

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TANYA LEE MARKOS,

Defendant-Appellant.

UNPUBLISHED

March 29, 2005

No. 249780

Oakland Circuit Court

LC No. 2001-178820-FH

Before: Neff, P.J., and Cooper and R.S. Gribbs*, JJ.

COOPER, J. (*concurring in part and dissenting in part*).

I agree with the majority opinion's resolution of many of the issues on appeal. I write separately, however, because I believe that substantial error occurred when the jury saw a videotape during deliberations referencing defendant's probationary status. That error was compounded by the trial court's subsequent failure to give a cautionary instruction or to question the jury regarding their reliance on this extraneous information. Such error should not be countenanced by this Court. As the record shows that defendant was prejudiced by the revelation of her probationary status during deliberations, I would reverse the trial court's denial of her motion for a mistrial and remand for further proceedings.

During deliberations, the jury requested and was allowed to review the videotape of defendant's observation period at the police station. At that time, the jury saw a portion of the tape in which defendant admitted to an officer that she was on probation. This portion of the tape was not shown during defendant's trial. Evidence of defendant's probationary status would not have been admissible at trial. The parties agree that the evidence is not relevant as a prior criminal act for any allowed purpose under MRE 404(b)(1). Furthermore, as it does not appear from the record that defendant's prior offense involved dishonesty or theft, her probationary status would be inadmissible for impeachment purposes under MRE 609.

“[I]t is perfectly plain that the jury room must be kept free of evidence not received during trial and that its presence, if prejudicial, will vitiate the verdict.”¹ “Where the jury

¹ *People v Keeth*, 63 Mich App 589, 593; 234 NW2d 717 (1975), quoting *Dallago v United*
(continued...)

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

considers extraneous facts not introduced in evidence, this deprives a defendant of his [or her] rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment.”² In determining whether reversal is required when inadmissible evidence that was not introduced during trial appears in the jury room during deliberations, this Court must determine “if the error might have operated to substantially injure the defendant’s case.”³ To establish a substantial injury, the defendant must demonstrate that there is a direct connection between the extraneous material and the adverse verdict.⁴ The burden then shifts to the prosecution to establish that any error is harmless.⁵

The record indicates that defendant immediately voiced her concern that the jury’s viewing of the inadmissible portion of the videotape may prejudice her case. Following the viewing, a juror asked the court if everything on the tape was evidence. Over defendant’s objection, the court merely informed the jury that it already heard the instruction regarding what constitutes evidence. Defendant subsequently moved for a mistrial or, in the alternative, requested a cautionary instruction, noting “I don’t know if the jurors all heard [the reference to probation] or not. I don’t know what the reaction was.” Defendant’s motion was denied and the trial court declined to give a cautionary instruction regarding the inadmissible evidence. Following the jury’s verdict, defendant asked the court to question the jurors individually to determine if they heard the inadmissible reference to defendant’s probationary status and whether the information was discussed in deliberations. The trial court again denied defendant’s request.

It is very likely that evidence of defendant’s probationary status could have affected the outcome of her trial. “MRE 404(b) is intended to exclude character evidence, or evidence that would lead the jury to convict a defendant on the basis of his [or her] past conduct rather than on evidence of his [or her] conduct in the instant offense.”⁶ It appears that the jury heard the statement and became confused, as a juror asked the court if the entire tape was evidence. Where there is evidence that a jury’s verdict was influenced by information not received during trial, it is appropriate for the trial court to question the jury about the deliberative process.⁷ As the trial court refused defendant’s request to do so, it cannot be ascertained from the record whether the inadmissible statement regarding defendant’s probationary status actually influenced

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States, 138 US App DC 276; 427 F2d 546, 553 (1969).

² *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997), writ gtd *Nevers v Killinger*, 990 F Supp 844 (ED Mich, 1997).

³ *People v Allen*, 94 Mich App 539, 543-544; 288 NW2d 451 (1980). See also *People v Clark*, 220 Mich App 240, 246; 559 NW2d 78 (1996).

⁴ *Budzyn*, *supra* at 89.

⁵ *Id.*

⁶ *People v Werner*, 254 Mich App 528, 539; 659 NW2d 688 (2002).

⁷ *People v Fletcher*, 260 Mich App 531, 539-540; 671 NW2d 127 (2004). See also *Clark*, *supra* at 244-245.

the jury's verdict.⁸ The trial court further compounded the error by failing to give an adequate cautionary instruction.

It is clear from the record that the jury likely relied on this highly prejudicial, extraneous information in reaching its verdict against defendant. The prosecution is unable to establish that the error was harmless, as the trial court refused to take any action after the inquiry by a juror. Thus, the impartiality of the jury is called into question. In light of these substantial errors, I would find that defendant is entitled to a new trial.

/s/ Jessica R. Cooper

⁸ The majority uses defendant's concession regarding this uncertainty to support their conclusion that no prejudice occurred. However, defendant conceded this point precisely to show that the trial court's actions were improper. As there was a doubt regarding the jury's reliance on this information, the jury should have been questioned.