

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
June 3, 2014

v

JASON JOSEPH RICHARDSON,  
  
Defendant-Appellant.

No. 313743  
Roscommon Circuit Court  
LC No. 12-006589-FH

---

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

BOONSTRA, J. (*dissenting*).

I respectfully dissent from the majority’s finding of jury coercion, and from its resulting reversal and remand for new trial. My reasons are set forth in Part I below, following which I address the remaining issues not addressed by the majority.

I. SUPPLEMENTAL JURY INSTRUCTIONS

Although the trial court strayed at times from the verbiage of the American Bar Association (ABA) standard jury instruction 5.4 as incorporated into CJI2d 3.12, I do not find it to be a “substantial departure,” *People v Sullivan*, 392 Mich 324, 342; 220 NW2d 441 (1974), such as to have been “unduly coercive,” *People v Pollick*, 448 Mich 376, 386; 531 NW2d 159 (1995), given the totality of the circumstances.

Our Supreme Court in *People v Hardin*, 421 Mich 296; 365 NW2d 101 (1985), emphasized that the test for determining whether a departure was substantial was not one of “language, style or syntax.” *Id.* at 314. Rather:

The instruction that departs from ABA standard 5.4 must also have an undue tendency of coercion—*e.g.*, could the instruction given cause a juror to abandon his conscientious dissent and defer to the majority solely for the sake of reaching agreement? [*Id.*]

See also *Pollick*, 448 Mich at 386 (“The teaching of *Hardin* is that an instruction on this subject requires reversal only if it has an ‘undue tendency of coercion,’ not if it merely fails to contain the same words as the ABA standard.”). Our Supreme Court further reiterated in *Hardin*, 421 Mich at 316, that:

The optimal instruction will generate discussion directed towards the resolution of the case but will avoid forcing a decision. If the instruction given can cause a juror to abandon his conscientious dissent and defer to the majority solely for the sake of reaching agreement, then that charge should not be used. [Citation and quotation marks omitted.]

The focus, therefore, is on whether the departure from the language of ABA standard 5.4 has an *undue* tendency to *coerce* or *force* a juror to abandon his conscientious dissent.

While this case presents a judgment call on which reasonable minds may differ, I am not convinced, given the totality of the instructions and circumstances, that the trial court's instructions in this case fail under that test, so as to establish plain error. *People v Vaughn*, 491 Mich 642, 654; 821 NW2d 288 (2012). In finding otherwise, the majority properly does not find the trial court's first supplemental instructions to be unduly coercive, but instead focuses primarily on the trial court's second supplemental instructions. Even then, the majority acknowledges, citing *Hardin*, that most of the trial court's "smattering of improper instructions" were "followed by proper instructions that dissipated, in part, the harm caused by the instructions, see *Hardin*, 421 Mich at 318." Further, while the majority correctly articulates for consideration relevant factors that can be suggestive of instructional coercion, most of those factors are not implicated by the trial court's instructions in this case. For example, the trial court here did not "require[], or threaten[] to require, the jury to deliberate for an unreasonable length of time or for unreasonable intervals." *Hardin*, 421 Mich at 316. It also did not fail[] to inform the jury that its deliberations can continue on a subsequent day if the jurors are unable to reach agreement." *People v Malone*, 180 Mich App 347, 350-352; 447 NW2d 157 (1989). To the contrary, it repeatedly advised the jury that it could deliberate for a reasonable period of time on the first afternoon of deliberations and, absent a verdict, could continue to deliberate the next day or the following Monday.

The majority concludes that, by referencing the jurors' "oath," the trial court "called for the jury, as part of its civic duty, to reach a unanimous verdict," citing *Hardin*, 421 Mich at 316 and *People v Goldsmith*, 411 Mich 555, 561; 309 NW2d 182 (1981). However, those cases did not address references by a trial court to juror "oaths," but instead addressed instructions that "contain[] the message that the failure to reach a verdict constitutes a failure of purpose." *Id.* At no time did the trial court in this case convey such a message. Moreover, I do not read the text or context of trial court's references to the jurors' "oath" as indicative of a civic duty to reach a unanimous verdict, but rather, quite properly, of an obligation "to rethink your own views and change your opinion if you decide it was wrong," to "reexamine your positions and think, look at things," but that "none of you should give up your honest beliefs about the weight of the evidence only because of what your fellow jurors think or only for the sake of reaching agreement." None of that is improper.

That leaves us with the following two considerations: (1) whether the language employed by the trial court included "pressure, threats, embarrassing assertions, or other wording that would cause this Court to feel that" the trial court's instructions were coercive. *Id.* at 315 (citation and quotation marks omitted); and (2) the "length of time" the jury spent deliberating after it was given the instruction. *People v Bookout*, 111 Mich App 399, 403; 314 NW2d 637 (1982). As to the former, the trial court in this case did not threaten the jury in any way. While

there naturally was an element of pressure in the trial court's instructions, such pressure is inherent in the nature of the type of instruction in question. In fact, in *Hardin*, our Supreme Court recognized that "in [*Goldsmith*], this Court impliedly recognized that even ABA instruction 5.4 was somewhat coercive." *Hardin*, 421 Mich at 313 (citation omitted). The question, therefore, is whether the trial court's instructions were of such a "coercive" character that they "can cause a juror to abandon his conscientious dissent and defer to the majority solely for the sake of reaching agreement." *Id.* at 316. Read in their totality, particularly in light of the trial court's repeated reiterations that jurors should not give up their honest beliefs solely to reach agreement, I would not find the trial court's instructions to have been "coercive" of precisely the opposite result. As one juror summarized the trial court's reiterations, "That says it all."

As to the length of time factor, the jury deliberated for approximately three hours before the trial court gave its first supplemental instruction, and for approximately another 2 and one-half hours before the trial court gave its second supplemental instruction. The majority thus properly focuses only on the subsequent 23 minute time period between the second supplemental instruction and the jury verdict. While indeed that time period was relatively short, I do not find it alone to be conclusive of "coercion." As the majority recognizes, evidence of significant deliberations occurring after jury instruction can *negate* a finding of coercion. See, e.g., *Bookout*, 111 Mich App at 403-404; *People v Rouse*, 272 Mich App 665, 676; 728 NW2d 874 (2007) (Jansen, J., dissenting), reversed *People v Rouse*, 477 Mich 1063 (2007). However, we should not reflexively find the converse, i.e., that a short period of deliberations necessarily demonstrates "coercion" in the jury instructions. There must be something more to establish such "coercion."

The majority posits that at the time of the second supplemental instructions, "Juror D indicated that the jury was still deadlocked." Further, it characterizes the second supplemental instructions as containing the "most coercive instructions" that "ended with improper coercive language in the form of embarrassing or shaming the jury for being deadlocked." I disagree.

First, Juror D never indicated that the jury was "still deadlocked," nor did any other juror. In fact, at no time during its deliberations did the jury ever indicate that it was deadlocked. At the time of its first supplemental instructions, the trial court principally was addressing a substantive jury note regarding an evidentiary issue. The trial court then took it upon itself, perhaps ill-advisedly, to give its first (and later its second) supplemental "deadlocked jury" instructions, noting "I see a scribbled-out 'we are.' And I assume that that means you're going to say we are deadlocked." But the words "we are," and the scribbled-out nature of that portion of the jury note, in no way suggest that the jury was deadlocked. If anything, even assuming that the words "we are" related to the status of the jury's deliberations, the scratched-out nature of that portion of the note demonstrates that the jury was *not* prepared to say that it was deadlocked. Moreover, the trial court delivered its second supplemental instructions without *any* inducement by *any* jury note, nor did any juror indicate, during any of the colloquy with the court, that the jury was deadlocked. In my view, therefore, the trial court needlessly and prematurely gave supplemental instructions that may never have been necessary. That it did so, however, and did so imperfectly, does not make them "coercive."

Juror D merely asked the following question:

*Juror D:* Judge, I have got a question. If we can't come to a decision, because some of us can't make our mind—our minds up, should we change our mind just so we can get out of here tonight or—

Juror D thus suggested *not* that the jury was deadlocked, but rather than some of the jurors had not yet been able to make up their minds. In response to Juror D's query, the trial court emphatically and properly reiterated that the jurors should not give up their own beliefs or change their mind simply to reach agreement.

Further, the trial court ended its second supplemental instructions not with "improper coercive language in the form of embarrassing or shaming the jury for being deadlocked," but rather with the following proper and non-coercive instruction:

Each one of you should look into your own mind, look into your conscience, and think.

So go back in the jury room. Let me know whether you want to continue to deliberate until 5:00 or you want to go home now. Either makes no difference.

That the jury returned a verdict 23 minutes after the second supplemental instructions does not, in my view, and under these circumstances, compel a conclusion that the jury instructions were coercive. While I do not view the instructions as a model to be emulated, they did not in their totality exhibit such an "undue tendency of coercion" as could "cause a juror to abandon his conscientious dissent and defer to the majority solely for the sake of reaching agreement." *Hardin*, 421 Mich at 314. Rather, I would find that the inducement to reach a verdict, particularly where, as here, jurors indicated an inability to decide (rather than deadlock), more likely emanated from the pressures that are inherent in the jury deliberative process, than from the trial court's instructions.

Accordingly, I dissent, and would hold that the trial court's instructions were not coercive and plainly erroneous. Because I would so hold, I will briefly address defendant's remaining arguments that were not addressed by the majority.

## II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that his trial counsel rendered ineffective assistance by failing to object to the trial court's supplemental jury instructions. The Sixth Amendment to the United States Constitution and Article I, § 20 of the Michigan Constitution guarantee the right to effective assistance of counsel for criminal defendants. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To establish that his counsel did not render effective assistance and therefore that he is entitled to a new trial, "defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009), quoting *People v Solomonson*, 261 Mich App 657, 663; 683 NW2d 761(2004). When determining whether counsel's performance fell below an objective standard of

reasonableness, defense counsel is given “wide discretion” to decide questions of “trial strategy.” *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012). “This Court will not substitute its judgment for that of defense counsel or review decisions with the benefit of hindsight.” *Id.*

Obviously, because I would not hold that the trial court’s instructions coercive, I would not find defense counsel ineffective for failing to raise a futile objection. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Further, defendant’s trial counsel may have believed that the court’s instructions would just as likely result in an acquittal as a guilty verdict. The statements by various jurors could have been seen by counsel as indicating a desire not to be forced into a verdict. For example, the exchange between juror D and the court seems to have been initiated by the juror to get the court to reiterate (perhaps for the benefit of others) that the jurors should not change their beliefs simply because others want to conclude the deliberations. Thus, I would hold that defendant has not overcome the presumption that his trial counsel’s failure to object to the trial court’s supplemental instructions constituted sound trial strategy.

### III. SENTENCING

Finally, defendant argues that he must be resentenced because the probation department failed to produce an accurate pre-sentence investigation report (PSIR) and erroneously indicated that a minimum sentence of 25 years’ imprisonment was required for the home invasion conviction. I disagree.

At sentencing, the prosecution stated:

I believe um the only correction we have to have is I believe there was a premise here that there was going to be a sentence minimum of twenty-five years because of a statute. I believe that’s probably something that the Probation Department was relying on turn outs that the legislature has not determined 750.110 home invasion 1st to be a serious felony for the mandatory minimum twenty-five and so based on that premise I think the recommendation would be inappropriate; however, based on the scoring corrections that we’ve made, it appears that he’s still up to 290 months so.

The trial court calculated defendant’s guidelines range without reference to the erroneous recommendation of a mandatory minimum 25 year sentence, and sentenced defendant to a minimum sentence of 240 months.

Following sentencing, defendant moved the trial court to correct defendant’s sentence and to correct the PSIR, arguing that resentencing was required due to the probation department’s mistaken belief that a 25-year mandatory minimum was required for the home invasion conviction, and the court was required to have a valid recommendation from the probation department. He also argued that reference to a 25-year mandatory minimum should be stricken from the PSIR.

At oral argument, the trial court acknowledged that reference to a 25-year minimum in the original PSIR was mistaken, saying, “[W]e caught that at sentencing.” The court asked, “So what did I do wrong?” Defendant’s counsel responded, “You did so without the benefit of a recommendation from a probation department that’s required statutorily and by court rule to give

you this information, accurate information. The defendant needs to be sentenced on the basis of accurate information.” The trial court replied:

Right but—but you got to understand maybe other judge’s [sic] don’t do it but I look at every PSI before. I check the scoring. I ask counsel to check the scoring and I don’t know if I caught this cuz [sic] I don’t have a transcript of the sentence, I don’t know if I caught it or probation caught it or [the prosecutor] caught it or if the defense attorney caught it but we caught it and we sentenced appropriately. . . . So the sentence was valid. He may have a statutory obligation to provide an accurate report but that’s why we have—I ask the defense attorney if they reviewed it, if there are any corrections, deletions, errors, any challenges to scoring. I ask them the same thing and that’s why I review the PSI and why I do the—check the scoring.

The trial court elaborated:

I come in here I check the scoring. I’ve checked the probation report. I’ve seen their recommendation. If there’s a sentencing memorandum, I’ve read the sentencing memorandum. If the prosecution has a reply to that, I’ve done that. Then I come in here and I ask any challenges, any additions, corrections—have you reviewed it with your client; any additions, corrections, deletions or errors, challenges to scoring? Then I listen to allocution. Then I make my determination.

The trial court agreed to correct the PSIR to strike the recommendation of a 25-year mandatory minimum term of imprisonment, but denied defendant’s motion for resentencing.

I find no error in the trial court’s conduct or reasoning. Defendant argues that MCR 6.425 requires his resentencing. The court rule provides in pertinent part:

(1) Prior to sentencing, the probation officer must investigate the defendant’s background and character, verify material information, and report in writing the results of the investigation to the court. The report must be succinct and, depending on the circumstances, include:

\* \* \*

(k) a specific recommendation for disposition . . . .

Defendant relies primarily on *People v Green*, 123 Mich App 563, 568-569; 332 NW2d 610 (1983), where this Court held that resentencing was required where the probation department failed to make any recommendation in the PSIR. However, in *People v Jackson*, 179 Mich App 344, 352; 445 NW2d 513 (1989), vacated in part on other grounds 437 Mich 866 (1990), this Court held that even an erroneous recommendation is sufficient to fulfill the mandate. The Court also found that the defendant in that case was not prejudiced because “the trial judge was aware of the mistake, knew the applicable alternative sentences to impose, and sentenced defendant accordingly.” *Id.*

This Court is not bound by either *Green* or *Jackson*. MCR 7.215(J)(1). However, I find the rationale of *Jackson* persuasive. In general terms, the purpose of objection at trial or sentencing is to give the trial court the opportunity to correct errors. See *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006). That is precisely what occurred in this case. The trial court was aware of the error at sentencing and stated that it does not “rubber-stamp” recommendations from the probation department but rather arrives at every criminal defendant’s sentence based on an independent review of his or her case. Had the trial court determined that it would have imposed a different sentence if it had been given a lower recommendation, it could have granted defendant’s post-conviction motion. *Green*, 123 Mich App at 568-569, is distinguishable from the instant case because the probation department in *Green* failed to make any recommendation at all in violation of MCL 771.14.

Further, any time the trial court sustains an objection to the scoring of an offense variable or prior record variable that changes the recommended guidelines range, the PSIR is in some respects “invalid” because it contains a recommendation based on inaccurate information. Trial courts are of course empowered to make these corrections at sentencing and proceed to sentence a defendant. See MCL 771.14(6). The trial court in this case similarly was not obliged to order the preparation of a new PSIR, rather than simply proceeding with sentencing as it would in every other case where the PSIR contained errors. I can see no reason to except this case from the general rule of MCL 771.14(6), which allows the trial court to amend an incorrect PSIR at sentencing and strike inaccurate or irrelevant information.

If the sentence imposed on a defendant is within the appropriate sentencing guidelines range, we will affirm the sentence absent an error in the scoring of the guidelines or inaccurate information relied upon in determining the sentence. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). No such error or inaccuracy is present here.

For the above reasons, I respectfully dissent, and would affirm defendant’s convictions and sentence.

/s/ Mark T. Boonstra