

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAWAN TYNER,

Defendant-Appellant.

UNPUBLISHED

June 10, 2008

No. 277149

Wayne Circuit Court

LC No. 06-007375-01

Before: Zahra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Pursuant to MCL 769.11, defendant was sentenced as a third habitual offender to concurrent prison terms of 22 to 40 years for the second-degree murder conviction, 10 to 20 years for the assault-with-intent-to-commit-murder conviction, and one to five years for the felon-in-possession conviction. He was sentenced to a consecutive prison term of two years for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court abused its discretion by not allowing defense counsel to voir dire the potential jurors. We disagree.

A trial court's decision regarding the scope and conduct of voir dire is reviewed for an abuse of discretion. *People v Washington*, 468 Mich 667, 674; 664 NW2d 203 (2003). "A defendant does not have a right to have counsel conduct the voir dire." *Id.* The scope and conduct of voir dire—including the participation of counsel—is within the discretion of the court. MCR 6.412(C)(1) and (2). A court abuses its discretion if it does not adequately question jurors regarding potential bias in order to enable the parties to make intelligent challenges. *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994). Further, a defendant must generally show actual prejudice by the presence of a particular juror in order to be entitled to relief. *Washington, supra* at 675.

Defendant claims that the trial court prevented him from adequately ascertaining potential bias or prejudice among the potential jurors. The trial court, however, invited the attorneys to submit questions for voir dire to the court. Defense counsel submitted no questions to the court. The trial court engaged in a significant colloquy with the prospective jurors

regarding the issue of identification—the only issue about which defendant expressed a concern. Defendant raised no concerns during this colloquy and expressed satisfaction with the impaneled jury. We cannot conclude that the trial court’s conduct of voir dire resulted in any actual prejudice to defendant when defendant did not even avail himself of the opportunities that he was given.

Defendant next argues that the trial court improperly instructed the jury after it returned from deliberations without a unanimous verdict. We disagree.

Defendant did not preserve this issue for appeal because, although he moved for a mistrial, he did not object to the jury instruction. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003); see also MCR 2.516(C). Thus, we review this issue for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

After the jury’s verdict was initially read, the jurors were polled and eight jurors expressed that they did not agree with the verdict. The trial court instructed the jurors that a verdict must be unanimous and that, if they were unable to agree, they were required to inform the court. The court then proposed to send the jurors back for further deliberations. During this process, one juror indicated to the court that there was confusion regarding the alternative charges of first-degree and second-degree murder. The court clarified that the jury was required to decide whether defendant was (1) not guilty of murder, (2) guilty of first-degree murder, *or* (3) guilty of second-degree murder. The jury then resumed deliberating and returned its verdict shortly thereafter.

Defendant argues that the judge’s supplemental instructions to the jury substantially departed from the standard jury instructions for a deadlocked jury, CJI2d 3.12.¹ There is no evidence, however, that the jury was actually deadlocked in this case. The jurors did not claim to be unable to reach a verdict. Instead, they were merely confused concerning the alternative murder counts as written on the verdict form. Indeed, the jurors indicated that they had a verdict, but in the reading of the verdict, their confusion became apparent. Defendant never suggested at the time that the court should give the deadlocked-jury instruction. It was not plain error for the court to address the jury’s confusion without reading the standard deadlocked-jury instruction.

Defendant also claims that the court’s statement that the verdict had to be unanimous was coercive, essentially suggesting that the jury was *required* to return a verdict. Our Supreme Court has concluded that the test for whether a departure from standard instructions is substantial is, at its core, an analysis of whether the instruction was coercive. *People v Pollick*, 448 Mich 376, 386; 531 NW2d 159 (1995); *People v Hardin*, 421 Mich 296, 316; 365 NW2d 101 (1984).

¹ CJI2d 3.12 provides, in part: “You have returned from deliberations, indicating that you believe you cannot reach a verdict. I am going to ask you to please return to the jury room and resume your deliberations in the hope that after further discussion you will be able to reach a verdict. As you deliberate, please keep in mind the guidelines I gave you earlier.”

The trial court's supplemental statement that the jury's verdict must be unanimous was not coercive. The court's correct statement of the law was given in response to the jury's confusion and was itself a part of the standard jury instructions. See CJI2d 3.11(3); see also CJI2d 3.12(2). Further, defendant completely ignores the judge's statement that the jury was required to inform the court if it could not reach an agreement. We perceive no error in this regard.

Lastly, defendant argues that he was improperly scored 25 points for offense variable 13, MCL 777.43(1)(b), which addresses "a pattern of felonious criminal activity." However, as defendant concedes in his brief on appeal, even without these 25 points his minimum guidelines range would have remained the same. If on appeal it appears that the guidelines were incorrectly scored but that the correct score would not change the recommended guidelines range, remand for resentencing is not required. *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003).

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen