

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD LEONARD MILLER,

Defendant-Appellant.

UNPUBLISHED

May 27, 1997

No. 186777

Arenac Circuit Court

LC No. 94-002222-FH

Before: Smolenski, P.J., and Michael J. Kelly and Gribbs, JJ.

PER CURIAM.

Defendant was convicted by a jury of involuntary manslaughter, MCL 750.321; MSA 28.553, and sentenced to five years' probation with the first year to be served in jail. Defendant appeals as of right. We affirm.

During a camping trip, defendant left his approximately 2½-year-old son, Austin, sleeping in a Dodge van near a river while defendant went to a nearby tent where he drank alcoholic beverages and played cards. Defendant periodically checked on the child but at approximately 1:15 a.m. he discovered that the van's side door was open and that the child was gone. The child's body was eventually found in the river.

The prosecution's theory at trial was that defendant's gross negligence caused the child's death. The prosecution's theory of gross negligence was that defendant had a duty to watch his child, and that defendant omitted to perform this duty by becoming intoxicated, losing track of time, and leaving the child unattended near the river in the middle of the night. Where evidence was received that the child probably could not have opened the van's door by himself, the prosecution suggested during closing argument that defendant probably left the door open.

Before sentencing, defendant moved for a new trial, in part, on the grounds of juror misconduct and perjured testimony. With respect to the claim of juror misconduct, defendant asserted that during trial the jury foreperson had conducted experiments with her minor child involving the cargo doors of Dodge vans and their accessibility to children. Defendant asserted that this misconduct violated the court's instruction not to discuss the case with anyone before deliberations and exposed the juror to

information outside of the courtroom. In support of this ground, defense counsel submitted an affidavit in which he attested that he interviewed this juror following the verdict, and that the juror admitted to visiting a Dodge dealership with her three-year-old daughter and conducting experiments to determine the ability of a small child to access or use the inside cargo door handle of Dodge vans. According to the affidavit, the juror also had a discussion related to the door handle and fit of the doors with someone at the dealership.

At oral argument on the motion, defense counsel stated that he was not requesting the court to grant the motion for a new trial solely on the basis of his affidavit. However, defense counsel did request the trial court to conduct an evidentiary hearing on the issue of juror misconduct “so that the court can make its own findings of fact regarding whether or not the juror did in fact conduct an experiment.” After determining that the affidavit did not state that the juror had discussed the experiments with the other jurors, the court found that the affidavit “doesn’t raise a question for me to have an evidentiary hearing,” and denied defendant’s motion for a new trial based on juror misconduct. The court also denied defendant’s motion for a new trial based on perjured testimony.

Defendant first argues that the trial court erred in denying his request for an evidentiary hearing on the issue of juror misconduct. We disagree.

The court rules provide that a new trial may be granted on the basis of juror misconduct. MCR 2.611(A)(1)(b). If the facts stated in the motion for a new trial do not appear on the record, the motion must be supported by affidavit. MCR 2.611(D)(1). The court may permit reply affidavits and may call and examine witnesses. MCR 2.611(D)(3). This Court reviews the trial court’s denial of a motion for a new trial for an abuse of discretion. *People v Miller (After Remand)*, 211 Mich App 30, 47; 535 NW2d 518 (1995).

Misconduct on the part of a juror does not automatically warrant a new trial. *People v Strand*, 213 Mich App 100, 103; 539 NW2d 739 (1995). Juror misconduct does not warrant a new trial 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 Messenger*, 221 Mich App 171, 175; ___ NW2d ___ (1997). Rather, juror misconduct will warrant a new trial only where the defendant is prejudiced thereby, i.e., the misconduct affected the impartiality of the jury or disqualified its members from exercising the powers of reason and judgment. *Id.* See also *Strand, supra*. 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. *Messenger, supra*; see also *In re Beverly Hills Fire Litigation*, 695 F2d 207 (CA 6, 1982); *People v Wilson*, 445 Mich 927; 521 NW2d 13 (1994).

In this case, the evidence submitted in support of defendant’s motion for a new trial based on juror misconduct was the uncorroborated hearsay contained in defense counsel’s affidavit. Cf. *Wilson, supra*. Accordingly, we conclude that the trial court did not abuse its discretion in denying defendant’s request for an evidentiary hearing into the unsubstantiated allegation of juror misconduct.

Next, defendant argues that the trial court erred by not conducting an evidentiary hearing in connection with his request for a new trial based on his allegation that his wife (Austin's mother) and sister-in-law presented fabricated testimony at trial. However, defendant did not request an evidentiary hearing on this ground below. Rather, defendant simply argued that newly discovered evidence of witness perjury warranted a new trial. Thus, we consider defendant's claim of error in the context of whether the court abused its discretion in denying his motion for a new trial based on witness perjury.

At trial, defendant's wife and sister-in-law testified that they tried to dissuade defendant from taking Austin on the camping trip during a conversation that they claimed occurred the day before defendant and Austin left on the trip. During oral argument on his motion for a new trial, defendant argued, as he does now on appeal, that a newly discovered time-card record showed that defendant had been at work during the time that this conversation was alleged to have taken place. Defendant's wife and sister-in-law also testified at trial that Austin had a serious asthmatic condition that needed constant attention. Defendant asserted in his motion for a new trial, as he does on appeal, that newly-discovered medical records show that this testimony was false.

Before a new trial is warranted based on newly discovered evidence, a defendant must show that the evidence (1) is newly discovered; (2) is not merely cumulative; (3) would probably have caused a different result; and (4) was not discoverable and producible at trial with reasonable diligence. *Miller, supra* at 46-47. In this case, the charge of involuntary manslaughter was predicated on the prosecution's theory that defendant was grossly negligent for leaving Austin unattended in the van near the river in the middle of the night. Accordingly, Austin's prior medical history, and whether defendant's wife and sister-in-law had tried to dissuade defendant from taking Austin on the trip, were not significant facts because these facts were not pertinent to whether defendant acted in the grossly negligent fashion that was claimed to have resulted in Austin's death. Accordingly, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial on this ground.

Finally, defendant takes issue with his score of ten points under offense variable (OV) 3. Defendant contends that the trial court misinterpreted the instructions in scoring this variable. However, because the guidelines do not have the force of law, error cannot be predicated on a claim that the scoring instructions were misinterpreted. *People v Mitchell*, ___ Mich ___; ___ NW2d ___ (Docket Nos. 98984, 98985, issued 3/25/97), slip op, p 31-33.

Affirmed.

/s/ Michael R. Smolenski

/s/ Michael J. Kelly

/s/ Roman S. Gribbs