

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 25, 2011

v

EVAN JEROME BURNEY,

Defendant-Appellant.

No. 298620
Oakland Circuit Court
LC No. 2009-229776-FC

Before: MARKEY, P.J., and SAAD and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b, and one count of unarmed robbery, MCL 750.531. The trial court sentenced defendant as a second habitual offender to 15 to 40 years in prison for the CSC I convictions and 7 to 22.5 years in prison for the unarmed robbery conviction. For the reasons set forth below, we affirm defendant's convictions, but vacate defendant's sentence and remand for resentencing.

I. FACTS

The victim in this case claimed that defendant Evan Burney and co-defendant Lance Mahone sexually assaulted her in a hotel room in Southfield. On the night of the incident, the victim was working as a prostitute, and, though she maintains that she declined her services to defendant and Mahone, she testified that Mahone tackled her, defendant and Mahone threatened her life, forced her to perform sexual acts, and stole a laptop computer and her cellular phone.

II. ANALYSIS

A. ALTERNATE JUROR

Defendant argues that the trial court erred when it failed to grant his motion for a mistrial after a juror requested dismissal from the jury. "We review for an abuse of discretion a trial court's decision regarding a motion for a mistrial." *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). This Court also reviews for an abuse of discretion a trial court's decision to replace a deliberating juror with an alternate juror. *People v Tate*, 244 Mich App 553, 562; 624 NW2d 524 (2001). A trial court abuses its discretion only if its decision falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269 666 NW2d 231 (2003).

After closing arguments and instructions, the trial court excused juror number 5 at random and directed him not to discuss the case in the event he would have to return to the jury if something happened to one of the sitting jurors. The jurors deliberated that afternoon and continued their deliberations the next day. On the second day of deliberations, juror Sharon Hicks informed the court that she could no longer serve on the jury. Ms. Hicks told the court that she was having mental difficulties, she had prior mental breakdowns, and she felt as though she was going to suffer another breakdown because of stress. She also disclosed that she was worried about her pregnancy and past problems she has had with stress and pregnancy complications. Ms. Hicks stated that, when initially impaneled, she believed she could put aside her prior experience with a sexual assault in her family, but she found that she was unable to do so. Though the judge and lawyers told Ms. Hicks not to disclose her position about defendant's innocence or guilt, Ms. Hicks stated that, based on her past experiences and views, she did not believe she could be fair and she did not believe she could engage in thoughtful discussions with the other jurors about the case. She further stated that, even if ordered to do so, she could not participate further in the deliberations.

The prosecutor asked the trial court to replace Ms. Hicks with juror number 5, who was excused prior to deliberations. Defendant's counsel argued that Ms. Hicks's assertions suggested that the jury was deadlocked, and he moved for a mistrial. The trial court denied the motions for a mistrial and sat juror number 5 in the jury. As noted, the jury found defendant guilty as charged.

In Michigan, the replacement of jurors is contemplated in both statute and court rule. MCL 768.18 provides, in pertinent part:

Should any condition arise during the trial of the cause which in the opinion of the trial court justifies the excusal of any of the jurors so impaneled from further service, he may do so and the trial shall proceed, unless the number of jurors be reduced to less than 12.

MCR 6.411 addresses the procedures used to seat alternate jurors. The rule provides:

The court may impanel more than 12 jurors. If more than the number of jurors required to decide the case are left on the jury before deliberations are to begin, the names of the jurors must be placed in a container and names drawn from it to reduce the number of jurors to the number required to decide the case. The court may retain the alternate jurors during deliberations. If the court does so, it shall instruct the alternate jurors not to discuss the case with any other person until the jury completes its deliberations and is discharged. If an alternate juror replaces a juror after the jury retires to consider its verdict, the court shall instruct the jury to begin its deliberations anew.

As this Court explained in *Tate*, 244 Mich App at 562:

[W]hile a defendant has a fundamental interest in retaining the composition of the jury as originally chosen, he has an equally fundamental right to have a fair and impartial jury made up of persons able and willing to cooperate, a right that is

protected by removing a juror unable or unwilling to cooperate. Removal of a juror under Michigan law is therefore at the discretion of the trial court, weighing a defendant's fundamental right to a fair and impartial jury with his right to retain the jury originally chosen to decide his fate. [Citation omitted.]

We hold that the trial court did not abuse its discretion when it replaced Ms. Hicks with the alternate juror. Though defendant maintains that the trial court should not have released Ms. Hicks, she made it abundantly clear that she could not and would not continue deliberations, even if ordered to do so by the court. Ms. Hicks stated that the deliberations caused her such significant stress that she was concerned about her mental health and her pregnancy, and she did not believe she could be impartial or have open or meaningful deliberations based on her feelings and experiences. Clearly, Ms. Hicks was unable and unwilling to cooperate in deliberations and that trial court's decision to replace her was within the range of principled outcomes. *Tate*, 244 Mich App at 562.

Further, the trial court acted within its discretion to replace Ms. Hicks with the alternate juror. The record reflects that the trial court instructed the alternate juror not to discuss the case with anyone and that the judge and attorneys confirmed that the juror did not do so before he returned to serve on the jury. Because the record also reflects that the trial court properly instructed the jury to begin their deliberations anew and complied with all other aspects of MCR 6.411, defendant is not entitled to relief on this issue.

B. ASSISTANCE OF COUNSEL

Defendant contends that he was denied the effective assistance of counsel. As this Court explained in *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010):

The right to counsel guaranteed by the United States and Michigan constitutions, US Const Am VI; Const 1963, art 1, § 20, includes the right to the effective assistance of counsel. *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Defendant complains that he chose not to testify on his own behalf at trial because his attorney erroneously advised him that, should he choose to testify, the prosecutor could impeach him by introducing evidence of his prior statements or convictions involving crimes of theft or dishonesty. Defendant maintains that he does not have a prior "conviction" for purposes of MRE 609 because he was sentenced for carjacking under the Holmes Youthful Trainee Act (HYTA).

Defendant did not preserve this claim of error, so our review of this issue is limited to mistakes apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342

(2004). While defendant is correct that his status under HYTA would have prevented the prosecutor from impeaching him with evidence of his previous crime of carjacking, the record does not reveal that counsel provided ineffective assistance during defendant's waiver of his right to testify. Rather, the record reflects that, when defendant placed his waiver on the record, counsel reiterated the general advice that the choice whether to testify was entirely up to defendant and, if he chose to testify, certain prior statements or evidence of prior convictions involving theft or dishonesty could be introduced for impeachment purposes. Any off-the-record discussions between counsel and defendant are unavailable to us, but nothing on the record suggests that defense counsel specifically discussed the carjacking with defendant or advised him that he should not testify because that crime could be raised during cross-examination. Further, nothing in the record indicates that defendant actually based his decision not to testify on his fear that the carjacking would be raised by the prosecutor. Accordingly, there is no mistake apparent on the record.

Moreover, were we to interpret defense counsel's statement as error, defendant has not shown prejudice. The evidence presented against defendant was plentiful and defendant has not shown that, had counsel advised him that a HYTA crime could not be used under MRE 609, the outcome of the proceedings would have been different. Again, nothing in the record suggests that defendant would have testified but for counsel's advice on this issue. Further, a co-defendant testified on his own behalf at the same trial, he offered a version of events that differed from the accuser, and he was nonetheless convicted as charged, the same as defendant. Thus, nothing in the record suggests that defendant's testimony would have impacted the verdict and defendant has made no showing that any error resulted in the conviction of an actually innocent defendant. Accordingly, there is no merit to defendant's claim.

C. SENTENCE

Defendant claims, and the prosecutor agrees, that counsel committed prejudicial error when he agreed that defendant should be sentenced as a second habitual offender. Defendant's HYTA status was revoked after he was found guilty in this case, so he did not have a prior felony conviction for purposes of habitual offender sentencing. Accordingly, we vacate defendant's sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Elizabeth L. Gleicher