

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD WAYNE HARRIS,

Defendant-Appellant.

UNPUBLISHED

June 3, 2008

No. 270621

Huron Circuit Court

LC No. 04-004395-FH

Before: Kelly, P.J., and Meter and Gleicher, JJ.

GLEICHER, J. (*concurring*).

I concur in the result reached by the majority, but write separately to express my view regarding the procedure that the trial court should have employed when it learned of three jurors' exposure to a newspaper article about the case.

The newspaper published the article after the second day of defendant's trial on a home invasion charge. The article revealed information the trial court had determined too prejudicial to present to the jury: that at the time of his arrest for the instant home invasion charge defendant possessed a weed whacker stolen from the victim's brother, and that at the time of the home invasion trial defendant was incarcerated for a prior conviction of third-degree fleeing and eluding a police officer. When defense counsel advised the trial court of the article's publication, the court denied having read the article. Defense counsel then requested that the court interview each juror individually in chambers "to make sure that the jury is untainted," but the court refused. Instead, it engaged in the following colloquy with the jury:

The Court: There's one question I want to ask all of you, I don't want to get into discussing it now, I may want to do that later on, but I . . . don't subscribe to the Tribune, I buy it on a daily basis during the week, I never buy the weekend one because often I'm not here on weekends and I read the Free Press on weekends.

But I'm told that there was an article in the . . . weekend Huron Daily Tribune concerning this trial. Have any of you read that article and, if so, would you raise your hand? Okay. Three of you. And did you read—I guess let me start with you, did you read the entire article?

Juror Hill: I glanced over it quickly, not really word by word.

The Court: All right. And—I'm sorry, what did you say?

Juror Hill: I said not really word by word.

Juror Goretski: Same here.

The Court: Ms. Wruble?

Juror Wruble: Yeah.

The Court: It—I'm sure there was information in that article that was not—you know, this case has to be decided solely on the evidence presented here in the courtroom without any effect at all about any other information that may have come to you in any way, including in that newspaper article.

Let me ask you this, as a blanket question, is there any . . . any of you feel that you could not set aside anything you may have read there even though there may have been some things you read there that wasn't presented as evidence here? I don't know, I didn't read the article myself, but if there was it's not proper for you to consider that.

Would you be able to put that aside, do you think, or is that going to affect your decision?

Juror Wruble: No, it won't.

Juror Goretski: No, it won't.

Juror Hill: No.

The Court: Anyone else? There's three of you that have responded and I guess for the record where's my list, oh, here it is, it's folded over, Ms. Wruble, Ms. Goretski and Ms. Hill, right, are the three jurors who responded as having read the article, not—the other nine of you have not read it?

Okay. So we won't be concerned about the rest of you then. Okay. I think we're ready to reconvene our cross-examination—or, yes, cross-examination, I'll remind you that you're still under oath.

In my view, this brief questioning did not permit the trial court to ascertain whether the jurors absorbed the salient feature of the article: its reference to inadmissible information. The court also did not determine how much of the article the three jurors actually remembered, whether any of them had been improperly influenced by information they may have gleaned through a "glance" at the article, and whether they had mentioned the article's contents to any other jurors. The majority concludes that "there is no indication that any of the jurors were actually influenced by the article." Although this is an accurate statement, our inability to reach an informed decision regarding the article's influence stems solely from the trial court's failure to create a complete record.

A defendant accused of a crime has the right to a fair and impartial jury. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). “During their deliberations, jurors may only consider the evidence that is presented to them in open court.” *Id.* Our Supreme Court has recognized that a jury’s consideration of extraneous, nonevidentiary facts “deprives a defendant of his rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment.” *Id.*

In *Budzyn*, the Supreme Court considered whether a jury’s viewing of the movie *Malcolm X* during the defendants’ trial for second-degree murder influenced its decision to convict the defendants. *Id.* at 90. The Supreme Court held that to establish that the extraneous influence constituted error requiring reversal, the defendant must prove that (1) the jury was exposed to extraneous influences, and (2) the influences “created a real and substantial possibility that they could have affected the jury’s verdict.” *Id.* at 88-89. If the defendant establishes both, the burden shifts to the prosecution to demonstrate that the error qualified as harmless beyond a reasonable doubt. *Id.* at 89.

The instant record reveals that three jurors were exposed to extraneous information about defendant contained within the newspaper article. The simple fact that the trial court had deemed the information prohibitively prejudicial and barred its admission demonstrates that the article may have “created a real and substantial possibility that the[] [information] could have affected the jury’s verdict.” *Budzyn, supra* at 89. Absent a fuller exploration of the jurors’ knowledge of the article’s contents, I cannot agree with the majority’s conclusion that the jurors were not “actually influenced” by the article.

In federal criminal trials, “persons who have learned from news sources of a defendant’s prior criminal record are presumed to be prejudiced.” *Murphy v Florida*, 421 US 794, 798; 95 S Ct 2031; 44 L Ed 2d 589 (1975). This principle derived from *Marshall v United States*, 360 US 310, 312-313; 79 S Ct 1171; 3 L Ed 2d 1250 (1959), in which the United States Supreme Court held that seven jurors’ exposure to a newspaper article discussing the defendant’s inadmissible prior convictions required the automatic reversal of his current conviction, despite the jurors’ assurance that they remained unprejudiced.

Budzyn holds that in Michigan, a mistrial need not be automatic when jurors are exposed to inadmissible and prejudicial information. In my view, however, the only reasonable method to determine whether exposure has irreparably prejudiced a juror is to individually question each involved juror regarding this specific issue.

Here, the newspaper article’s discussion of the stolen weed whacker embodied a fact ruled inadmissible by the trial court, and strongly probative of defendant’s guilt. When the trial court questioned the jurors exposed to the article, it did not investigate how much of the reported information the jurors remembered, or whether they had already discussed it with other jurors. It seems likely that the trial court was understandably reluctant to address these questions in open court, for fear of tainting the jurors who had not seen the article. The trial court’s inability or unwillingness to explore the depth and breadth of the jurors’ knowledge may also have resulted from the court’s admitted failure to familiarize itself with the article. Questioning the exposed jurors en masse, however, virtually ensured that they would deny both reading the article in detail and laboring under any possible prejudice potentially arising from it.

I believe the trial court should have questioned the jurors individually, on the record and in his chambers.

It is too much to expect of human nature that a juror would volunteer, in open court, before his fellow jurors, that he would be influenced in his verdict by a newspaper story of the trial. Not only so, but had one or more of them said they would be so influenced, and especially if they had then explained why, the damage to the defendant would have been spread to the listening other jurors. In view of the nature of the articles the court should have made a careful, individual examination of each of the jurors involved, out of the presence of the remaining jurors, as to the possible effect of the articles. [*Coppedge v United States*, 272 F2d 504, 508 (CA DC, 1959).]

The procedural admonition set forth in *Coppedge* is embodied within the American Bar Association (ABA) Standards for the Administration of Criminal Justice, specifically the ABA Standards Relating to Fair Trial and Free Press (3d ed, 1992). Standard 8-3.6(e) provides,

If it is determined that material disseminated during the trial goes beyond the record on which the case is to be submitted to the jury and raises serious questions of possible prejudice, the court may on its own motion or should on the motion of either party question each juror, out of the presence of the others, about exposure to that material. . . . [A] juror who has seen or heard reports of potentially prejudicial material should be excused if reference to the material in question at the trial itself would have required a mistrial to be declared.

The commentary to this standard explains that individual questioning in camera “is designed both to encourage candor and to contain whatever prejudice may have infected the jury.”

I would hold that the trial court’s superficial, public questioning of the exposed jurors constituted error because it deprived the court of a meaningful opportunity to determine whether the “extraneous influences created a real and substantial possibility” of an unfair impact on the jury’s verdict. *Budzyn, supra* at 89. Nevertheless, I conclude that the rule set forth in *Budzyn* does not mandate reversal of defendant’s conviction because the record contains overwhelming evidence of his guilt. *Id.* at 89-90.

/s/ Elizabeth L. Gleicher