

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERMON GILMORE,

Defendant-Appellant.

UNPUBLISHED

May 18, 1999

No. 204932

Recorder's Court

LC No. 96-007143

Before: Markey, P.J., and Holbrook, Jr. and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to twenty-five to fifty years in prison for the second-degree murder conviction and two years in prison for the felony-firearm conviction. We affirm.

Defendant's only issue on appeal is that the trial court coerced the jury into reaching a verdict when they repeatedly indicated they were unable to reach a decision. Because defendant did not object to the court's instructions before the jury considered its verdict or resumed deliberations after the interim instructions, he has waived appellate review except as necessary to avoid manifest injustice. MCR 2.516(C); *People v Pollick*, 448 Mich 376, 386-388; 531 NW2d 159 (1995) (quoting *People v Hardin*, 421 Mich 296; 365 NW2d 101 (1984)); *People v Green*, 196 Mich App 593, 596; 493 NW2d 478 (1993).

In *People v Sullivan*, 392 Mich 324, 341-342; 220 NW2d 441 (1974), the Michigan Supreme Court adopted the ABA standard jury instruction 5.4¹ and held that any "substantial departure" from this model supplemental instruction shall be grounds for reversal. *Id.* at 342. A substantial departure will not be found merely because the instructions fail to contain the same words as the ABA standard. Rather, the test is whether the instructions had an undue tendency to coerce. *Pollick, supra* at 386; *Hardin, supra* at 320-321. In other words, could the instruction as given cause a juror to abandon his conscientious dissent and defer to the majority solely for the sake of agreement? *Hardin, supra* at 320-321. On review, we must examine the alleged coerciveness of the language used in the instructions as well as the factual context in which the instructions were given. *Id.* at 321.

In the present case, the trial court gave three supplemental instructions. After the first two supplemental instructions, the court emphasized to each jury member not to give up his honest opinion just for the sake of reaching a verdict. In the third supplemental instruction, the court was more assertive in advising the jury to continue to deliberate. The court stated: “You were read six hours of testimony that you had asked for. And within ten minutes after hearing that testimony, you come back with a message that you’re still hung. That’s really not acceptable.” The court also told the jury that it was to continue deliberating for the rest of the day (approximately two hours) and then continue the next day if they had not yet reached a verdict.

After a careful review of the instructions as a whole, as well as the factual context in which they were given, we find that although the supplemental instructions departed from the ABA model, they did not constitute a “substantial departure” as defined by our Supreme Court. The trial court did not require the jury to deliberate until they reached a verdict, *Hardin, supra* at 319-320, nor did the court threaten to require that the jury deliberate for an unreasonable amount of time. Moreover, although the court stressed in its third supplemental instruction that the jury had a duty to the parties and to the people of Detroit, the court never said the jury’s duty was to reach a verdict. Compare *People v Goldsmith*, 411 Mich 555, 560-561; 309 NW2d 182 (1981) (reversal required where trial court’s supplemental instruction advised jury that its civic duty was to reach a unanimous verdict). Rather, the court emphasized the jury’s duty to deliberate and seriously consider the facts of the case, and made a plea for the jury to try to reach a verdict.

Because we find that the supplemental instructions were not coercive in nature, we conclude that they were not a substantial departure from ABA standard jury instruction 5.4 and are not grounds for reversal.

Affirmed.

/s/ Jane E. Markey
/s/ Donald E. Holbrook, Jr.
/s/ Janet T. Neff

¹ Section 5.4 provides:

- (a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:
 - (i) that in order to return a verdict, each juror must agree thereto;
 - (ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
 - (iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
 - (iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(c) the jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

The ABA's model instruction, as adapted for a deadlocked jury, is now incorporated in CJI2d 3.12.