

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
January 15, 2013

v

CARL JESSE HOUGH,  
Defendant-Appellant.

No. 302132  
Wayne Circuit Court  
LC No. 06-008265-FH

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Before: RONAYNE KRAUSE, P.J., and SERVITTO and SHAPIRO, JJ.

SHAPIRO, J. (*dissenting*).

I must respectfully dissent because the trial court improperly reopened proofs after the jury had been instructed and had already begun deliberations. The majority cites *People v Keeth*, 193 Mich App 555; 484 NW2d 761 (1992) for the principle that a trial court has discretion to reopen proofs. That is surely the case—so long as the jury has not already begun its deliberations. *Keeth*, like all the other cases establishing this principle involved a reopening of proofs before the jury was instructed and began deliberations. An extension of this discretion from before deliberations to during deliberations is a change in kind, not merely a change in degree and one which I believe undermines the sanctity of jury deliberations.

The prosecution’s brief, recognizing that there was no authority for the proposition that proofs could be reopened during deliberations, argued that the trial court was merely allowing the jury another view of the defendant’s chest that had been shown during the trial. If this were the case, I would find no error as it would, like a reread of testimony, not constitute new proofs. However, the record reveals that this was not the case. The defendant’s bare chest was viewed by the jury during the cross-examination of one of the police officers concerning identification. The officer’s report had noted that the perpetrator had old chest scarring that the officer saw while questioning him in the hospital. Defense counsel asked defendant to “pull up your shirt” and asked the officer if he saw any such scarring on defendant. The officer replied that he did not. The prosecution did not ask the court to have defendant take off his shirt, or show his shoulders nor did he ask the police officer in redirect whether the officer may have been mistaken about the location of the scar. The prosecution did not seek to call any other witnesses as to the defendant’s scarring. Defense counsel reminded the jury of this discrepancy in closing argument when he said to the jury: “You had an opportunity to look at Mr. Hough’s chest. There was nothing on that chest. Nothing.” During his closing arguments, the prosecutor did not

suggest that the jury had not had a good view nor that the scarring may have been on parts of the defendant's torso that were not visible when he merely pulled up his shirt.

The jury retired to deliberate at 11:48 a.m. and the judge sent the exhibits into the jury room immediately thereafter. At 2:42 p.m. the jury sent a note to the judge that read: “Can we see [defendant] to observe [lacerations]?” and another note that read: “Can we see three facial lacerations and the gunshot wound left arm and right hip?”<sup>1</sup> The court initially stated “you can show them back what was already introduced,” but then directed that the defendant take off his shirt entirely. Defense counsel objected that the jury had only been shown his chest and to require defendant to take off his shirt completely would also display his shoulder which the jury had not been shown during trial. The court then stated “I don’t care if the shoulders are shown or not . . .” but then again stated that the defendant’s “whole shirt and everything from the waist up can be removed as far as I’m concerned.” The significance of the jury now seeing defendant’s shoulder for the first time was not lost on the prosecutor who during discussion of a request for testimony to be reread stated, “I have a strong belief that once the defendant—once the jury sees the defendant without his shirt on that they probably will not need that testimony [reread].”

I agree that the defendant’s shoulder scarring was powerful evidence of identity and guilt. Had the prosecutor asked the court to require defendant to remove his shirt completely during proofs in light of his voluntary removal of it partway, it would have been proper to require it. Indeed, had the prosecution requested that proofs be reopened prior to deliberations for that purpose, I would agree that it was proper. It would also have been wholly proper for the prosecutor to read from the admitted medical records if they indicated shoulder rather than chest scarring.

Unfortunately, however, none of these occurred. Proofs were closed; the jury was instructed and had retired to deliberate. After three hours of deliberations they asked to observe portions of defendant's body that they had not been shown during trial and that they had not asked to see during trial. I am not aware of any law that provides for admission of new proofs during jury deliberations and such a procedure undermines the sanctity of jury deliberations upon which our system most fundamentally relies. I would therefore reverse and remand for a new trial.

/s/ Douglas B. Shapiro

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<sup>1</sup> While we cannot know for certain why the jury asked to see these particular areas of defendant's body, I agree with the majority that the most likely explanation is that the jury, in possession of defendant's medical records, saw that such wounds had been described therein.