

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS D. ASHBURN,

Defendant-Appellant.

UNPUBLISHED

April 25, 2000

No. 210037

Wayne Circuit Court

LC No. 97-002935

Before: Gribbs, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant was convicted of felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to one to four years' imprisonment for the felonious assault conviction, to be served consecutively to two years' imprisonment for the felony-firearm conviction. Defendant appeals by right. We affirm.

Defendant first contends that the trial court's misconduct deprived him of a fair and impartial trial. Claims that a trial court's comments denied a defendant a fair trial are reviewed to determine whether the comments unduly influenced the jury, thereby depriving the defendant of a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). However, because defendant did not object to the trial court's comments in the lower court, this issue is not preserved for appellate review. *Id.*

Unpreserved claims of error are reviewed under the "plain error rule." *People v Carines*, 460 Mich 750, 763-767, 774; 597 NW2d 130 (1999). In order to avoid forfeiture under the plain error rule, a defendant must show that: (1) an error occurred; (2) the error was plain, i.e., clear or obvious; and (3) the plain error affected substantial rights. *Id.* at 763. Establishing that the plain error affected substantial rights requires a showing of prejudice such that the error affected the outcome of the lower court proceedings. *Id.* The defendant bears the burden of persuasion with respect to prejudice. *Id.* "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 'seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.* at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

Even assuming that the trial court's comments constituted plain error, defendant has not established that he was prejudiced such that the remarks affected the outcome of the proceeding. Contrary to defendant's argument, none of the contested remarks in this case suggested that defendant was guilty of any crime and none illustrated a bias against defendant on behalf of the trial court. The record shows that the trial court merely reiterated defendant's own testimony that he possessed the gun without authority and held the gun in his hand during this incident. The trial court's comments about hunting, target practice, and the sale, repair, or transfer of firearms were not prejudicial because no evidence was presented of such activities. The court's remarks about the evidence referred only to undisputed evidence and did not suggest that defendant had committed any crime. Furthermore, contrary to defendant's assertions, the trial court did not imply that the jurors were stupid if they chose to disbelieve any of the evidence. While the trial court's remarks did not imply a particular bias against defendant, the court instructed the jurors to disregard any opinion that they thought the trial court held regarding the case. Because defendant has not established that the trial court's remarks affected the outcome of the proceeding, defendant forfeited the claim of error by not timely objecting to the comments. *Carines, supra* at 772.

Defendant next contends that the trial court denied him a fair trial by coercing the jury's deliberations. We disagree. Claims that a verdict was coerced are reviewed on a case-by-case basis, and all the facts and circumstances, including the particular language used by the trial court, must be considered to determine whether the defendant was denied a fair trial. *People v Turner*, 213 Mich App 558, 583; 540 NW2d 728 (1995). However, defendant failed to preserve this issue by objecting below. *Paquette, supra*. Unpreserved claims of error are reviewed for plain error that affected substantial rights. *Carines, supra* at 763.

Defendant argues that the timing of the trial court's remarks about the short work day coerced the jury into reaching a hasty verdict. Nothing in the record, however, shows that the trial court's remarks were strategically timed to coerce a verdict. In fact, the trial court told the jurors that if they did not reach a verdict that day, they could return the following Monday and continue deliberating. Informing a jury that it can return and continue deliberating if a verdict is not reached on a particular day is not coercive. *People v Vettese*, 195 Mich App 235, 244-245; 489 NW2d 514 (1992).

Defendant also argues that the trial court should not have scheduled a short work day when the jury was deliberating and that the trial court failed to explain the reasons for the short day. We find that neither of these arguments demonstrate that the trial court was attempting to coerce a verdict. Defendant further argues that the trial court shifted from an attitude of patience on the third day of trial to an attitude of impatience when the jury requested re-instruction on felonious assault and brandishing a firearm in public. The record, however, shows that the trial court told the jurors not to let the short work day affect their deliberations and that they could return on Monday and resume deliberations if they had not yet reached a verdict. The several arguments advanced by defendant regarding a coerced verdict are without merit. Defendant's

substantial rights were not affected such that the outcome of the lower court proceedings were affected.
Carines, supra.

We affirm.

/s/ Roman S. Gibbs

/s/ Joel P. Hoekstra

/s/ Jane E. Markey