

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANGELA KAY MCCREERY,

Defendant-Appellant.

UNPUBLISHED

September 14, 2004

No. 247348

Saginaw Circuit Court

LC No. 02-021997-FC

Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

PER CURIAM.

I. Overview

Defendant Angela McCreery appeals as of right her convictions of assault with intent to murder, MCL 750.83, carjacking, MCL 750.529a, and carrying a dangerous weapon with unlawful intent, MCL 750.226. The trial court sentenced McCreery to consecutive terms of twenty-three to thirty-six years' imprisonment for the assault and carjacking convictions, and to two years and five months to five years for the weapons conviction. We affirm.

II. Basic Facts And Procedural History

At trial, Paula Parcell testified that on April 14, 2002, she went shopping at Meijer in Bay City. Parcell stated that she did not know her way around Bay City very well and that, after she was done shopping, she stopped at Burger King for lunch, then drove toward her home in her Honda Accord. Parcell said that on her way home, she saw a woman on the side of the road walking away from a car with a flat tire, so she stopped and offered the woman a ride to a gas station. Parcell testified that she did not know the woman, but thought that she would do a good deed for someone in need by offering her assistance. At trial, Parcell identified the woman as McCreery.

Parcell testified that McCreery accepted her offer of a ride to a gas station and got in her car. Halfway to the gas station, McCreery offered Parcell \$10 to turn around and get her luggage, which she left in her own car. Parcell agreed but did not want McCreery's money, so they returned to McCreery's car, where McCreery transferred four suitcases and piles of clothes into Parcell's car. Parcell stated that McCreery then asked her to stop at a junkyard so McCreery could get a tire for her car, and Parcell complied. The first junkyard they tried was closed, so they decided that Parcell would drop McCreery off at the bus station. On the way to the bus

station, the two women stopped at another junkyard, Reigler's Auto. According to Parcell, McCreery tried to purchase a car there, but could not reach a deal. Jeffrey Reigler, the owner of Reigler's Auto, testified that he remembered two women stopping by his business that day, and that one of the women tried to make a deal with him to trade in her car and get a different car. Reigler testified that after they failed to make a deal, the driver of the car asked him for directions to the Saginaw bus station, and the two women left.

Parcell testified that after they left the second junkyard, they got onto Interstate 75 and headed toward the bus station. According to Parcell, while they were driving down the highway, McCreery stabbed her in the eye with a knife, then continued to stab her in the head, chest, and neck. Parcell stated that she tried to pull the car off the road, but because they were traveling at 50 mph and McCreery had put her foot on the accelerator, Parcell could not stop the car. Parcell said that she tried to bite McCreery and push her away, but McCreery was much stronger than she was. Parcell tried to put the car in park and take the keys out of the ignition, but McCreery began to saw at her fingers with the knife. Parcell then grabbed the knife and threw it out the window. Parcell stated that she next remembered her foot hitting the ground and then waking up lying on the side of the road with McCreery driving away in her car.

McCreery gave a radically different account of the events that transpired after they left the second junkyard. McCreery testified that, after they left the second junkyard, she requested that Parcell take her back to her car instead of taking her to the bus station. McCreery stated that Parcell ignored her request and turned out of the junkyard in the opposite direction of her car. McCreery stated that Parcell then began driving around aimlessly, refused to ask for directions, and ended up driving on a vacant road. McCreery testified that once they were on the vacant road, Parcell slowed the car down and stated that she did not know where the bus station was, but her "friend" wanted what was in McCreery's pocket, she wanted what was in McCreery's purse, and they both wanted what was in McCreery's luggage. Next, according to McCreery, she felt a poke on her leg and saw Parcell throw something out the window. McCreery testified that she believed she was injected with something.

According to McCreery, she again asked Parcell to take her back to her car, but Parcell refused, so McCreery put her foot on the accelerator and steered the car onto the expressway. McCreery testified that, after they were on the expressway, she began to feel sick, and Parcell pulled out a knife and began stabbing her, pulling her hair, and yelling at her. McCreery stated that she then pried the knife out of Parcell's hand and Parcell pulled the car over to the side of the road, but that the car continued to travel at two to three miles an hour. McCreery insisted that Parcell was the aggressor and that she was merely defending herself against Parcell. McCreery stated that the altercation ended when she kicked Parcell out of the open car door with her foot and drove away.

Daniel Boyton and Amy White both testified that on April 14, 2002, they were driving down I-75 and saw a woman fall from the front driver-side door of a slow-moving Honda Accord and a second person drive off in the car. White described Parcell as being covered with blood and stated that Parcell said that she had been stabbed and carjacked. Boyton testified that he called 911.

Michigan State Police Trooper Jeremy Sloan testified that he was dispatched to the scene, and, when he arrived, he saw a woman lying on the side of the road with blood around her.

Birch Run Police Officer Jason Leidel testified that he received a dispatch regarding a carjacking and the description of the vehicle and McCreery. When Leidel saw a vehicle matching the description, he pulled behind the vehicle and activated his lights. The car continued to move for approximately two more miles before it stopped. Officer Leidel stated that, once the car was stopped, he noticed blood on the driver's side of the vehicle, so he and the reserve officer with him pulled out their guns and ordered McCreery out of the car. Officer Leidel testified that McCreery did not comply with their directions to get out of the car. Officer Leidel approached the car, opened the driver's door, removed McCreery, set her between the two vehicles, and handcuffed her. Officer Leidel described McCreery as distraught, possibly with mental problems or on drugs of some sort.

Dr. Roger Roller, an emergency physician, testified that he treated Parcell in the emergency room for blunt trauma and multiple stab wounds to her head, face, arms, torso, and neck. Dr. Roller further testified that Parcell's injuries included a potentially life-threatening cut that had entered the globe of her eye and ruptured it. Dr. Roller estimated that Parcell had over thirty stab wounds. Dr. Tori Snider, an emergency resident physician, testified that she treated McCreery on April 14, 2002, for eleven lacerations to her fingers and a laceration to her wrist. Dr. Snider stated that McCreery was given Narcan, a narcotic antidote, but that she reacted slowly; however, no toxicology was taken.

Following her conviction, McCreery filed her claim of appeal. She then filed post-conviction motions challenging the constitutionality of MCL 777.57(2)(c)¹ on the ground of due process and requesting an evidentiary hearing to investigate the misconduct of one of the jurors. McCreery argued that MCL 777.57(2)(c), which allows the courts to increase the sentencing guideline range for defendants who are also convicted of subsequent or concurrent offenses that do not result in a mandatory conviction, was void for vagueness and was an arbitrary and capricious violation of substantive due process. Specifically, McCreery argued that she was unfairly scored 20 points for each of the offenses because none of her convictions would result in a mandatory consecutive sentence. Therefore, according to McCreery, the consecutive nature of her sentence and the increased guideline scoring effectively punished her twice, whereas a defendant who committed a crime requiring a consecutive sentence would be treated more leniently because he or she would not receive increased point scores. At the hearing on McCreery's post-conviction motions, she added another incident of jury misconduct in support of her request for an evidentiary hearing. Specifically, she alleged that she had been informed that the jury had been exposed to Parcell's family and had conversations regarding Parcell's injuries.

At the conclusion of the hearing, the trial court denied McCreery's request for an evidentiary hearing concerning jury misconduct and ruled that prior record variable (PRV) 7 was not unconstitutionally vague. In a separate opinion and order, the trial court denied McCreery's due process challenge to PRV 7, because the court determined that the language in PRV 7 was clear. McCreery now appeals.

¹ Prior record variable (PRV) 7 is codified at MCL 777.57. The designations PRV 7 and MCL 777.57 will be used interchangeably throughout this opinion.

III. PRV 7

A. Standard Of Review

McCreery argues that prior record variable (PRV) 7, codified at MCL 777.57, violates due process and is void for vagueness. Whether a statute is constitutional is a question of law that we review de novo.²

B. Legal Standards

At the time of McCreery's sentencing, MCL 777.57(2)(c) provided: "Do not score a concurrent felony conviction if a mandatory consecutive sentence will result from that conviction." McCreery argues that the statute does not give defendants fair notice of the potential sentences they face for their convictions, because the variable is vague and subject to mutually exclusive interpretations.

Although no Michigan authority supports a constitutional vagueness challenge to a sentencing guideline, the United States Supreme Court has stated that "vague sentencing provisions may post [sic] constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute."³ If a statute does not involve First Amendment freedoms, it can be unconstitutionally vague if it fails "to provide fair notice of what conduct is prohibited" or if it encourages "arbitrary and discriminatory enforcement."⁴ A statute gives fair notice if it gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited or required.⁵

C. MCL 777.57(2)(c)

MCL 777.57(2)(c) prohibits scoring a concurrent felony conviction only "if a mandatory consecutive sentence will result from that conviction." The jury convicted McCreery of three crimes, none of which mandated consecutive sentences. Therefore, the statute unambiguously gave her notice that, because none of her convictions mandate consecutive sentences, she would be scored under PRV 7. We conclude that the statute is not vague when applied to McCreery.

McCreery also argues that MCL 777.57(2)(c) violates substantive due process by arbitrarily distinguishing between sentences that are required by statute to be consecutive and sentences that can be consecutive within judicial discretion. If a defendant challenges a classification affecting a fundamental right or it involves a suspect classification, strict scrutiny applies and a compelling state interest is required to uphold it.⁶ However, if the classification

² *People v Boomer*, 250 Mich App 534, 538; 655 NW2d 255 (2002).

³ *United States v Batchelder*, 442 US 114, 123; 99 S Ct 2198; 60 L Ed 2d 755 (1979).

⁴ *People v Lino*, 447 Mich 567, 575-576; 527 NW2d 434 (1994).

⁵ *People v Noble*, 238 Mich App 647, 652; 608 NW2d 123 (1999).

⁶ *People v Sleet*, 193 Mich App 604, 605; 484 NW2d 757 (1992).

affects neither a fundamental right nor a suspect classification, the classification being challenged is to be upheld if it is not arbitrary and capricious and is rationally related to a legitimate state interest.⁷

Suspect classifications include race, alienage, ethnicity, and national origin.⁸ The scoring distinctions under MCL 777.57(2)(c) do not involve any of those classifications. Further, convicted criminals do not have a liberty interest in being free from consecutive sentencing.⁹ Sentencing classifications, therefore, are subject to rational basis scrutiny, which requires the Legislature's judgment to be supported by "any state of facts either known or which could reasonably be assumed, although such facts may be debatable."¹⁰ The classification is presumed constitutional and the party challenging it bears a heavy burden of rebutting the presumption.¹¹

Black's Law Dictionary defines "arbitrary" as "depending on individual discretion, [specifically] determined by a judge rather than by fixed rules, procedures, or law."¹² MCL 777.57(2)(c) states that scoring under PRV 7 is determined by whether the conviction would result in a mandatory consecutive sentence. Therefore, the Legislature chose to distinguish between two types of sentences and gave trial courts limited discretion in the matter. We conclude that the Legislature's choice is rationally related to the state's interest in allowing the trial courts some discretion to determine whether the facts of a case require a harsher or more lenient sentence. "The authority to impose sentences and to administer the sentencing statutes enacted by the Legislature lies with the judiciary."¹³ However, the discretion is still limited to circumstances not involving mandatory consecutive sentences. We conclude that the statute is neither arbitrary nor unreasonable.

IV. Mistrial

A. Standard Of Review

McCreery asserts that the trial court abused its discretion when it failed to grant her motion for a mistrial because of alleged misconduct by one of the jurors. We review a trial court's denial of a motion for a mistrial for an abuse of discretion,¹⁴ while we review a trial

⁷ *Id.* at 606.

⁸ *Proctor v White Lake Twp Police Dep't*, 248 Mich App 457, 469; 639 NW2d 332 (2001).

⁹ *Sleet, supra* at 606, citing *Wolff v McDonnell*, 418 US 539, 555-557; 94 S Ct 2963; 41 L Ed 2d 935 (1974).

¹⁰ *Shavers v Attorney Gen*, 402 Mich 554, 614; 267 NW2d 72 (1978), mod on other grounds 406 Mich 1122 (1979), mod on other grounds 407 Mich 1153 (1979), aff'd after remand 412 Mich 1105 (1982) (internal quotation marks omitted).

¹¹ *Id.* at 613-615.

¹² Black's Law Dictionary (7th ed).

¹³ *People v Garza*, 469 Mich 431, 434; 670 NW2d 662 (2003) (emphasis omitted).

¹⁴ *People v Coffman*, 45 Mich App 480, 487; 206 NW2d 795 (1973).

court's factual findings for clear error.¹⁵ A mistrial should only be granted where a "suspicious exercise of judicial discretion" reveals the existence of no less drastic remedy.¹⁶

B. The Trial Court's Decision

The record shows that the trial court conducted an inquiry into the juror's alleged misconduct, determined that the juror had not prejudged the case, and instructed the juror not to discuss the matter with the other jurors. "It is well established that jurors are presumed to follow their instructions."¹⁷ McCreery has not shown that the juror actually disobeyed the trial court's instruction, nor that the juror was either unable to follow or disinclined to follow the trial court's instruction. Further, the juror was excused before the jury began deliberating. Therefore, even if the juror was not impartial, McCreery has not shown that the jury and its deliberations were unfairly affected.

V. Evidentiary Hearing

A. Standard Of Review

McCreery argues that the trial court erred in denying her post-conviction motion request for an evidentiary hearing addressing the juror's alleged misconduct, as well as information that came to light after the trial that the jurors had been in the same hallway as Parcell's family when they were discussing Parcell's injuries. A defendant is guaranteed the right to a trial by an impartial jury by both federal and state constitutions.¹⁸ However, this issue is not preserved for review because McCreery's motion was improperly brought before the trial court after she had already filed an appeal.¹⁹ Further, McCreery also failed to ask this Court for a remand.²⁰ Accordingly, we review for plain error affecting substantial rights.²¹

¹⁵ *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000).

¹⁶ *People v Benton*, 402 Mich 47, 60-61; 260 NW2d 77 (1977).

¹⁷ *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

¹⁸ US Const, Am VI; Const 1963, art 1, § 20.

¹⁹ MCR 7.208(B)(1); see MCR 7.208(A).

²⁰ MCR 7.211(C)(1)(a)(i), (ii).

²¹ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). McCreery argues that to the extent defense counsel failed to preserve the issue by requesting an evidentiary hearing at trial, she was denied effective assistance of counsel. However, "defendant did not preserve her ineffective assistance of counsel argument for appeal because she did not raise it in her statement of the issues presented." *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Further, it was McCreery's appellate counsel who ultimately failed to preserve the issue by not complying with the court rules and moving this Court for a remand pursuant to MCR 7.211(C)(1)(a)(i), (ii).

B. Legal Standards

For a defendant to avoid forfeiture under the plain error rule, a defendant must meet the following three requirements: (1) an error occurred, (2) the error was plain, and (3) the plain error affected defendant's substantial rights.²² "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings."²³ Further, it is the defendant who bears the burden of persuasion regarding the prejudice.²⁴ If a defendant meets all three of the requirements, reversal is only warranted when the plain error resulted in the conviction of an innocent defendant or the error seriously affected the integrity of the judicial proceedings.²⁵

C. Applying The Standards

As we have discussed above, McCreery cannot show that the challenged events caused her prejudice. The juror who allegedly engaged in misconduct was excused before jury deliberations began, and McCreery has presented no proof that any jurors actually heard the alleged conversations or that the alleged conversations contained any information the jurors did not hear at trial. "[T]he constitution guarantees only a fair trial, not a perfect one."²⁶ In this case, the evidence of McCreery's guilt presented at trial was overwhelming, including her admission that she inflicted Parcell's injuries. Because McCreery has not shown plain error affecting her substantial rights, reversal is not warranted.

Affirmed.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ Henry William Saad

²² *Id.* at 763.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *People v Reed*, 449 Mich 375; 535 NW2d 496 (1995).