

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHON CARL SCHEIDLER,

Defendant-Appellant.

UNPUBLISHED

April 19, 2005

No. 250977

Ogemaw Circuit Court

LC No. 02-002091-FH

Before: Saad, P.J., and Smolenski and Cooper, JJ.

COOPER, J. (*dissenting*).

I respectfully dissent from the majority opinion of my colleagues. Defendant was denied his constitutional right to a fair and impartial jury by the impaneling of juror Burgher. This juror was properly excusable for cause under *People v Daoust*,¹ and would have been excused had she disclosed her actual prior relationship with Jason Kruger during voir dire. Accordingly, I would reverse the trial court's order denying defendant's motion for a new trial and remand for further proceedings.

Ms. Burgher admitted in affidavits submitted after defendant's trial that Mr. Kruger, a participant in the film that is the subject of this case,² was her ex-boyfriend and that he raped her. She admitted that she was afraid of Mr. Kruger and avoids contact with him. She also stated that she broke up with Mr. Kruger because he and his friends were always in trouble, and asserted that Mr. Kruger and his friends once stood outside her place of employment, mocking her. Ms. Burgher's judgment was certainly clouded by her admittedly strong negative feelings about Mr. Kruger and his friends. In fact, Ms. Burgher stated that, if she understood Mr. Kruger's role in defendant's case, she would *not* have said that she could be an impartial juror.

The trial court asked Ms. Burgher how she knew Mr. Kruger. Although the majority states that Ms. Burgher truthfully disclosed that she knew Mr. Kruger, she merely responded that she went to school with the witness in the eighth grade. By her own admission, Ms. Burgher knew Mr. Kruger much more intimately than she indicated. She failed to further elaborate on

¹ *People v Daoust*, 228 Mich App 1, 9; 577 NW2d 179 (1998).

² Although Mr. Kruger is present in the film, he does not participate in any sexual activity.

this relationship when asked if she knew of any reason that she could not be fair and impartial or whether she would give Mr. Kruger's testimony different weight. If these facts had been disclosed during voir dire, the trial court clearly would have excused Ms. Burgher for cause.

This conclusion is unaffected by Ms. Burgher's claim that she failed to disclose accurate information regarding her relationship with Mr. Kruger because she was not questioned in more detail during voir dire. In *People v DeHaven*,³ the Michigan Supreme Court found that the defendant's constitutional right to be tried by a fair and impartial jury was violated when two jurors knowingly withheld relevant information, when directly asked, during voir dire.⁴ Subsequently, in *People v Hannum*,⁵ the Court found that the defendant's rights were violated when a juror failed to disclose that he was a police officer.⁶ "That the lack of disclosure of the pertinent fact can be attributed to failure to expressly ask the prospective juror about it can hardly be thought to have insured an impartial trial. . . ."⁷ Ms. Burgher's failure to disclose highly pertinent information that directly affected her ability to impartially consider Mr. Kruger's participation in the underlying crimes involved in defendant's trial clearly prevented her being excused for cause.

Without regard to the Michigan Supreme Court's explicit holding in *Hannum*, the majority relies on nonbinding caselaw to find that defendant waived his right to challenge the presence of Ms. Burgher on the jury, as his attorney failed to question her further on voir dire. However, as the majority concedes in their analysis of defendant's ineffective assistance of counsel challenge, defense counsel had no reason to suspect that Ms. Burgher had a prior acrimonious relationship with Mr. Kruger. As defendant's trial occurred in a rural area with a small population, it was not unusual that two jurors knew Mr. Kruger. Therefore, Ms. Burgher's limited response likely would not have elicited further questions from a defense attorney. Accordingly, I would find, pursuant to longstanding precedent, that defense counsel's failure to further question Ms. Burgher does not prevent defendant from challenging her presence on the jury.

The majority also finds that defendant was not prejudiced by Ms. Burgher's presence on the jury as Mr. Kruger's role in defendant's trial is "far too tangential" to find prejudice. I disagree. The evidence reveals that Mr. Kruger operated the camera at times, and Mr. Kruger

³ *People v DeHaven*, 321 Mich 327; 32 NW2d 468 (1948).

⁴ *Id.* at 331-334.

⁵ *People v Hannum*, 362 Mich 660; 107 NW2d 894 (1961).

⁶ *Id.* at 666.

⁷ *Id.* at 667.

appears in the film that is the subject of this trial. This young female juror could not have been impartial watching an ex-boyfriend, who raped her, participate in such activities. Accordingly, I would reverse and remand.

/s/ Jessica R. Cooper