

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 9, 2012

v

SHAVONTAE LADON WILLIAMS,

Defendant-Appellant.

No. 301336
Wayne Circuit Court
LC No. 09-030893-FC

Before: MURRAY, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317,¹ and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a prison term of 25 to 40 years for the murder conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the October 6, 2009, shooting death of 17-year-old Nathan Jimerson in Detroit. Defendant was tried jointly with codefendant Rayshun Williams (who is defendant's cousin), before separate juries. The evidence showed that Jimerson was shot 25 times. According to witnesses, Rayshun and Jimerson were involved in a verbal confrontation earlier in the day, which angered Rayshun. Defendant was also present during this earlier confrontation. Witnesses testified that Rayshun and defendant both later approached Jimerson on the street and shot him, with Rayshun using an assault rifle and defendant using a shotgun. Evidence collected from the scene indicated that a third weapon may also have been involved. Defendant presented an alibi defense at trial, but also alternatively argued that the evidence collected from the scene suggested that the shooting occurred during a shootout, not as part of an execution-style killing as alleged by the prosecution, and accordingly, Jimerson's shooting death was not premeditated. The jury acquitted defendant of first-degree murder, but convicted him of the lesser offense of second-degree murder, as well as felony-firearm. Rayshun was acquitted of all charges.

¹ Defendant was charged with first-degree premeditated murder, MCL 750.316(1)(a). The jury convicted him of the lesser included offense of second-degree murder.

I. MISTRIAL

Defendant first argues that the trial court abused its discretion by denying his motions for a mistrial after the jury indicated that it was unable to reach a verdict. The grant or denial of a mistrial is generally within the sound discretion of the trial court. *People v Lett*, 466 Mich 206, 216; 644 NW2d 743 (2002). “The trial judge’s decision to declare a mistrial when he considers the jury deadlocked is accorded great deference by a reviewing court.” *Id.* at 213. “At most, . . . the inquiry . . . turns upon [the] determination [of] whether the trial judge was entitled to conclude that the jury in fact was unable to reach a verdict.” *Id.* (citation omitted).

The record discloses that on the first full day of deliberations,² the jury sent out a note at 3:50 p.m. stating that it was not likely to reach a verdict that day and asking if it could be excused for the day. The trial judge was unavailable and, therefore, an acting judge agreed to excuse the jury and directed it to return the next day to resume deliberations. The following day, after deliberating for approximately 45 minutes, the jury sent out a note stating that it was unable to reach a verdict. The acting judge denied defendant’s request for a mistrial and instead gave the deadlocked jury instruction in accordance with CJI2d 3.12. The judge also advised the jury that playing cards and magazines would be removed from the jury room. Shortly after noon that Friday, the jury sent out another note explaining that there were “emotional dynamics” going on in the jury room, resulting in discord among the jurors and causing some jurors to cry, and that one juror had asked to go home. The acting judge again denied defendant’s renewed motion for a mistrial, but agreed to send the jury home early that afternoon because he did not believe that continued deliberations were likely to be productive that afternoon.

When the jury returned the following Monday, defendant continued to argue that the jury was hung. The trial judge addressed the jury and explained that it was not unusual for emotions to run high in a criminal trial, and instructed the jury in accordance with CJI2d 3.11. Approximately 80 minutes after the jury was excused to resume deliberations, it returned its verdict finding defendant guilty of second-degree murder and felony-firearm.

We conclude that neither the acting judge nor the trial judge abused his discretion by having the jury continue to deliberate and refusing to declare a mistrial. In *Arizona v Washington*, 434 US 497, 510; 98 S Ct 824; 54 L Ed 2d 717 (1978), the United States Supreme Court observed:

At the other extreme is the mistrial premised upon the trial judge’s belief that the jury is unable to reach a verdict, long considered the classic basis for a proper mistrial. The argument that a jury’s inability to agree establishes reasonable doubt as to the defendant’s guilt, and therefore requires acquittal, has been uniformly rejected in this country. Instead, without exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and

² The record indicates that the jury was excused to begin deliberations late in the afternoon of September 15, 2010. Although it is unclear how long the jury actually deliberated that day, later comments on the record indicate that the period was brief.

require the defendant to submit to a second trial. This rule accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws.

Moreover, in this situation there are especially compelling reasons for allowing the trial judge to exercise broad discretion in deciding whether or not "manifest necessity" justifies a discharge of the jury. On the one hand, if he discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his "valued right to have his trial completed by a particular tribunal." But if he fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors. If retrial of the defendant were barred whenever an appellate court views the "necessity" for a mistrial differently from the trial judge, there would be a danger that the latter, cognizant of the serious societal consequences of an erroneous ruling, would employ coercive means to break the apparent deadlock. Such a rule would frustrate the public interest in just judgments. The trial judge's decision to declare a mistrial when he considers the jury deadlocked is therefore accorded great deference by a reviewing court. [Footnotes omitted.]

In this case, the jury had deliberated for a little more than one full day when the acting judge denied defendant's initial request for a mistrial and instead gave the deadlocked jury instruction. Considering the four-week length of the trial, it was reasonable to conclude that the jury had not exhausted all efforts to fully consider and resolve the differing views of the jurors in relation to the volume of evidence and testimony that had been presented. Further, there were indications that some jurors may have been distracted by playing cards and magazines, and as a consequence the judge ordered those items to be removed from the jury room. There was little basis for believing that the case had reached a point where the jurors had made all efforts to reach a verdict and simply could not resolve their different, strongly held beliefs. It was also not an abuse of discretion for the acting judge to excuse the jury early that afternoon without declaring a mistrial. The judge had an appropriate basis for believing that further deliberations that Friday afternoon were not likely to be productive, but that the jury was still capable of resolving its differences and reaching a verdict.

Similarly, when the jury and the trial judge returned the following Monday, it was not unreasonable for him to provide appropriate guidance when instructing the jury to continue deliberating. The judge's instructions were responsive to the jury's last note from the previous Friday. Defendant argues that it is apparent that the court's refusal to declare a mistrial and its insistence that the jury continue deliberating had a coercive impact on the jury, because the jury reached a verdict approximately 80 minutes after the court instructed it to continue deliberating. He also argues that the guilty verdict of second-degree murder was incompatible with the evidence, thereby indicating that the jury reached a compromise verdict because it felt compelled to come to an agreement. We disagree. First, defendant has not identified any particular aspect of the trial court's instruction that was inherently coercive. Second, contrary to what defendant asserts on appeal, a second-degree murder verdict was not completely out of the question. Indeed, during closing argument, defense counsel argued that there was evidence that three guns

may have been involved, which suggested that Jimerson may have been shot during a shootout, not as part of an execution-style shooting, and thus was not shot with premeditation and deliberation. Third, the fact that the jury reached a verdict a little more than an hour after the court's reinstruction does not compel the conclusion that the verdict was coerced. Nothing in the record suggests that the jurors were not able to simply resolve their differences and freely come to a verdict with the guidance it received from the court.

Accordingly, we reject defendant's claim that either the acting judge or the trial judge abused his discretion by refusing to declare a mistrial.

Defendant also argues that the judges' instructions, which were based on CJI2d 3.11 and CJI2d 3.12, were themselves coercive. Because defendant did not object to the instructions below, this claim is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000). Although defendant generally asserts that an *Allen*³ charge has been criticized in other jurisdictions, see *United States v Rey*, 811 F2d 1453, 1458 (CA 11, 1987), the instructions given by the trial court were modified versions of the *Allen* charge. See *People v Sullivan*, 392 Mich 324; 220 NW2d 441 (1974). Our Supreme Court has confirmed that these instructions are appropriate. *People v Rouse*, 477 Mich 1063; 728 NW2d 457 (2007), and *People v Pollick*, 448 Mich 376, 386; 531 NW2d 159 (1995). Further, as previously indicated, defendant has not identified any particular aspect of the instructions that can be considered inherently coercive. Accordingly, defendant has not established a plain error.

We also reject defendant's argument that the trial court erred by failing to inquire into possible juror misconduct after one of the jury notes suggested that one or more jurors may be exerting undue influence upon other jurors. Defendant's failure to object on that basis below or otherwise request that the court make such an inquiry leave this issue unpreserved. Accordingly, defendant must establish a plain error affecting his substantial rights. *Nash*, 244 Mich App at 97.

A trial court's ability to inquire into the deliberative process of a jury is very limited. In *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997), this Court explained:

A trial court's denial of a motion for a mistrial based on juror misconduct is an abuse of discretion only where the misconduct was such that it affected the impartiality of the jury or disqualified its members from exercising the powers of reason and judgment. A new trial will not be granted if no substantial harm was done thereby to the defendant, even though the misconduct may merit a rebuke from the trial court if brought to its notice. *People v Rohrer*, 174 Mich App 732, 740; 436 NW2d 743 (1989). Misconduct can be demonstrated with evidence pertaining to outside or extraneous influences, but cannot be demonstrated with evidence indicating matters that inhere in the verdict, such as juror thought processes and interjuror inducements. *People v Smith*, 106 Mich App 203, 211-212; 307 NW2d 441 (1981).

³ *Allen v United States*, 164 US 492; 17 S Ct 154; 41 L Ed 528 (1896).

Similarly, MRE 606(b) provides:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

The jury's note does not suggest that any external influences were affecting its deliberations. Rather, it alludes only to interjuror inducements. Such influences are part of the jury's deliberative process, which is not subject to inquiry. Further, the trial judge appropriately addressed any concerns of interjuror pressures by advising the jury during reinstruction that "none of you should give up your honest opinion about the case just because other jurors disagree with you or just for the sake of reaching a verdict." Moreover, the jury was polled and all jurors agreed that they had voted to convict defendant of second-degree murder and felony-firearm. Accordingly, defendant has not shown any error, plain or otherwise, in connection with this issue. Compare *People v Echavarría*, 233 Mich App 356, 358-362; 592 NW2d 737 (1999).

II. PUBLIC TRIAL

Defendant lastly argues that reversal is required because the trial court's exclusion of the public from the courtroom during jury voir dire violated his right to a public trial. Although defendant's failure to object to the closure of the courtroom during voir dire did not result in a waiver of this issue, defendant is not entitled to relief unless he satisfies these requirements: (1) that an error occurred, (2) that the error was "plain," (3) that the plain error affected his substantial rights, and (4) that the error either resulted in a conviction of an actually innocent defendant or it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *People v Vaughn*, 491 Mich 642, 665; ___ NW2d ___ (2012). In *Vaughn*, the Supreme Court held that closure of a courtroom to the public during voir dire is a plain structural error that satisfies the first three requirements of this test. *Id.* at 665-666. Accordingly, resolution of this issue comes down to the fourth requirement of the plain-error test. Defendant has not shown that the error wrongly resulted in his conviction because he is actually innocent. Therefore, to be entitled to relief, defendant must show that the courtroom closure seriously affected the fairness, integrity, or public reputation of the proceedings. *Id.* at 667.

In *Vaughn*, 491 Mich at 667-669, the Supreme Court explained that the closure of the courtroom during voir dire did not seriously affect the proceedings in that case, stating:

The United States Court of Appeals for the Second Circuit has recognized that "it does not follow that every temporary instance of unjustified exclusion of the public—no matter how brief or trivial, and no matter how inconsequential the

proceedings that occurred during an unjustified closure—would require that a conviction be overturned.” While the Second Circuit's analysis “does not dismiss a defendant's claim on the grounds that the defendant was guilty anyway or that he did not suffer ‘prejudice’ or ‘specific injury,’” it examines “whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant—whether otherwise innocent or guilty—of the protections conferred by the Sixth Amendment.” The goals sought by these protections include (1) ensuring a fair trial, (2) reminding the prosecution and court of their responsibility to the accused and the importance of their functions, (3) encouraging witnesses to come forward, and (4) discouraging perjury.

In reviewing the closure of a courtroom during the first day of jury selection, the Second Circuit determined that the third and fourth protected values were “not implicated by voir dire because no witnesses testified.” The Second Circuit then analyzed the remaining two protected values within the particular circumstances of the case before it and concluded that “limiting presence at the voir dire proceedings to only the attorneys, judge, defendant, and prospective jurors for one afternoon did not subvert these values.”

A review of the circuit court transcript during defendant's voir dire shows that both parties engaged in a vigorous voir dire process, that there were no objections to either party's peremptory challenges of potential jurors, and that each party expressed satisfaction with the ultimate jury chosen. Moreover, because “the *venire* is drawn from the public itself,” individual veniremembers “remain public witnesses during much of the *voir dire* proceedings, listening to the court's questions and observing the conduct of counsel, until such time as they are chosen for the jury, disqualified, or excused.” Thus, “the presence of the *venire* lessens the extent to which [the court's] closure implicates the defendant's public trial right because the *venire*, derived from and representative of the public, guarantees that the *voir dire* proceedings will be subject to a substantial degree of continued public review.” Because the closure of the courtroom was limited to a vigorous voir dire process that ultimately yielded a jury that satisfied both parties, we cannot conclude that the closure “seriously affected the fairness, integrity, or public reputation of judicial proceedings.” Defendant is not entitled to a new trial on the basis of his forfeited claim of error. [Footnotes omitted.]

In this case, like in *Vaughn*, it is apparent that there were a large number of potential jurors because some had to be seated in the gallery area. Those jurors were also members of the public at large. While defendant's family members were apparently not permitted inside the courtroom, there is no indication that their exclusion during voir dire seriously affected the fairness, integrity, or public reputation of the voir dire process. Defendant has not explained how their absence during the jury selection process affected the fairness or integrity of the proceeding. Accordingly, defendant is not entitled to relief on the basis of this unpreserved issue.

Defendant alternatively argues that trial counsel was ineffective for not objecting to the closure of the courtroom. Following an evidentiary hearing, the trial court found that defendant

had not overcome the presumption that trial counsel reasonably failed to object as a matter of trial strategy, or shown that he was prejudiced by counsel's failure to object. Whether defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law. This Court reviews the trial court's factual findings for clear error, and its constitutional determinations de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

In this case, defendant was unable to establish whether defense counsel purposefully declined to object as a matter of strategy because counsel had died before the evidentiary hearing. However, as in *Vaughn*, there is every reason to believe that the jury selection process was not hindered by the absence of spectators from the courtroom. Therefore, even if trial counsel should have objected, defendant has not shown that the closure adversely affected either the voir dire process or the ultimate jury that was selected. Accordingly, defendant is unable to establish the requisite prejudice to succeed on a claim of ineffective assistance of counsel.

Affirmed.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens