

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS SCOTT PALMER,

Defendant-Appellant.

UNPUBLISHED

May 26, 2005

No. 253408

Iron Circuit Court

LC No. 03-008361-FH

Before: Murray, P.J., and O’Connell and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a third habitual offender, MCL 769.11, to seven to twenty years’ imprisonment for the assault conviction and a consecutive two year term for the felony-firearm conviction. We affirm.

At the time of the shooting, the victim was the boyfriend of defendant’s estranged wife. After a series of confrontational and increasingly belligerent telephone calls on the night of the assault between defendant and the victim, defendant drove to the home the victim shared with defendant’s estranged wife, broke out the kitchen window, and fired a shot into the home. The bullet struck the victim in the arm. Defendant claimed that he went to the victim’s home only after the victim had threatened to harm defendant’s children. The victim denied this charge. Evidence was adduced at trial that both men had been drinking heavily on the night of the shooting.

Defendant first argues that the trial court erred in its handling of defendant’s challenge to the last juror seated. Defendant’s assertion of error involves two subissues, namely that the trial court abused its discretion in denying his challenge for cause and his subsequent request for an additional peremptory challenge. Defendant argued that the juror should be dismissed for cause because of her familiarity and friendship with the prosecutor pursuant to MCR 2.511(D)(3) (bias for or against a party or an attorney). A trial court’s ruling on a challenge for cause based on bias is reviewed for an abuse of discretion. *People v Roupe*, 150 Mich App 469, 474; 389 NW2d 449 (1986). In *Poet v Traverse City Osteopathic Hospital*, 433 Mich 228, 241; 445 NW2d 115 (1989), our Supreme Court set forth a test to determine whether an error in refusing a challenge for cause merits reversal. The test requires a showing that “(1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party

demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse was objectionable.” *Id.* The *Poet* test was applied by this Court in the criminal context in *People v LeGrone*, 205 Mich App 77, 81-82; 517 NW 2d 270 (1994).

The *Poet* test was announced and applied, however, in circumstances where the improper failure to remove a juror for cause resulted in the use of a peremptory challenge that “otherwise would have been available to remove the last juror from the panel.” *LeGrone, supra* at 81; also see *Poet, supra* at 233. *Poet* was concerned with identifying an error that warranted reversal (“actionable prejudice”). Such an error, *Poet* indicated, exists when a party is improperly forced to use up its peremptory challenges and then is unable to peremptorily strike an objectionable subsequent juror. *Poe, supra*, at 240-241. Here, unlike *Poet*, defendant had used all of his peremptory challenges when the juror in issue was called. Thus, the *Poet* analysis does not apply. Rather, resolution of this issue is controlled by *People v Eccles*, 260 Mich App 379, 382-383; 677 NW2d 76 (2004):

Although, as a general matter, the determination whether to excuse a prospective juror for cause is within the trial court’s discretion, once a party shows that a prospective juror falls within the parameters of one of the grounds enumerated in MCR 2.511(D), the trial court is without discretion to retain that juror, who must be excused for cause.^[1]

Defendant’s argument fails because he is unable to show that the challenged juror “falls within the parameters” of MCR 2.511(D). *Eccles, supra* at 382-383. MCR 2.511(D)(3) provides that grounds for challenging a juror for cause exist if the juror “is biased for or against a party or attorney.” On *voir dire* the juror assured the court that she could be impartial despite her relationship with the prosecutor. She affirmed that she would hold the prosecutor to his burden of proof and would have no difficulty rendering a verdict of not guilty if the prosecutor failed to meet this burden. Moreover, given the trial court’s superior position to assess credibility, we defer to its conclusion that the juror was “a person of absolute integrity” who would have admitted any potential problem if it existed. See *People v Williams*, 241 Mich App 519, 522; 616 NW2d 710 (2000).

We also reject defendant’s assertion that the court abused its discretion and erred in denying his request for an additional peremptory challenge pursuant MCR 6.412(E)(2) so that he could remove the juror. *People v Howard*, 226 Mich App 528, 536; 575 NW2d 16 (1997). MCR 6.412(E)(2) provides, “on a showing of good cause, the court may grant one or more of the parties an increased number of peremptory challenges”. The record reveals that the potential juror was questioned at length by all counsel and independently by the trial court. After *voir dire* and out of the presence of the jury, on his motion for an additional peremptory challenge, defense counsel conceded that, “[e]ven though the relationship may not rise to the level of cause challenge, we believe that simply for the sake of insuring a pristine verdict. . . . we be allowed to

¹ See *People v Lamar*, 153 Mich App 127, 134-135; 395 NW2d 262 (1986) (“Such a showing is equivalent to bias or prejudice at common law.”).

use it on her.” The trial court evaluated the impartiality of the proposed juror on the basis of the *voir dire* and declared her “a person of absolute integrity.” The trial court found no hint of unacceptability in the proposed juror. The *voir dire*, although extensive, did not suggest any hostility by the juror with either counsel or the court. In defendant’s plea for a “pristine verdict” he failed to articulate any reason to be suspicious of the juror or the verdict. To establish that good cause exists for an additional peremptory challenge, defendant must make some demonstrable showing of potential unfairness to the defendant by or in the process of selection. This he has failed to do.

Defendant also asserts that the trial court abused its discretion in admitting other acts evidence that while intoxicated on prior occasions, defendant intentionally assaulted others including male friends of defendant’s ex-wife. To be admissible under MRE 404(b), other acts evidence must be offered for a proper purpose, must be relevant, and its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). If such evidence is admitted, a limiting instruction must be provided on request. *Id.*

“When other acts are offered to show intent, logical relevance dictates only that the charged crime and the proffered other acts ‘are of the same general category.’” *People v VanderVliet*, 444 Mich 52, 79-80; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). Here, defendant was charged with going over to the victim’s residence, breaking out a kitchen window, and shooting the victim while defendant was intoxicated. Defendant claimed that he shot the victim to protect his kids and that the shooting was an accident. In point of fact, the victim and defendant’s ex-wife were in a relationship. The admitted prior acts demonstrated that when defendant became intoxicated he used assaults to resolve domestic conflicts against his ex-wife, and, sometimes with deadly force, against her male companions. The proffered other act is of the same general category as the charged act. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000); *VanderVliet, supra* at 79-80. The fact that defendant previously assaulted someone while intoxicated, without having done so in defense of others, is logically relevant to show that defendant was acting with the requisite intent in the case at hand. Further, the probative value of this testimony was not substantially outweighed by its prejudicial effect. *Knox, supra* at 509. Accordingly, the trial court did not abuse its discretion in admitting the challenged evidence. See *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

We also reject defendant’s assertion that he was deprived of his right to a fair trial by an alleged coercive atmosphere created by the court during the jury’s deliberations. “Claims of coerced verdicts are reviewed case by case, and all the facts and circumstances, including the particular language used by the trial court, must be considered.” *People v Vettese*, 195 Mich App 235, 244; 498 NW2d 514 (1992). Because this issue was not preserved, our review is for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 764-765; 587 NW2d 130 (1999).

After the close of proofs, the jurors began their deliberations at approximately 4:30 p.m. and returned with a verdict at approximately 8:30 p.m. Considering all of the circumstances, we conclude that the trial court’s failure to offer the jurors a dinner break or inform them that they could resume deliberations on another day does not constitute plain error. There is simply no evidence of coercion. Indeed, despite sending out three notes requesting further instruction on

several issues, the jury never indicated to the court that it wanted to discontinue deliberations. Unlike the trial court in *People v Malone*, 180 Mich App 347; 447 NW2d 157 (1989), this trial court did not send the jury the message, either directly or by implication, that it would be discharged if the jurors failed to reach a verdict on the evening deliberations began. See *id.* at 353. We also reject defendant's unreserved assertion² that defense counsel was ineffective for failing to raise the matter with the court.

Affirmed.

/s/ Christopher M. Murray

/s/ Peter D. O'Connell

/s/ Pat M. Donofrio

² Defendant failed to preserve his claim of ineffective assistance of counsel by setting forth the issue in his statement of questions presented. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).