STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 27, 2004
v	No. 250076 Dickinson Circuit Court
CRAIG EDWARD HAYES, Defendant-Appellant.	LC No. 02-002934-FH; 02-002935-FH

Before: Whitbeck, C.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant Craig Edward Hayes appeals as of right from a jury conviction of breaking and entering, MCL 750.110, and two counts of falsely passing a lottery ticket, MCL 432.30. We affirm.

Defendant first argues that he was denied his Sixth Amendment right to a fair and impartial trial when the trial court denied his motion for a mistrial. We disagree.

We review a trial court's grant or denial of a motion for mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). A motion for a mistrial is appropriately granted where there is "an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995), citing *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

Defendant moved for a mistrial based on an answer given by a venireperson during voir dire. He argues that the venireperson's answer constituted an impermissible, extraneous influence, which deprived him of his Sixth Amendment right to a fair and impartial trial.

Criminal defendants are denied their right to an impartial jury in violation of their Sixth Amendment rights if the jury considers facts outside those introduced into evidence. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997) (citations omitted), writ of habeas corpus gtd sub nom *Nevers v Killinger*, 990 F Supp 844 (ED Mich 1997). The defendant bears the initial burden of proving that (1) "the jury was exposed to extraneous influences," and (2) "these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict." *Id.* at 88-89 (citations omitted). Regarding the latter part of the defendant's burden, our Supreme Court in *Budzyn* explained that "[g]enerally, . . . the defendant will

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 (citations omitted). If the defendant meets this initial two-pronged burden, the burden shifts to the prosecutor to prove that the error was harmless beyond a reasonable doubt. *Id*.

Defendant contends that the following statement from a potential juror denied him his right to a fair and impartial jury

> The one about the – I would have to explain it. I used to be an over-the-road truck driver and I would be out four to eight weeks. A lot of times I was out driving, a good friend of mine, Ray Gardipey, had a Craig Hayes at his house. I'm not sure if that's him or not. And he took all his food, all his beer, all his cigarettes, all his checks. I didn't know – like I said, I never saw him before, but the name Craig Hayes is in my mind and I just couldn't – I just couldn't do it.

Directly following the dismissal of the venireperson, the trial court stated:

> All right, members of the jury, what you heard the previous prospective juror say about a Craig Hayes, can you all disregard that? You're not gonna [sic] hear any evidence in this case that this Craig Hayes, the Defendant here, is the same person that that juror was talking about. Is there anybody who feels they can't disregard that? You're all indicating that you can. All right, thank you.

We find that any possible impact on the jury's verdict was obviated by the trial court's dismissal of the venireperson and the court's subsequent curative instruction to prospective jurors. See *People v Abraham*, 256 Mich 265, 279; 662 NW2d 836 (2003), citing *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant next argues that the prosecution presented insufficient evidence to sustain his conviction of breaking and entering. We disagree.

We review a claim of insufficient evidence de novo, looking at the evidence "in a light most favorable to the prosecution" to determine "whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Additionally, all conflicts are resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Defendant's primary argument on this point is that the prosecution's witness, Becky Maholic, lacked credibility. Specifically, defendant contends, Maholic was an admitted heroin user, who was drunk when defendant allegedly confessed to her about the break-in. Moreover, defendant argues, Maholic was biased against him because defendant owed her money for a drug transaction.

The jury heard evidence regarding all the purported flaws in this witness, and we are reluctant to interfere with a jury's assessment of a witness's credibility and the weight to accord a witness's testimony. *Wolfe, supra* at 514-515, quoting *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974). Moreover, we note that Maholic's testimony was not the only

evidence implicating defendant. There was ample circumstantial evidence pointing to defendant as the perpetrator of the break-in. It is the trier-of-fact's role – not a reviewing court's role – "to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002); see *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Therefore, looking at all the evidence in a light favoring the prosecution, we are satisfied that the prosecution presented sufficient evidence identifying defendant as the perpetrator of the break-in.

Last, defendant argues that the prosecutor engaged in misconduct when he referred to defendant's involvement with illegal drugs and the fact that a police officer was previously acquainted with him. He also argues that this evidence was more prejudicial than probative.

However, because defendant failed to object to these purported errors below, we review these issues for plain error. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001); see *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). We will not reverse a conviction based on prosecutorial misconduct where any prejudice could have been reversed with a curative instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001), citing *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). We believe that any prejudice resulting from the conduct at issue could have been cured by an instruction from the trial court. *Id*. Likewise, with regard to the evidentiary issue, defendant fails to show that "more probably than not, a miscarriage of justice occurred because of the error." *Knapp, supra* at 378, citing *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Affirmed.

/s/ William C. Whitbeck
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello