively as to whether the alternate juror had participated in deliberations. The transcript indicates that jurors (in the plural) stated, "No." After an interjection by the court, the jurors continued, "No. She wanted to. She did want to. She just kept quiet as a mouse." The trial judge instructed the jury that if she had said anything, the jury is to disregard it. At about 3 p.m. the jury returned with a verdict.

Defendant relies on *People v Knapp*, 42 Mich 267, 269-270; 3 NW 927 (1879), where our Supreme Court granted a new trial after it was discovered that a court officer was present during jury deliberations, even though there was no evidence that he spoke. In *Knapp*, the defendant was being prosecuted for adultery. Our Supreme Court was concerned that the presence of the officer could have an impact on the juror's deliberations, such that the jurors may feel compelled to reach a particular result or may feel constrained in what they can state in the presence of a court officer. Our Supreme Court was also concerned that a court officer overhearing jury deliberations was not bound by the same oath of a juror to keep and maintain the confidences of the deliberations creating another myriad of potential problems. Our Supreme Court held in *Knapp* that the officer's presence was sufficient to justify a new trial. The emphasis of the ruling in *Knapp* was that due to the nature of his job, a court officer's presence in the jury room would create, among other problems, a chilling effect on jury deliberations, by stating: "We have said enough already to show that it is not conversation alone that is mischievous; the mere presence of the officer within the hearing of the jury is often quite as much so. In one case what he would say might influence the verdict; in another, what his presence might restrain jurors from saying, might accomplish the same result." *Id*. at 271-272. Defendant also cites *People v Chambers*, 279 Mich 73, 79-81; 271 NW2d 556 (1937), where our Supreme Court reversed a conviction because a court officer was present several times during jury deliberations and admitted talking to the jurors briefly.

The cases cited by defendant in his brief are distinguishable from the facts presented to us in this appeal. The individual in the room during part of the jury's deliberations was not an officer of the court, and absent an offer of proof by defendant, we presume that the alternate was a member of the general public. Consequently, the basis for our Supreme Court's decisions in *Knapp* and *Chambers* are not present in this case. Rather, the case we find applicable to the facts presented in this appeal is *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993). *Olano* answered the question whether the presence of alternate jurors during deliberations mandated reversal by ruling that "the ultimate inquiry" in a case such as this is whether "the jury's deliberations and thereby its verdict" were impacted by the intrusion into the privacy of the jury room. *Id*. at 727. The Supreme Court went on to state:

> There may be cases where an intrusion should be presumed prejudicial, but a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury's deliberations and thereby its verdict? . . . The question, then, is whether the instant violation of Rule 24(c) prejudiced respondents, either specifically or presumptively. In theory, the presence of alternate jurors during jury deliberations might prejudice a defendant in two different ways: either because the alternates actually participated in the deliberations, verbally or through 'body language'; or because the alternates' presence exerted a 'chilling' effect on the regular jurors . . . . Conversely, 'if the alternate in fact abided by the court's instructions to remain orally silent and not to otherwise indicate his views or attitude . . . and if the presence of the alternate did not operate as a restraint upon the regular jurors' freedom of expression and action, we see little substantive difference between the presence of [the alternate] and the presence in the juryroom of an unexamined book which had not been admitted into evidence.'

> Respondents have made no specific showing that the alternate jurors in this case either participated in the jury's deliberations or 'chilled' deliberation by the regular jurors . . . . On this record, we are not persuaded that the instant violation of Rule 24(c) was actually prejudicial. *Id*. at 739-740.

As in *Olano*, defendant has "made no specific showing that the alternate[] either participated in, or 'chilled' the jury's deliberations." *Id*.; *Smith v Phillips*, 455 US 209, 217; 71 L Ed 2d 78, 102 S Ct 940 (1982) the United States Supreme Court summarized the jurisprudence of juror intrusion by stating:

> Due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. . . . It is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. *Id*. at 217. See also, *Olano*, *supra* at 738.

In this case the jurors were asked if the alternate had participated in jury deliberations. They collectively responded that she did not participate in deliberations. Furthermore, the trial court then instructed the members of the jury to disregard any remarks the alternate juror may have made. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, in the absence of any evidence that the presence of the alternate juror had a chilling effect on the jury's deliberations or its verdict, we find that defendant has failed to establish that he has been prejudiced by the presence of the alternate juror during part of the jury's deliberations. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Defendant next argues that the trial court erred in admitting complainant's prior consistent statements through the testimony of two witnesses. We review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1990). Reversal is warranted if defendant shows that he was actually innocent or that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of his innocence. *Id.*

Although hearsay is generally inadmissible, MRE 802, a statement "consistent with the declarant's testimony [that] is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive" is not hearsay and therefore admissible. MRE 801(d)(1)(B). Whether proffered evidence satisfies this exemption is left to the discretion of the trial court. *People v Harris*, 160 Mich App 301, 305; 272 NW2d 635 (1978).

In *People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000), this Court adopted the following test applied in *United States v Bao*, 189 F3d 860, 864 (CA 9, 1999) for offering prior consistent statements:

> "(1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper

> influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose."

Defendant's argument is focused on testimony provided by the complainant's friend, Natalie Bajaras, and Darcy Schiller, a school counselor, regarding the complainant's statements to them about the sexual contact. In relevant part, Bajaras testified as follows:

> *Q*. Okay. Did she ever discuss with you her relationship with her mother's ex-boyfriend?
>
> *A*. Yes.
>
> *Q*. Okay. And do you know that person to be Troy Carpenter?
>
> *A*. Yes.
>
> *Q*. Based on those conversations that you had with her, did you ever make any recommendations to her?
>
> *A*. Yes.
>
> *Q*. And what where those recommendations?
>
> *A*. I told her she, ah, should go talk to our school counselor, Mrs. Schiller. I gave her a card that had a sexual assault hotline number on it . . . so she could talk to somebody. I even told her to go to her mother or call the cops, just in general.

Defendant also objects to a statement by Schiller in which she testified in response to a query on how she met the complainant by stating that the complainant "came into my office to tell me that she had been sexually abused by Troy Carpenter."

Defendant asserts on appeal that the complainant fabricated her allegations against defendant after defendant broke off his relationship with her mother, the point at which the motive to fabricate arose. Therefore, he argues, because the statements to Bajaras and Schiller were made after the motive to falsify arose, the evidence failed to satisfy the requirements of MRE 801(d)(1)(B) and *Jones*.

The testimony provided by Bajaras did not recount a prior statement by the complainant. Instead, she simply responded in the affirmative when asked if the complainant discussed with her the complainant's relationship with defendant. Thus, Bajaras statement does not qualify as a prior consistent statement by the complainant. As for the statement by Schiller, while it did recount a prior consistent statement made by the complainant, the testimony was unresponsive to the prosecutor's question regarding how the counselor met the girl. Additionally, Schiller did not elaborate on the statement or recount anything else that the complainant told her with respect

to defendant. Moreover, defense counsel made clear on cross-examination that Schiller had no personal information regarding the allegations of sexual abuse other than what the complainant had told her. Under the circumstances, and given the weight of the evidence adduced, particularly that of the complainant, defendant has not established that his substantial rights were impacted. See *People v Rodriguez* (*On Remand*), 216 Mich App 329, 332; 549 NW2d 359 (1996).

Next, defendant argues that he received ineffective assistance of counsel due to his trial counsel's failure to request a mistrial upon the discovery of the dismissed juror's presence during jury deliberations and his failure to object to the admission of the alleged prior consistent statements. The right to effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996).

> Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms. Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different. [*People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005) (citations omitted).]

Regarding the alternate juror, as discussed above, there is no evidence that the dismissed juror participated in the deliberations or that her mere presence had a chilling effect on the jury's deliberations or its verdict. Accordingly, since there was no showing on appeal that defendant had been prejudiced by the alternate juror's presence during part of the deliberations, there would have been no showing of prejudice if the issue had been raised immediately after it was discovered. Accordingly, the court did not err in denying the motion for a new trial, nor can counsel be faulted for failing to bring a motion for mistrial predicated on the same argument that failed on appeal. See *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). As for the alleged instances of bolstering the complainant, we have concluded that the testimony of Bajaras did not amount to improper bolstering, and the isolated and unresponsive remark offered by Schiller did not impact the proceedings. Counsel cannot be faulted for failing to bring a meritless motion for mistrial predicated on the same argument. *Id*.

Lastly, defendant contends that the cumulative errors in this case deprived him of a fair trial. The cumulative effect of several minor errors can warrant reversal even when the individual errors would not. *People v Unger*, 278 Mich App 210, 258; 749 NW2d 272 (2008). However, "[i]n making this determination, only actual errors are aggregated to determine their cumulative effect." *People v LeBlanc*, 465 Mich 575, 592 n 12; 640 NW2d 246 (2002) (citation and internal quotation marks omitted). We have concluded that none of the alleged errors previously raised has merit under the relevant rules of appellate review. Moreover, defendant failed to establish with respect to the one new argument raised here—that a new trial is warranted because the complaint violated a sequestration order—that he sustained the requisite prejudice. See *People v King*, 215 Mich App 301, 309; 544 NW2d 765 (1996).

Affirmed.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly