

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TAVARIOUS ARNELL BROWN,

Defendant-Appellant.

UNPUBLISHED

April 14, 2005

No. 253246

Oakland Circuit Court

LC No. 03-188275-FH

Before: Whitbeck, C.J., and Zahra and Owens, JJ.

PER CURIAM.

A jury convicted defendant of first-degree home invasion, MCL 750.110a(2), and domestic violence, third offense, MCL 750.814. The trial court sentenced defendant as an habitual offender, MCL 769.12, to ninety months to twenty years' imprisonment for the first-degree home invasion conviction and two to fifteen years' imprisonment for domestic violence, third offense, conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in denying his motion for a mistrial. A trial court's decision to deny a motion for a mistrial is reviewed for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *People v Jackson*, 467 Mich 272, 277; 650 NW2d 665 (2002), citing *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

"A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant . . . and impairs his ability to get a fair trial." *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003) quoting *People v Haywood*, 209 Mich App 217, 228, 530 NW2d 497 (1995).

Defendant argues that the trial court erred by informing the jury that defendant was charged with "domestic violence, third offense" instead of only, "domestic violence." Defendant maintains that his conviction must be reversed because the trial court's comment enabled the jury to convict him on the basis of his prior convictions. i.e., MRE 404(b). In regard to defendant's motion for a mistrial, the trial court held:

The Court has heard your respective arguments. The Court acknowledges that it inadvertently had said third. It was not mentioned in the reading of the information itself, just the title of the charge. The information itself did not have anything about any prior conduct or any prior violation of the law in regards to domestic violence. The court could make a curative instruction, but the court is satisfied that a curative instruction may emphasize more than it would diminish whatever impact it has. I'm satisfied it does not have any prejudicial impact and therefore, we will deny that motion.

Here, the prejudice caused by the trial court's inadvertent comment, if any, was mitigated by the cautionary jury instructions, and therefore, the trial court's comment did not impair defendant's ability to get a fair trial. Immediately after the trial court denied defendant's motion for a mistrial, the trial court instructed the jury that:

You should clearly understand that the information I've just read is not evidence. An information is read in any criminal trial so that the defendant and the jury can hear the charges. You must not think it is evidence of his guilt or that he must be guilty because he has been so charged.

A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent. This presumption continued – will continue throughout this trial and entitled the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that he is guilty.

The above instruction effectively dispels the notion put forth in defendant's brief on appeal that the jury considered the trial court's comment as evidence of defendant's guilt. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 1998), citing *People v Hanna* 447 Mich 325, 351; 524 NW2d 682 (1994). Here, the challenged comment was read from the title of the charge of the Information, which the trial court made clear should not be considered as evidence of defendant's guilt. Defendant has failed to show, in light of the cautionary instructions, that he was prejudiced by the trial court's comment. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Moreover, the prosecution did not move to admit evidence that defendant had previously been convicted of domestic violence. Indeed, defense counsel elicited evidence of defendant's criminal record from defense witness, Erickah Attmore, who testified that defendant began living with her after he was released from jail in 2002. Thus, because defendant presented evidence of his criminal history, we conclude that any error is harmless as a matter of law. Therefore, reversal is not required.

Defendant next argues that the trial court improperly allowed police officer Eric Smith to testify to Erikah's oral and written statements pursuant to the excited utterance exception to the hearsay rule. This Court reviews a trial court's decision to admit evidence under a hearsay exception for an abuse of discretion. *People v Geno*, 261 Mich App 624, 632-633; 683 NW2d 687 (2004).

MRE 803(2) provides that a “statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition[,]” is not excluded by the hearsay rule, even though the declarant [Erickah] is available as a witness. This Court reiterated that:

[MRE 803(2)] allows hearsay testimony that would otherwise be excluded because it is perceived that a person who is still under the ‘sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy.’ The pertinent inquiry is not whether there has been time for the declarant to fabricate a statement, but whether the declarant is so overwhelmed that she lacks the capacity to fabricate. [*People v McLaughlin*, 258 Mich App 635, 659-660; 672 NW2d 860 (2003) (citations omitted).]

Here, the trial court did not abuse its discretion in finding that Erickah was “so overwhelmed that she lacks the capacity to fabricate.” *McLaughlin, supra*. There was evidence presented that the officers arrived at the apartment and met the complainant Erickah within minutes after the 911 call. When he arrived, Smith observed that Erickah had a swollen right eye, split lip, displaced hair, and was very upset, shaking and crying. Smith even attempted to calm her, “as she was trying to explain to [Smith] what happened [but] she was talking so fast and in a high tempo voice.” “It took [Smith] a few minutes to calm [Erickah] down, . . . to the point where she could actually explain her story to [Smith.]”

Defendant maintains that because Smith calmed Erickah before she gave her statements, she was not under the “sway of excitement” precipitated by defendant’s assault. However, even assuming that Smith calmed Erickah before she made her statements, there is evidence that Erickah remained overwhelmed by defendant’s assault and lacked the capacity to fabricate her statements. Smith testified concerning Erickah’s appearance when she made her statements:

When she spoke to me, as she did tell the story of what happened, she was very angry, very angry about the fact that she had been punched in the face. And she was crying, she had tears in her eyes. She was somewhat shaking.

Smith further testified that, “[Erickah] had to stop several times while she was writing the statement because she was still shaking . . . “ Also that Erickah “ would write some and then she would stop and just be overwhelmed with emotion about what she – the trauma that she had just been through, and then she would continue writing.”

The record reflects defendant’s assault continued to traumatize Erickah even after Smith attempted to calm her down. A trial court’s decision on a close evidentiary question does not amount to an abuse of discretion. *Geno, supra* at 632. Therefore, the trial court did not abuse its discretion in allowing Smith to testify to Erickah’s statements pursuant to the excited utterance exception to the hearsay rule.

Defendant last argues he was denied his right to an unanimous verdict. This Court reviews unpreserved constitutional issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

Criminal defendants are guaranteed the right to a unanimous verdict under the Michigan Constitution. *People v Gadomski*, 232 Mich App 24, 30; 592 NW2d 75 (1998); *People v Quinn*, 219 Mich App 571, 576; 557 NW2d 151 (1996); Const 1963, art 1, § 14. To protect a defendant's right to a unanimous verdict, it is the duty of the trial court to properly instruct the jury regarding the unanimity requirement. *People v Smielewski*, 235 Mich App 196, 201; 596 NW2d 636 (1999), citing *People v Cooks*, 446 Mich 503, 511; 521 NW2d 275 (1994).

Defendant argues that the trial court erred by suggesting to the jury that it was expected to return a verdict. Defendant challenges the following statement:

Ladies and gentlemen, while Mr. Landau is getting his witnesses, there are a couple things that happened in the lives of two people that are involved in this case that have nothing to do with the case itself, that has caused some disruption today and that may require us to take an early break. I'm advising you that we – to come back next week and there's nothing we can do about it, and it will be explained to you after the trial is over with, after you return a verdict. We're checking our schedule right now. And I wish these things hadn't happened, but they did and there's nothing we can do about it.

Defendant claims prejudice resulted because the trial court made a statement that “seems to imply that the jury was *expected* to return a verdict, which could only put pressure on any isolated dissenting juror to violate his or her conscience, and inappropriately submit to the majority's will. The comment could have only confused and subtly, but impermissibly, prejudiced the jury toward ignoring their individual consciences.” Defendant's Brief on Appeal, p 16 (emphasis in original.)

However, jurors are presumed to follow their instructions. *Graves, supra* at 485-486. Here, the trial court instructed the jury that:

A verdict in a criminal case must be unanimous. In order to return a verdict, it is necessary that each of you agree on that verdict. In the jury room, you must discuss the case among yourselves, but ultimately each of you will have to make up your own. Any verdict must represent the individual consideration of each juror. It is your duty as jurors to make a reasonable effort to reach a verdict. Express your opinions and your reasons for them, but keep an open mind while you listen to your fellow jurors. Rethink your opinions and do not hesitate to change your mind if you decide that you were wrong.

Try your best to work out your differences. However, although you should try to reach agreement, none of you should give up your honest opinion about this case just because other jurors disagree with you or just for the sake of reaching a verdict. In the end, your vote must be your own and you must vote honestly and in good conscience.

Thus, because jurors are presumed to follow the above instruction, defendant's argument that the trial court's comment “prejudiced the jury toward ignoring their individual consciences” must be rejected.

In a related claim, defendant argues that defense counsel rendered ineffective assistance of counsel by not objecting to the trial court's statement suggesting jurors were expected to return a verdict. Because defendant did not move for an evidentiary hearing or a motion for new trial before the trial court, this Court will consider defense counsel's mistakes only to the extent they are apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v Leblanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's finding of fact are reviewed for clear error. *Id.* Questions of constitutional law are reviewed de novo. *Id.*

Defendant's claim that counsel provided ineffective assistance in failing to object to the trial court's comment is without merit. Defendant must show, with regard to counsel's performance "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment . . . [and] that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *LeBlanc, supra* at 578. Because the jury is presumed to follow its instructions, defendant cannot maintain that defense counsel's failure to object to the trial court's comment caused prejudice. *Graves, supra.*

Affirmed.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Donald S. Owens