

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES ANTHONY RALSTON,

Defendant-Appellant.

UNPUBLISHED
December 6, 2005

No. 253184
Lapeer Circuit Court
LC No. 03-007820-FC

Before: Cooper, P.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree felony murder,¹ assault with intent to commit murder,² armed robbery,³ and possession of a firearm during the commission of a felony.⁴ He was sentenced to two years' imprisonment for the felony-firearm conviction; life imprisonment for the murder conviction; and 35 to 70 years' imprisonment for the assault and robbery convictions. We affirm.

I. Factual Background

Defendant's convictions arose from the shooting of two men during the commission of an armed robbery of a gun store. Around 5:00 p.m. on October 29, 2002, defendant and two other men arrived at the store in two vans. Herman Page stayed outside and acted as look-out; defendant and Jeremy Powell went inside wearing masks.⁵ Mr. Powell testified that he emptied the cash register and took approximately 50 guns and ammunition.⁶ Defendant found the owners of the store, Robert Smith Sr. and Jr., in the back workroom. He ordered the Smiths to lay on the

¹ MCL 750.316(1)(b).

² MCL 750.83.

³ MCL 750.529.

⁴ MCL 750.227b.

⁵ Defendant was tried jointly with Mr. Page, but before separate juries. Mr. Powell testified against the codefendants pursuant to a plea agreement.

⁶ About half of the stolen guns were later recovered from defendant's home.

ground. Defendant shot the senior Mr. Smith twice in the abdomen. Defendant then shot the junior Mr. Smith once in the chest. As the men drove away from the gun shop, defendant instructed Mr. Powell to inform Mr. Page over a walkie-talkie that he had committed a double murder. However, Robert Smith, Jr. survived the shooting and called for help after the assailants left.

II. Ineffective Assistance of Counsel

Defendant first argues that trial counsel was ineffective in failing to move for a change of venue on the basis of pretrial publicity. The trial court denied defendant's motion for a new trial following remand from this Court for a *Ginther*⁷ hearing.⁸ We review a trial court's determination regarding a motion for new trial for an abuse of discretion.⁹ Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise.¹⁰ To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently.¹¹

As a general rule, criminal defendants must be tried in the county where the charged offenses were committed.¹² However, a trial court may order a change of venue "where justice demands or statute provides," including where the defendant cannot receive "a fair trial by a panel of impartial "indifferent" jurors" due to pretrial publicity.¹³ A change of venue is warranted where

[c]ommunity prejudice amounting to actual bias has been found where there was extensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted, and, much more infrequently, community bias has been implied from a high percentage of the venire who admit to a disqualifying prejudice.^[14]

"The existence of pretrial publicity does not by itself require a change of venue."¹⁵

⁷ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

⁸ *People v Ralston*, unpublished order of the Court of Appeals, entered January 4, 2005 (Docket No. 253184).

⁹ *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

¹⁰ *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

¹¹ *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

¹² *People v Jendrzejewski*, 455 Mich 495, 499; 566 NW2d 530 (1997); MCL 600.8312.

¹³ *Jendrzejewski*, *supra* at 501, quoting *Irvin v Dowd*, 366 US 717, 722; 81 S Ct 1639; 6 L Ed 2d 751 (1961).

¹⁴ *Id.* at 500-501, citing *United States v Angiulo*, 897 F2d 1169, 1181-1182 (CA 1, 1990).

¹⁵ *People v Harvey*, 167 Mich App 734, 741; 423 NW2d 335 (1988).

The burden rests on the defendant to demonstrate the existence of actual prejudice or the presence of strong community feeling or a pattern of deep and bitter prejudice so as to render it probable that the jurors could not set aside their preconceived notions of guilt, notwithstanding their statements to the contrary.^{16]}

We first note that 37 potential jurors were questioned during voir dire. Only two stated that they had heard publicity about this case that they could not disregard and were unable to set aside their preconceived opinions. Five other potential jurors stated that they had heard publicity and were unsure whether they could disregard it. Of these seven potential jurors, four were removed for cause and three were removed by peremptory challenge. An additional seventeen potential jurors stated that they had not formed an opinion and could disregard the publicity they had heard to decide the case solely on the evidence. One potential juror was uncertain whether he had heard any pretrial publicity about the case and the remainder affirmatively stated that they had heard none. Of the 14 jurors actually selected, two had never heard of the case and 12 stated that they could set aside any information they heard prior to trial.

Where jurors swear under oath that they can be impartial, the court presumes that they will honor that oath.¹⁷ Even “preconceived notions regarding guilt or innocence” are insufficient to rebut the presumption of impartiality where the juror swears that he or she can set those opinions aside.¹⁸ In this case, less than 20 percent of the potential jurors questioned indicated that they had been permanently influenced by pretrial publicity.¹⁹ Furthermore, all of the jurors actually selected denied having preconceived opinions and swore to set aside any information learned prior to trial.

Defendant also has not established that pretrial publicity so saturated the community that the entire jury pool was tainted. Over a period of 11 months, two local newspapers published 24 articles regarding the current offenses. The trial court determined, following the *Ginther* hearing, that the articles were too few in number to prejudice all potential jurors in Lapeer County against defendant and were not so inflammatory that a change of venue would be required. Following our review of these articles, we do not find that the trial court’s decision amounted to an abuse of discretion. Moreover, there is no indication on the record that defendant was actually prejudiced by the influence of pretrial publicity on the jury pool.

Accordingly, defendant failed to demonstrate that he would have been entitled to a change of venue had defense counsel made such a motion. Counsel is not ineffective for failing

¹⁶ *Id.* at 741-742.

¹⁷ *People v DeLisle*, 202 Mich App 658, 662-663; 509 NW2d 885 (1993).

¹⁸ *Id.* at 665, citing *Murphy v Florida*, 421 US 794, 800; 95 S Ct 2031; 44 L Ed 2d 589 (1975).

¹⁹ Compare *Irvin*, *supra* at 727 (finding a change of venue necessary where 90 percent of the jury venire admitted to having a preformed opinion of the case).

to advocate a meritless position.²⁰ Therefore, defendant has not established that he was denied the effective assistance of counsel.

III. Motion for Mistrial

Defendant also argues that the trial court abused its discretion by denying his motion for a mistrial based on the inadvertent introduction of testimony suggesting that defendant had recently committed other crimes. We review a trial court's decision on a motion for a mistrial for an abuse of discretion.²¹ A mistrial should be granted only where the alleged error is so egregious that its prejudicial effect cannot otherwise be remedied.²²

Defendant moved for a mistrial based on testimony given by Mr. Powell. While no evidence was presented at the current trial regarding other crimes committed by defendant and his accomplices, it appears that the charged offenses were part of a multi-county crime spree. The prosecutor questioned Mr. Powell regarding the trio's plans on October 29. Mr. Powell testified that they originally planned to dispose of the vans in Detroit. He testified that they subsequently decided "[t]hat we were going to do the same thing the next day," referring to a previous armed robbery the trio had committed.

The prosecutor does not deny that this testimony was highly improper. However, "an unresponsive, volunteered answer to a proper question is not cause for granting a mistrial,"²³ unless the prosecutor conspired with, encouraged, or otherwise expected the witness to provide the improper testimony.²⁴ The prosecutor merely asked Mr. Powell to describe the trio's plans in Lapeer County, not to make a connection to any previous wrongdoing. Further, it does not appear from the record that the prosecutor conspired with or encouraged Mr. Powell to offer the improper testimony. The prosecutor immediately refocused Mr. Powell's testimony and the jury heard nothing further about any other offenses. Moreover, upon defense counsel's request, the trial court subsequently instructed the jury to only consider "the evidence of the alleged offenses that the Defendant is charged with." As any potential prejudice from this volunteered testimony was quickly remedied, the trial court properly determined that a mistrial was not warranted.

Affirmed.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello

²⁰ *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

²¹ *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001).

²² *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992).

²³ *Id.* at 266-267, quoting *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988).

²⁴ *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990).