

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME B. PACE,

Defendant-Appellant.

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UNPUBLISHED  
November 5, 2002

No. 230888  
Wayne Circuit Court  
LC No. 00-000991-02

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, intentional discharge of a firearm from a motor vehicle, MCL 750.234a, and felony-firearm, MCL 750.227b. The court sentenced defendant to concurrent prison terms of twenty-six months to ten years for the assault with intent to do great bodily harm conviction and seventeen months to four years for the discharge of a firearm from a motor vehicle conviction, and to a consecutive two-year term for the felony-firearm conviction. We affirm.

I

Defendant first argues the trial court erred in refusing to declare a mistrial because the court coerced a juror into agreeing with the verdicts during polling and failed to immediately discontinue polling when the juror disagreed with the announced verdicts.

We review the trial court's decision denying a motion for a mistrial for an abuse of discretion. *People v Ortiz-Kehoe*, 237 Mich App 508, 513; 603 NW2d 802 (1999). A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *Id.* at 513-514. Further, we review claims of coerced verdicts case by case, considering all the facts and circumstances, as well as the particular language used by the trial court. *People v Malone*, 180 Mich App 347, 352; 447 NW2d 157 (1989).

MCR 6.420(C), which governs jury polling in a criminal trial, provides in pertinent part:

If polling discloses the jurors are not in agreement, the court may (1) discontinue the poll and order the jury to retire for further deliberations, or (2)

either (a) with the defendant's consent, or (b) after determining that the jury is deadlocked or that some other manifest necessity exists, declare a mistrial and discharge the jury.

If a juror expresses disagreement with the verdict when the jury is polled, the jury must be sent out for further deliberations. MCR 2.512(B)(3); *People v Echavarria*, 233 Mich App 356, 362; 592 NW2d 737 (1999). The continuation of the polling or the subsequent questioning of a dissenting juror is improper because of their potentially coercive effect. *Id.*; see Staff Comment to MCR 6.420.

Here, the record shows that, during the poll, when asked if the guilty verdict announced with regard to the codefendant was her verdict, the fifth juror paused and then stated, "I guess so." In response to the juror's indistinct answer, the trial court asked the juror if her response was a yes. Following a pause, and the court repeating the same question, the juror responded "yes." With regard to defendant, when asked if the guilty verdict announced was her verdict, the juror answered "yes." Contrary to defendant's position, the juror's initial response was not tantamount to a disagreement with the verdicts announced. As such, the court was not required to cease polling and send the jury out for further deliberations based on the juror's initial response. Further, it is clear that the juror's ultimate response to the question of defendant's guilt was "yes." Moreover, we find nothing coercive in the trial court's questioning of the juror, particularly in light of the juror's initial response. Accordingly, defendant has not demonstrated that he was denied his right to a unanimous verdict.

In his brief, defendant also notes that the fifth juror averred in an affidavit that she was browbeaten in the jury room, and that certain members said defendant must be guilty because he did not testify. This affidavit was attached to a motion for new trial below; however, as presented, the affidavit was not verified. In any event, the juror's affidavit concerning intimidation by other jurors and the interjuror discussions do not entitle defendant to a new trial. Generally, jurors may not impeach their own verdict by subsequent affidavits showing misconduct in the jury room. *People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997). An exception exists where juror misconduct can be demonstrated with evidence pertaining to outside or extraneous influences. *Id.*; *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997). However, juror misconduct "cannot be demonstrated with evidence indicating matters that inhere in the verdict, such as juror thought processes and interjuror inducements." *Messenger*, *supra* at 175. Accordingly, defendant is not entitled to relief on this basis.

## II

Defendant also contends that the trial court erred in denying his motion for a new trial on the basis that the jury was exposed to extraneous influences. In the affidavit presented to the lower court, the fifth juror averred that the jury foreperson and possibly another juror had visited the crime scene. The juror also averred that members of the jury made up possible scenarios of what could have happened. We review the trial court's decision denying a motion for a new trial for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000).

During deliberations, jurors may consider only the evidence presented in open court. *Budzyn*, *supra* at 88. A jury's consideration of extraneous facts not introduced in evidence deprives defendant of his Sixth Amendment rights of confrontation, cross-examination, and

assistance of counsel. *Id.* In order to establish that the extrinsic influence was error requiring reversal, the defendant must prove that the jury was exposed to extraneous influences, and that the influence “created a real and substantial possibility that they could have affected the jury’s verdict.” *Id.* at 88-89. In proving that an extraneous influence created a real and substantial possibility of prejudice, the defendant must generally “demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict.” *Id.* at 89. If the defendant makes such a showing, the burden shifts to the prosecution to demonstrate that the error was harmless beyond a reasonable doubt. *Id.* The prosecution may establish that the jury’s consideration of extraneous influences was harmless beyond reasonable doubt by proving either that the extraneous influences were duplicative of evidence produced at trial or that the evidence of guilt was overwhelming. *Id.* at 89-90.

Even considering the juror’s affidavit, defendant has failed to establish an error requiring reversal. Because the two jurors’ observations of the crime scene occurred outside of the adversarial process, they may properly be characterized as an extrinsic influence. However, defendant did not demonstrate that this extraneous influence was “substantially related to a material aspect of the case,” and that it created a real and substantial possibility that the jury’s verdict was affected. *Budzyn, supra* at 89. Rather, it is unclear what, if any, effect the jurors’ alleged visit had on the other jurors. Indeed, the record shows that the jurors heard extensive testimony about the crime scene, and were shown numerous photographs, as well as a sketch, of the scene. The photographs and the sketch were admitted as exhibits. Moreover, there was strong evidence, including the testimony of the victim and several eyewitnesses, that defendant committed the crimes, as a principal or as an aider and abettor. Under these circumstances, it is unlikely that the extraneous information had any affect on the jury’s verdict. Accordingly, defendant is not entitled to a new trial on this basis.

### III

Defendant argues that the trial court abused its discretion by granting the prosecution’s motion to amend the information to allow felonious assault or discharge of a firearm from a motor vehicle to serve as the predicate felony for the charge of felony-firearm. As defendant was originally charged, the offense of assault with intent to murder was designated the predicate felony for the offense of felony-firearm. The trial court granted the motion to amend, finding that the amendment would not add an additional charge, but merely conform the information to the evidence that had been presented, and would not be prejudicial.

This Court reviews a trial court’s ruling to amend an information for an abuse of discretion and will not reverse unless the defendant was prejudiced in his defense or a failure of justice has occurred. MCL 767.76; *People v Prather*, 121 Mich App 324, 333-334; 328 NW2d 556 (1982). Before, during, or after trial, a trial court may permit the prosecution to amend the information unless to do so would result in undue prejudice to the defendant. MCL 767.76; MCR 6.112(H). Undue prejudice includes unfair surprise, inadequate notice, or insufficient opportunity to defend. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

We find that the trial court did not abuse its discretion because defendant failed to show that the amendment caused him any prejudice. The amendment did not add a new charge, but added additional predicate felonies to the existing charge of felony-firearm. Further, defendant

was already charged with the predicate felonies, i.e. felonious assault and discharge of a firearm from a motor vehicle in Counts II and III of the information. As such, the amendment did not alter the facts, evidence, or possible defenses, and, thus, did not deprive defendant of a sufficient opportunity to defend against the charges. Accordingly, defendant is not entitled to appellate relief on this basis.

#### IV

Defendant argues that the trial court erred by assessing ten points under offense variable four (OV 4), MCL 777.34(1), for serious psychological injury to the victim because there is no evidence that psychological treatment was necessary or sought by either victim.<sup>1</sup>

A sentencing court has discretion in determining the number of points to be scored provided that evidence of record adequately supports a particular score. *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000). “Scoring decisions for which there is any evidence in support will be upheld.” *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

We find that defendant’s contention that the trial court improperly scored OV 4 is without merit. MCL 777.34(1) directs a score of ten points if the serious psychological injury *may* require professional treatment. The guidelines instructions clearly state, “the fact that treatment has not been sought is not conclusive.” MCL 777.34(1). Further, as a result of defendant’s actions, the victim suffered a nearly fatal gunshot wound that left him unable to move his lower extremities and with a dim likelihood that he will ever walk again. Under such circumstances, the trial court did not abuse its discretion in scoring ten points under OV 4 because the victim suffered “serious psychological injury [that] may require professional treatment.”

Affirmed.

/s/ Richard Allen Griffin

/s/ Hilda R. Gage

/s/ Patrick M. Meter

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<sup>1</sup> The offenses of which defendant was convicted occurred after January 1, 1999; therefore, the statutory sentencing guidelines apply to this case. MCL 769.34(1).