

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DELON EMERSON MCCULLEN,

Defendant-Appellant.

UNPUBLISHED

April 8, 1997

No. 190323

Recorder's Court

LC No. 95-003579

Before: Jansen, P.J., and Reilly and W.C. Buhl*, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), and from his sentence of two concurrent terms of fifteen to thirty years of imprisonment. We reverse.

I.

Defendant argues that the trial court abused its discretion when it denied his motion for a new trial. We agree.

The decision whether to grant new trial is within the trial court's discretion and will not be reversed on appeal absent a clear abuse of that discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993). A new trial may be granted on all or some of the issues when the substantial rights of a party were materially affected and there was an irregularity in the proceedings of the court, jury, or prevailing party, or an order of the court or abuse of discretion that denied the moving party a fair trial. MCR 2.611(A)(1)(a).

In this case, a tape of a call made by the complainant to 911 was admitted at trial for the purpose of allowing the jury to hear the conversation between the complainant and the 911 operator. At sentencing, defense counsel informed the court that conversations she had with two of the jurors

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

revealed that, when the jurors were replaying the tape during deliberations, they were able to detect a conversation between defendant and his mother, which the court, defense counsel and the prosecutor did not know existed. In the conversation with his mother on the tape, defendant indicates to his mother that he engaged in oral sex with the complainant. At an evidentiary hearing on defendant's motion for new trial, several of the jurors confirmed that they heard the statement made by defendant on the tape.

A fundamental aspect of a defendant's constitutional right of confrontation is the idea that a jury's verdict be based on evidence produced at trial and not on extraneous information that has escaped the rules of evidence, not come under the supervision of the court and has bypassed other procedural safeguards. *State v Lyles*, 94 NC App 240, 247; 380 SE2d 390, 394 (1989), citing *Parker v Gladden*, 385 US 363, 364; 87 SCt 468 ; 17 L Ed 2d 420(1966) and *Turner v Louisiana*, 379 US 466, 472-473; 85 SCt 546 ; 13 L Ed 2d 424 (1965). A jury must determine the facts of the case from the evidence received at trial. *People v Schmidt*, 196 Mich App 104, 108; 492 NW2d 509 (1992). Consideration of extraneous information that was not properly admitted during the trial is improper because such information is not subject to objection, cross-examination, explanation or rebuttal. *State v Balisok*, 123 Wash 2d 114, 118; 866 P2d 631, 633 (1994). Such consideration is grounds for a new trial when there is a showing of prejudice. *People v McCre*a, 303 Mich 213, 265-266; 6 NW2d 489 (1942). See also, *People v Clark*, 220 Mich App 240; ___ NW2d ___ (1996) (unexplained presence of packets of cocaine found by jury during deliberations in an exhibit held to be an error so offensive to the maintenance of a sound judicial system that it could never be considered harmless.)

In this case, when the jury replayed the tape and heard the background conversation between defendant and his mother, the jury considered evidence that was not intended to be or known to be a part of the record. The inadvertent "viewing" of this evidence was prejudicial in light of defendant's trial testimony. At trial, defendant admitted propositioning the complainant and stated that she agreed to have sexual relations with him. However, defendant denied having any sexual contact with the complainant at his mother's home. Left unexplained, defendant's statement to his mother recorded on the tape refutes defendant's trial testimony.

The prosecution argued, and the trial court agreed, that reversal is not required because the 911 tape in its entirety could have been admitted. Even if the tape in its entirety were admissible, because defense counsel was unaware that this conversation was discernible on the tape, she did not have an opportunity to formulate a strategy to handle this critical piece of evidence nor did defendant have an opportunity to offer the jury an explanation of the statement that can be heard on the tape. We are of the opinion that the jury's access to the background conversation on the tape requires reversal and a new trial. *People v Talley*, 56 Mich App 598, 601; 224 NW2d 660 (1974).

II.

Although the remaining issues raised by defendant are moot, we will briefly address those issues that may be pertinent to defendant's retrial.

The portion of the tape of the 911 call in which the complainant can be heard talking with the 911 operators was admissible as an excited utterance, MRE 803(2) and was adequately authenticated. *People v Berkey*, 437 Mich 40; 467 NW2d 6 (1991). The probative value was not substantially outweighed by the danger of unfair prejudice.

Defendant contends that the trial court erred in failing to issue attempt and second-degree criminal sexual conduct instructions to the jury. The instructions for lesser offenses are necessarily dependent upon the specific evidence presented at trial. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991). The evidence presented at defendant's retrial will likely vary from that presented at his first trial. It would be pointless for us to speculate about which lesser offenses will be sufficiently supported by the evidence so as to require an instruction from the court.

Defendant also argues that the trial court abused its discretion when it allowed one of the police officer's to vouch for the credibility of the complainant by characterizing the incident as a "rape" and to identify defendant as the "perp." On retrial, it would be preferable for the officer to refer to the "alleged rape" and the "alleged perp" to avoid the possibility that the jury would interpret the statements as an expression of the officer's opinion as to the credibility of the complainant or the guilt of the accused.

Reversed.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ William C. Buhl