

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID L. SIMMONS,

Defendant-Appellant.

UNPUBLISHED

January 19, 1999

No. 203714

Recorder's Court

LC No. 96-007953

Before: Hoekstra, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of voluntary manslaughter, MCL 750.321; MSA 28.553, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to consecutive terms of imprisonment of two years for felony-firearm and ten to fifteen years for voluntary manslaughter. Defendant appeals as of right, and we affirm.

Defendant shot the victim in the back and leg, killing him. Defendant maintained that he shot the victim in self-defense. In the course of deliberations, the jury sent the judge a note announcing a 10-2 deadlock with the majority voting guilty. The trial court responded as follows:

We received your latest note indicating that you are in a deadlocked—what I'm going to instruct you at this time is to take your lunch break, come on back about 20 to two, quarter to two and continue deliberating. The amount of time that this Jury's been in deliberation in terms of the nature of the charge and the length of the trial, is not sufficient to cause me to think that without some additional deliberation you might be able to resolve any differences.

However, any note that you send out, don't put what your vote is. You can send out another note that you continue to be deadlocked; don't put what the count is. Until such time as you reach a verdict, we don't nor are we entitled to know what the count is.

In any event, take your lunch; come on back, 20 to two, a quarter to two and continue deliberating.

On the basis of this exchange defendant argues on appeal that the trial court attempted to coerce the jury into reaching a verdict, thereby denying him a fair trial, and that defense counsel's failure to object to the instruction constituted ineffective assistance of counsel. We find no merit in either of these arguments.

Defendant alleges that the instruction was coercive because of the trial court impliedly pressured the two jurors voting not guilty to adopt the majority's position. We disagree. Because there was no objection at trial to the instructions as given, we need review this issue only to the extent necessary to avoid manifest injustice. MCL 769.26; MSA 28.1096; *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997).

In *People v Sullivan*, 392 Mich 324; 220 NW2d 441 (1974), our Supreme Court adopted standard 5.4 of the ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury (Approved Draft, 1968), for supplemental jury instructions in response to deadlocked deliberations.¹ The Court declared that a substantial departure from standard 5.4 would be grounds for reversal. *Sullivan*, *supra* at 342. "Whether any deviation from ABA standard jury instruction 5.4 is substantial in the sense that reversal is required depends upon whether the deviation renders the instruction unfair because it might have been unduly coercive." *People v Hardin*, 421 Mich 296, 314-316; 365 NW2d 101 (1984). An unduly coercive instruction is one that has the propensity to cause a minority juror to sacrifice his or her conscientious dissent for the sake of reaching agreement. *Id.* at 314.

In the present case, the trial court's instruction comported with standard 5.4 and added no coercive force. In particular, after the jury notified the court that it was deadlocked, the court required the jury to deliberate further in conformity with standard 5.4(b). The trial court's action was not motivated or influenced by the disclosure of the status of deliberations. Indeed, the court specifically instructed the jury not to reveal its vote tallies through the course of deliberations, and repeated that admonishment in response to the jury's taking of that liberty. The court did not otherwise acknowledge how the votes were lining up, and gave no hint that further deliberations should make it possible specifically for the majority to convince the minority. When the jury reported its deadlocked status, it had deliberated for approximately one and one-half days only, this including time given over to having instructions repeated and testimony read back. Consequently, it was reasonable for the trial court to conclude that additional deliberations could lead to a unanimous verdict. See *People v Hargrove*, 57 Mich App 378, 383; 225 NW2d 772 (1975). We conclude that the trial court instructed the jury reasonably in light of the jury's need to consider the serious charges that defendant was facing against a backdrop of three days of trial which brought forth testimony from eighteen witnesses. Defendant suffered no prejudice in this matter, and there has been no manifest injustice.

We likewise reject defendant's claim of ineffective assistance of counsel. To prove ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to result in

deprivation of a fair trial. *Strickland v Washington*, 466 US 668, 687-688, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). The defendant must further show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel's poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

In this case, because the trial court's instruction to the jury after the jury announced that it was deadlocked was proper, defendant's argument that defense counsel was ineffective for failing to raise an objection must fail. "Counsel is not obligated to make futile objections." *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989).

Affirmed.

/s/ Joel P. Hoekstra

/s/ Martin M. Doctoroff

/s/ Peter D. O'Connell

¹ Standard 5.4, as set forth in *Sullivan, supra* at 335 (internal quotation marks omitted), reads as follows:

Length of deliberations; deadlocked jury.

(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 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.