

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WAYNE NINO BROWN,

Defendant-Appellant.

UNPUBLISHED

September 27, 1996

No. 178359

LC No. 93-008238

Before: Gribbs, P.J., and Young and W. J. Caprathe,* JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and sentenced to twenty to forty years' imprisonment for the murder conviction, to be served consecutive to a two-year term for felony-firearm. Defendant appeals his conviction and sentences as of right. We affirm.

The jury heard more than 3 ½ days of witness testimony, followed by lengthy closing arguments. After deliberating for two days, the jury sent a note to the trial judge informing her that because of one juror the jury could not reach a verdict. According to the note, the juror was a Jehovah Witness and, because of her religious beliefs, could not determine defendant's guilt. The juror was discharged and replaced with an alternate. Defendant asserts that this constituted reversible error. We disagree.

This Court reviews a trial court's decision to remove a juror for an abuse of discretion. *People v Dry Land Marina*, 175 Mich App 322, 325; 437 NW2d 391 (1989). We will find an abuse of discretion only when we determine that the trial court's decision was "so grossly violative of fact and logic that it defies reason and amounts to passion or bias. *Id.* at 326, citing *Spalding v Spalding*, 355 Mich 382, 384; 94 NW2d 810 (1959). Jeopardy attaches to a criminal defendant once the jury is impaneled and sworn. *Id.* at 325, citing *United States v Jorn*, 400 US 470, 479, 484; 91 S Ct 547; 27 L Ed 2d 543 (1981); *People v Gardner*, 37 Mich App 520, 526; 195 NW2d 62 (1972). Discharge of the jury, before it reaches its final verdict, with neither the defendant's consent nor legal

* Circuit judge, sitting on the Court of Appeals by assignment.

justification operates to dismiss the charges and bars retrial. *Gardner, supra* at 526. Where, after deliberations have begun, a juror is replaced by a discharged alternate, a defendant's conviction need be reversed only where the defendant has been prejudiced by the procedure. *Dry Land Marina, supra* at 329.

The *Dry Land Marina* Court opined that, in light of the requirements that courts consider viable alternatives to declaring a mistrial and that mistrial must be exercised with great caution: "it may be concluded that the policy of protecting [a] defendant's right to have its case decided by the jury as chosen is protected by avoiding a mistrial if reasonable alternatives exist." *Dry Land Marina, supra* at 327. That Court also noted that a defendant's right to a trial by a fair and impartial jury is not violated when an alternate juror is recalled during deliberations and substituted for a juror excused by the court. *Id.* at 328-329. Thus, the procedure employed by the trial court in the instant case does not per se require reversal. However, it must be determined whether defendant was prejudiced by the procedure.

Defendant asserts that he was prejudiced by the trial court's failure to question the excused juror regarding her inability to make a decision and its failure to instruct the jury to begin deliberations anew. We disagree.

Although the excused juror was not questioned regarding her inability to determine defendant's guilt, we conclude that such questioning was unnecessary. The juror indicated that her religious beliefs prohibited her from sitting in judgment of others. This clearly was a satisfactory reason for the trial court's excusing her.

The *Dry Land Marina* Court indicated that the most substantial violation of the federal and state court rules regarding the discharge of alternate jurors "is that the alternate joining a panel which has engaged in deliberations may be coerced and unduly influenced by those jury members who have already formed an opinion." *Id.* at 329. Defendant correctly notes that the judge did not instruct the jury to begin its deliberations from scratch. However, no objection or request was made by the defendant to further instruct the jury and, upon receiving its verdict, the court polled the jury to determine whether each juror found defendant guilty. Defendant was also apparently satisfied with the polling of the jury. There is no evidence that defendant was prejudiced by the substitution of the alternate for the excused juror. The trial court did not abuse its discretion in taking this alternative to declaring a mistrial.

In addition, the evidence against the defendant was overwhelming. On the night of the killing, the victim had been arguing with defendant's friend. Thereafter, defendant's friend gave defendant a handgun. In defendant's statement to the police, which was received at trial, he said that he had a long-running feud with the victim and he waited in the alley behind the victim's house with the pistol until the victim pulled into his driveway. When the victim got out of his car, he shot him.

The jury deliberated approximately two hours after the replacement of the juror and returned a verdict of guilty to the lesser offense of second degree murder and felony firearm, rather than the charged offense of first-degree murder and felony firearm. There was no reasonable possibility that a

more favorable verdict would have been returned if the jurors had been instructed to begin anew; and any error was harmless.

Defendant next challenges his sentence as disproportionate. A trial court has the discretion to sentence a defendant, but that sentence must be proportionate to the seriousness of the circumstances of the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). A sentence within the recommended guidelines' range is presumed proportionate, but a defendant may present evidence of unusual circumstances to rebut that presumption. *People v Tolbert*, 216 Mich App 353, 356; ___ NW2d ___ (1996).

Defendant's sentence of twenty-five to forty years' is within the guidelines range of ten to twenty-five years. It is therefore presumed proportionate. We are not persuaded that because defendant's background includes only one prior felony conviction that the trial court abused its discretion in sentencing him at the high end of the guidelines.

Affirmed.

/s/ Roman S. Gibbs
/s/ Robert P. Young, Jr.
/s/ William J. Caprathe