

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL D. POLLARD,

Defendant-Appellant.

UNPUBLISHED

July 11, 1997

No. 191059

Oakland Circuit Court

LC No. 94-134397

Before: White, P.J., and Bandstra and Smolenski, JJ.

PER CURIAM.

A jury convicted defendant of one count of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). The court sentenced defendant to three to fifteen years' imprisonment. Defendant appeals as of right, and we reverse.

Defendant initially argues that he is entitled to a new trial because the trial court erred in giving a coercive deadlocked jury instruction. Although defendant has waived any error regarding this claim because defense counsel failed to object to the instruction at trial, we conclude that defense counsel's failure to object constituted ineffective assistance of counsel as argued by defendant. *People v Pollick*, 448 Mich 376, 386-388; 531 NW2d 159 (1995).

To prove ineffective assistance of counsel, the defendant must prove that trial counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the outcome of the trial would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Because the deadlocked jury instruction was unduly coercive and prejudiced defendant, we agree that trial counsel's failure to object fell below an objective standard of reasonableness. Given the close credibility contest between the complainant and defendant, there is a reasonable probability that, but for counsel's error, the outcome of the trial would have been different.

In *People v Sullivan*, 392 Mich 324, 342; 220 NW2d 441 (1974), the Michigan Supreme Court adopted the ABA standard jury instruction 5.4 to be given as a supplemental charge for a deadlocked jury. A departure from the standard instruction does not constitute error requiring reversal.

Rather, the question is whether the instruction given had “an undue tendency of coercion.” *People v Hardin*, 421 Mich 296, 314; 365 NW2d 101 (1984). An example of a coercive jury instruction is an instruction that calls for the jury to reach a unanimous verdict as part of its civic duty. *Id.* at 316.

After two days of jury deliberations in this case, the trial court departed from the standard jury instruction and called for the jury to reach a verdict as part of its civic duty. It drew the jurors’ attention to the duplication of testimony and expense involved in a new trial and the possibility that witnesses would not appear at a future date. Most significantly, the trial court instructed the jury that “we, the taxpayers, pay thousands of dollars per day for a jury trial such as this.” Considering the timing and the full content of the trial court’s instruction, we conclude that there was a significant possibility that the jury found the instruction to be unduly coercive. *Cf. Pollick, supra* at 385-386. The trial court’s instruction could have caused “a juror to abandon his conscientious dissent and defer to the majority solely for the sake of reaching agreement.” *Hardin, supra*.

We need not consider defendant’s claims involving the prosecutor or his remaining claims of ineffective assistance of counsel, having reversed on other grounds. We reverse and remand for a new trial. We do not retain jurisdiction.

/s/ Helene N. White

/s/ Richard A. Bandstra

/s/ Michael R. Smolenski