

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAROLD ALLEN,

Defendant-Appellant.

UNPUBLISHED
February 10, 2005

No. 251451
Oakland Circuit Court
LC No. 03-189548-FH

Before: Wilder, P.J., and Sawyer and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of possession with intent to unlawfully use an explosive device, MCL 750.211a. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 3 ½ to 20 years in prison. We affirm.

Defendant first asserts that he was denied rights to due process and a fair trial when the trial court failed to declare a mistrial after a prospective juror tainted the panel with her comments during voir dire. We disagree. This Court reviews unpreserved issues for plain error affecting the defendant's substantial rights. This Court will not reverse unless the plain error resulted in the conviction of an actually innocent defendant or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

A criminal defendant is guaranteed by the United States and Michigan constitutions a fair trial by an impartial jury. *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994). The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury. *Id.*

Defendant contends that he was denied the right to a fair trial by an impartial jury by comments made by a potential juror during voir dire:

The Court: Is there a question you would have answered or responded to?

Juror Number Thirteen: Yes.

The Court: Which one?

Juror Number Thirteen: I was a victim of a crime and I have seen damage from a Molotov cocktail from a neighbor.

The Court: Would these two experiences influence your verdict in this case to such an extent whereby you could not render a fair and impartial verdict in this case?

Juror Number Thirteen: Yes.

The Court: They would?

Juror Number Thirteen: Yes.

The Court: Thank you. Questions, prosecutor?

Mr. Gleeson (attorney for the prosecution): Ms. Winekoff, if I can ask you just a little bit. I'm assuming it's the Molotov cocktail part that's going to influence your ability to be fair.

Juror Number Thirteen: Yes.

Mr. Gleeson: As far as—I'll start with this, a Molotov cocktail, that was damage inflicted on your neighbor's home?

Juror Number Thirteen: Right.

Mr. Gleeson: Where you present when that happened or after the fact?

Juror Number Thirteen: After the fact, during the fire.

Mr. Gleeson: And you arrived home to see this happening?

Juror Number Thirteen: No the whole neighborhood woke up from the noise.

Mr. Gleeson: Is that something you can set aside, that experience, and just listen to what happened here? You absolutely can't do it?

Juror Number Thirteen: Can't do it.

Mr. Gleeson: Fair enough. Thank you very much. Thank you your Honor.

The prospective juror was then dismissed for cause and defense counsel concurred in the dismissal. There was no request that the entire panel be excused.

There is no indication in the record that the prospective juror's comments tainted the entire panel of jurors. None of the remaining jurors expressed reservations concerning their ability to remain impartial. The prospective juror merely commented on the damage she had

seen result from a Molotov cocktail. There is no reason to conclude that this comment affected anyone on the jury or that it provided special information of any sort.

Further, the trial court cured any error by instructing the jury that they may consider only evidence that has been properly admitted and by explaining what would be considered evidence. Jurors are presumed to follow the instructions the trial court gives them. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant next asserts that defense counsel's failure to object to the jury panel denied him a fair trial and constituted ineffective assistance of counsel. We disagree.

Because defendant did not move for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Westman*, 262 Mich App 184, 192; 685 NW2d 423 (2004). To establish ineffective assistance of counsel, defendant must show: (1) that his trial counsel's performance fell below an objective standard of reasonableness, and (2) that defendant was so prejudiced thereby that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and 3) that the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant cannot demonstrate that, but for the failure to seek a new jury panel, the results of the proceeding would have been different. The evidence against defendant was strong, and there is no reason to believe that the jury was tainted by the prospective juror's comments.

Lastly, defendant asserts that the trial court abused its discretion when it allowed rebuttal testimony from a witness who had violated its sequestration order. We disagree.

This Court reviews the decision to exclude a witness' testimony for violation of a sequestration order for an abuse of discretion. *People v Solak*, 146 Mich App 659, 669; 382 NW2d 495 (1985). A defendant who complains on appeal that a witness violated the lower court's sequestration order must demonstrate that prejudice has resulted. *Solak, supra* at 669.

Laverne Powell's daughter, Jessica Powell, was in the courtroom during Laverne's testimony. After Laverne's testimony and before calling another witness, the prosecutor asked that Jessica leave the courtroom and remain in the hallway. Defendant was called as a witness for the defense, and Jessica was called, over defense counsel's objection, as a rebuttal witness. Jessica testified that defendant told her and her brother about making a bomb and asked Jessica's brother to make the bomb. She also testified that defendant was upset because he had been hit by Alexander's boyfriend or ex-husband.

In essence, Jessica's testimony was offered to rebut defendant's testimony. Jessica was not, however, in the courtroom during defendant's testimony. Further, there is no indication in the record that Jessica's testimony was influenced by Laverne's testimony. Thus, defendant has failed to show any prejudice as a result of the violation of the sequestration order.

Affirmed.

/s/ Kurtis T. Wilder
/s/ David H. Sawyer
/s/ Helene N. White