

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

LATEEF WRIGHT,

Defendant-Appellant.

UNPUBLISHED

November 27, 2001

No. 224382

Wayne Circuit Court

Criminal Division

LC No. 99-001339

Before: Zahra, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of six counts of assault with intent to commit murder, MCL 750.83, arson of a dwelling house, MCL 750.72, and two counts of obstruction of justice, MCL 750.505. He was sentenced as a third habitual offender, MCL 769.11, to fifteen to fifty years' imprisonment for one of the assault convictions and eighteen to fifty years' imprisonment for the other five assault convictions, fifteen to forty years' imprisonment for the arson conviction, and 40 to 120 months' imprisonment for each of the obstruction of justice convictions, all sentences to be served concurrently. He appeals as of right. We affirm.

Defendant argues that the trial court erred in denying his motion for a new trial. We review a trial court's decision on a motion for new trial for an abuse of discretion. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). In general, in order to merit a new trial on the basis of newly discovered evidence, a defendant must show that the evidence: (1) is newly discovered; (2) is not merely cumulative; (3) would probably cause a different result; and (4) was not discoverable and producible at trial with reasonable diligence. *Id.*; *People v Davis*, 199 Mich App 502; 515; 503 NW2d 457 (1993). After reviewing defendant's claim, we conclude that a new trial is not warranted.

Defendant argues that, after trial, he took and passed a polygraph examination that was administered by an independent examiner. Defendant maintains that the polygraph results constitute "newly discovered evidence" of his actual innocence. However, the polygraph examination results would not be admissible at a new trial, *People v Ray*, 431 Mich 260, 265; 430 NW2d 626 (1988), and thus, cannot constitute newly discovered evidence sufficient to justify a new trial, *People v Barbara*, 400 Mich 352, 412 n 45; 255 NW2d 171 (1977).

Although couched in terms of a “free standing” claim of actual innocence, defendant in essence is seeking a new trial because his decision not to testify at his first trial did not produce the result he desired. He attempts to recharacterize an essential trial strategy regarding his decision not to testify into a perceived failure to allow the introduction of the polygraph examination results at a post-trial hearing in support of future testimony regarding his alleged innocence. We note that defendant was specifically asked at trial whether he wished to waive his right to testify and he answered affirmatively, indicating that he did not wish to testify. Under the circumstances, the trial court was certainly justified in refusing to construe willfully withheld testimony as “newly discovered evidence” warranting a new trial. Moreover, defendant's deliberate decision not to testify at trial precludes him from complaining on appeal about the fact that he did not do so. We will not allow defendant to harbor error as an appellate parachute. *People v Hughes*, 217 Mich App 242, 247; 550 NW2d 871 (1996).

Defendant next argues that the trial court erred in dismissing a specific juror by utilizing the appearance the juror was randomly dismissed as an alternate juror. Earlier in the trial, a court attendee saw the juror making non-verbal contact with defendant's sister. When questioned, the juror admitted that she recognized defendant's sister from the juror's place of employment. Based on these facts, we conclude that the trial court had a factual basis for removing the juror for cause. Moreover, a full jury panel of impartial jurors was still available to decide defendant's case. Defendant failed to demonstrate actual, rather than general, prejudice. The trial court's action was not limited by MCR 6.411. MCL 768.18(1) provided the court with authority to dismiss the juror in question. We find no basis for reversal with respect to this issue. *People v Van Camp*, 356 Mich 593, 604-606; 97 NW2d 726 (1959); *People v Weatherspoon*, 171 Mich App 549, 560; 431 NW2d 75 (1988).

Last, defendant argues that the conduct of the trial judge deprived him of his right to due process and a fair trial. Defendant complains that the judge made improper comments to defense counsel, improperly interrupted and interfered with defense counsel's cross-examination of witnesses, improperly questioned witnesses, and berated a defense witness who contacted a juror in violation of the court's instructions to the parties, witnesses and court attendees not to speak with jurors in the case.

A defendant in a criminal trial is entitled to a “neutral and detached magistrate.” *People v Conyers*, 194 Mich App 395, 398; 487 NW2d 787 (1992). While a trial court may question witnesses to clarify testimony or elicit additional relevant information, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial. *Id.* at 404-405. The test is whether the judge's questions and comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996); *Conyers, supra* at 405. Generally, however, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases do not ordinarily support a challenge for partiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996). Moreover, partiality is not established by mere expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women sometimes display. *Id.*

After carefully reviewing the various comments and questions at issue, we conclude that the trial court's conduct was not partial and was not calculated to influence the jury to the detriment of defendant's case. We are satisfied that the trial court's questioning of witnesses and defense counsel were not deliberately designed to belittle counsel or the defense. In fact, the trial court praised defense counsel on a number of occasions.

In regard to the court's statements addressing the improper conduct of a defense witness in attempting to contact a juror, we conclude that the decision to admonish the parties and members of the court not to have any further contact with the jurors was proper under the circumstances, MCR 6.414(A); *People v France*, 436 Mich 138, 158; 461 NW2d 621 (1990), especially in light of the previous contact between defendant's sister and another juror. Although the trial judge expounded at some length regarding the witness' improper actions, he did not directly challenge the witness' credibility and interspersed his comments with instructions that the jury was not to allow the witness' misconduct to bias them against defendant or defense counsel, or to affect their decision regarding the issues in the case. The trial court's challenged remarks were, at most, expressions of impatience, dissatisfaction, annoyance, and anger that are within the "bounds of what imperfect men and women sometimes display." We therefore conclude that defendant was not denied a fair trial due to judicial misconduct.

Affirmed.

/s/ Brian K. Zahra

/s/ Harold Hood

/s/ William B. Murphy