

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANGELO MARTIN ESPINOZA,

Defendant-Appellant.

UNPUBLISHED

June 7, 1996

No. 193716

LC No. 92-006220-FC

ON REMAND

Before: Hood, P.J., and Sawyer and Reilly, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit murder, MCL 750.83; MSA 28.278, conspiracy to commit same, MCL 750.157a; MSA 28.354(1), carrying a concealed weapon in a motor vehicle, MCL 750.227; MSA 28.424, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He thereafter pleaded guilty to being an habitual offender, third offense, MCL 769.11; MSA 28.1083. He was sentenced as an habitual offender to prison terms of eighteen to thirty years for each assault and conspiracy conviction, and five to ten years for carrying a concealed weapon, plus a consecutive two-year prison term for felony-firearm. We now review defendant's case on remand from our Supreme Court. In our original opinion, we found that the evidentiary issues raised by defendant had not been properly preserved and affirmed his convictions. On remand, our Supreme Court directed this Court to consider the substance of defendant's claims. After consideration of the errors asserted by defendant we find no cause for reversal and affirm.

Defendant's convictions arise from the shooting of John O'Valle in the early morning hours of March 31, 1991. On the night of March 30, 1991, O'Valle was out drinking with defendant, Mike Guzman, and several others. O'Valle ended up in the same truck as Guzman and defendant. Defendant drove to an isolated wooded area and asked Guzman "Is this good?" Guzman indicated that it was. O'Valle and Guzman then got out of the truck to urinate. According to Guzman, defendant handed him a pistol as he got out of the truck. O'Valle turned around, and defendant told Guzman to

shoot. Guzman shot O'Valle once, and O'Valle fell and rolled into a ditch. Guzman tried to shoot a second time, but the pistol jammed. O'Valle heard defendant say "get him" and O'Valle fled the scene.

The prosecutor argued that defendant arranged to have Guzman shoot O'Valle because O'Valle had an affair with defendant's girlfriend. Defendant argued that Guzman had acted entirely on his own in shooting O'Valle.

Mike Guzman testified for the prosecution at trial as part of a plea and sentence agreement. On direct examination the prosecutor questioned Guzman regarding the terms of the plea and sentence bargain he had reached with the prosecutor. Under the plea bargain, Guzman's minimum sentence would not exceed ten years, and he would be required to take and pass a polygraph test upon request. The following exchange took place:

[Prosecutor:] And is it your understanding that even after today you may be subjected to a polygraph examination?

[Guzman:] Yes, sir.

[Prosecutor:] And should you fail it, there would be no agreement between yourself and the People, right?

[Guzman:] Yes, sir.

[Prosecutor:] Are you confident if you were to take a polygraph examination you would be able to pass it?

[Guzman:] Yes.

Defense counsel objected to this last question and answer as speculative. The trial judge sustained the objection, and immediately instructed the jury to disregard any comments regarding a polygraph examination.

Before trial, defense counsel moved to preclude any references to defendant's prior convictions or the fact that defendant was on parole at the time of the shooting. The trial judge ordered that defendant's prior record not be mentioned, and directed both lawyers not to ask questions which might involve defendant's criminal record without first approaching the bench.

On direct examination, the prosecutor asked O'Valle whether he had ever seen defendant's handwriting. O'Valle replied that he had seen letters written by defendant to his girlfriend, and that the letters had defendant's name and return address on them. The prosecutor asked O'Valle if he knew defendant's return address, and O'Valle replied that it was 208 South Harrison. 208 South Harrison is the address of the Saginaw County jail, although that fact was not mentioned in the jury's presence.

On direct examination, Guzman testified that the pistol used in the shooting belonged to defendant, that defendant gave it to him when they got out of the truck to urinate, and that he returned it to defendant after shooting O'Valle. On cross-examination, defense counsel elicited that Guzman told the detective that Guzman usually had the gun and that he was carrying the gun at a bar earlier in the evening. Guzman replied that he was just holding it for defendant. Defense counsel asked Guzman whether he was holding the gun in order to shoot anyone who might attack defendant. Guzman replied, "No." Defense counsel then asked, "Well, if you weren't going to use the gun, Mike, why would you carry it"? Guzman replied, "Because he couldn't carry it because he was on parole."

Defendant subsequently moved for a mistrial based on the same evidentiary issues raised in this appeal. The trial judge denied defendant's motion for a mistrial. The trial judge noted that defense counsel's cross-examination of Guzman invited the answer regarding defendant's parole status and found that the jurors would not recognize the address given by O'Valle as that of the county jail. The judge did offer to give a curative jury instruction to disregard any reference to defendant's parole status. The trial judge found that any prejudicial effect caused by mentioning the agreed-to polygraph test would be cured by his instruction to the jury to disregard the reference to the polygraph, and stated that he would reiterate that instruction later.

I.

Defendant first argues that his convictions must be reversed due to the prosecutor's questioning Guzman regarding a polygraph examination. We find no cause for reversal.

It is well established that the results of polygraph tests are not admissible as evidence at trial. *People v Ray*, 431 Mich 260, 265; 430 NW2d 626 (1988); *People v Barbara*, 400 Mich 352, 364; 255 NW2d 171 (1977). Injection of polygraph test results into evidence ordinarily requires reversal of the resulting conviction. *People v Smith*, 211 Mich App 233, 234-235; 535 NW2d 248 (1995). However, reference to a polygraph examination at trial does not always constitute error requiring reversal. *People v Rocha*, 110 Mich App 1, 9; 312 NW2d 657 (1981). Five factors should be considered to determine whether reversal is required:

- (1) whether defendant objected and/or sought a cautionary instruction;
- (2) whether the reference was inadvertent;
- (3) whether there were repeated references;
- (4) whether the reference was an attempt to bolster a witness's credibility; and
- (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. *Id.*

In *Rocha*, this Court reversed the defendant's conviction where the prosecutor repeatedly referred to a witness' willingness to take a polygraph test, finding:

The prosecutor's purpose in bringing up the polygraph reference was plainly to bolster Ms. Overmyer's testimony with her willingness to take a polygraph examination. Further, the jurors might easily infer that the police took up Ms. Overmyer on her offer and that she was given and passed a polygraph test. Moreover, since credibility was a critical issue at trial, we can hardly discount the possible impact of these references upon the jurors' deliberations. *Id.* at 9-10

Review of the prosecutor's questions show that he intentionally brought up Guzman's willingness to take a polygraph test in order to bolster Guzman's credibility. However, unlike the references in *Rocha*, there was little danger that the jury would infer that Guzman had already taken and had passed a lie detector test; the questions clearly referred to a theoretical polygraph test that Guzman could be called upon to take in the future. Test results were not admitted, nor was it implied that Guzman had passed a polygraph test. Defendant's trial counsel objected to the speculative nature of these questions below, and the trial judge immediately instructed the jury to disregard any comments regarding a polygraph. Although this was an improper line of questioning, any unfair prejudice was cured by the trial judge's timely instruction to the jury.

II.

Defendant argues that his convictions must be reversed because Guzman, the prosecutor's witness, mentioned that defendant was on parole at the time of the shooting. Defendant complains that the prosecutor improperly failed to instruct Guzman not to mention defendant's parole status, and that this reference denied him a fair trial. We disagree.

On cross-examination, defense counsel repeatedly demanded that Guzman explain why he was carrying a pistol that reportedly belonged to defendant. Defense counsel apparently pursued this line of questioning in order to suggest that the pistol belonged to Guzman rather than defendant, and to create doubt regarding Guzman's credibility. This tactic backfired. As the trial judge pointed out, the objectionable answer was directly responsive to defense counsel's questioning. Even if the prosecutor had instructed Guzman not to reveal that defendant had a prior criminal record, defense counsel invited Guzman's answer through his repeated questioning. Defendant may not obtain reversal of his conviction by reliance upon an error caused by his own trial counsel. *People v Lipps*; 167 Mich App 99, 108; 421 NW2d 586 (1988); *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991)..

III.

Finally, defendant argues that the trial judge erred by failing to grant his motion for a mistrial. Defendant argues that he was entitled to a mistrial based upon the cumulative effect of the evidentiary errors discussed above combined with O'Valle's answer indicating that defendant had been residing in the county jail. We affirm the trial court's decision denying the requested mistrial.

The grant or denial of a mistrial is within the trial court's discretion, "and there must be a showing of prejudice to the defendant's rights if error requiring reversal is claimed." *People v McAlister*, 203 Mich 495, 503; 513 NW2d 431 (1994); *People v Gonzales*, 193 Mich App 263, 265 483 NW2d 458 (1992),. To require reversal, "[t]he trial court's ruling must be so grossly in error as to deprive a defendant of a fair trial or to amount to a miscarriage of justice." *McAlister, supra*, at 503.

The trial judge did not abuse his discretion by denying defendant a mistrial. As pointed out by the trial judge, O'Valle's reference to defendant's address at 208 South Harrison was not an obvious reference to defendant's prior incarceration, because it was highly unlikely that any of the jurors would know the address of the county jail. The prosecutor's references to a proposed polygraph test for Guzman, although improper, do not require reversal for the reasons stated above. Any prejudicial effect was cured by the trial judge's prompt instruction to disregard any reference to a polygraph. Defendant's own trial counsel elicited the reference to defendant's parole status. Moreover, any resulting prejudice due to this reference could have been cured by an appropriate jury instruction, which the trial judge was willing to give at defense counsel's request. Defendant has not shown unfair prejudice to his rights. He was not denied a fair trial, nor did the denial of a mistrial result in a miscarriage of justice.

Affirmed.

/s/ Harold Hood

/s/ David H. Sawyer

/s/ Maureen Pulte Reilly