Court of Appeals, State of Michigan

ORDER

People of MI v Gregory Phillip Keith

Docket No. 252187

LC No. 03-190080-FH

Janet T. Neff
Presiding Judge

Michael R. Smolenski

Michael J. Talbot
Judges

On the Court's own motion, the July 19, 2005 opinion is hereby VACATED. The opinion contained the following clerical error: the opinion referenced alleged instances of prosecutorial misconduct. Prosecutorial misconduct was not an issue in this case. A new opinion is attached which corrects the error located in the second to the last full paragraph of the opinion. That paragraph now reads as follows:

Defendant next argues that the cumulative errors warrant reversal. We reject defendant's assertion that he was denied a fair trial by the cumulative effect of the alleged errors. "'Only actual errors are aggregated to determine their cumulative effect.'" *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999) (citation omitted). Because any actual errors were minor and had no prejudicial effect, the aggregation of those errors will not warrant reversal.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUL 28 2005
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 28, 2005
v	No. 252187 Oakland Circuit Court
GREGORY PHILLIP KEITH, Defendant-Appellant.	LC No. 03-190080-FH

Before: Neff, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to commit criminal sexual conduct involving sexual penetration (CSC I), MCL 750.520g(1), and two counts of assault with intent to commit criminal sexual conduct in the second degree (CSC II), MCL 750.520g(2). Defendant was sentenced to five to twenty years in prison for his assault with intent to commit CSC I conviction, and five to ten years in prison for each of his assault with intent to commit CSC II convictions. We affirm.

Defendant first argues that his identification as the perpetrator of the assaults against the victims was against the great weight of the evidence. We disagree.

Defendant properly preserved this issue by raising it in a motion for a new trial. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). A trial court's decision to grant or deny a motion for new trial is reviewed for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998). An abuse of discretion exists where "an unprejudiced person, considering the facts on which the trial court [relied], would find no justification or excuse for the ruling made." *People v McSwain*, 259 Mich App 654, 685; 676 NW2d 236 (2003), quoting *People v Williams*, 240 Mich App 316, 320; 614 NW2d 647 (2000). "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Musser*, *supra* at 218-219.

While the evidence against defendant was circumstantial, there was evidence to support his identification as the perpetrator of the assaults against the victims. Defendant admitted that he was in the trailer park where the assaults occurred on the morning of April 2, 2003. When he spoke to police, defendant was wearing clothes similar to those identified by the victims as having been worn by their attacker. The victims also stated that their attacker had a scar on his

chin and defendant has a similar scar on his chin. Furthermore, one of the victims testified that defendant resembled the attacker. The victims also identified the knit ski cap found in defendant's van as the one worn by their attacker. Finally, officer Froehlich testified that when he interviewed defendant on the day following the assaults, he asked defendant if he had been in an altercation with any girls and defendant responded by stating that he "wasn't up to the bus stop." Froehlich also testified that when he noted that he had not mentioned the bus stop, defendant became apprehensive and avoided eye contact.

Based on this evidence, a reasonable jury could conclude that defendant was the perpetrator of the assaults. Defendant argues that this evidence is thoroughly undermined by the fact that the victims identified a different picture during a photo lineup and were unable to conclusively identify him as their attacker. However, the failure to identify defendant conclusively is a matter of weight and credibility. Our Supreme Court has stated that credibility issues must remain with the jury and unless it can be said that the evidence "was so far impeached that it was 'deprived of all probative value or that the jury could not believe it' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Lemmon*, *supra* at 645-646 (citation omitted). The evidence tending to support the identification of defendant as the perpetrator was not deprived of all probative value such that the jury could not rely upon it in making its findings. Consequently, the trial court was required to defer to the jury's determination that defendant was the perpetrator of the assaults. The trial court did not err in refusing to grant defendant a new trial.

Defendant next argues that the trial court violated MCR 6.414(H) by completely precluding the jury from rehearing testimony or reexamining evidence. This Court reviews a trial court's decision whether to grant a jury's request to review certain testimony for an abuse of discretion. *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996). A trial court has the discretion whether to allow a jury to reexamine selected testimony. MCR 6.414(H); *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000). The court may order the jury to continue deliberations without the requested review, as long as it does not deny any future possibility of rehearing the testimony. MCR 6.414(H); *Carter, supra* at 219-220 (noting that foreclosing to the jury the possibility of later reviewing testimony is error).

During deliberations the jury requested the following: (1) "Transcript of today's trial," (2) "When was picture of def. taken?," (3) "When was arrest and arraignment?," (4) line-up photos, (5) police report, (6) exhibit list, (7) hat, (8) pictures of scratches, and (9) pictures of bra. The trial court refused to provide items two and three because the time the photograph of defendant was taken and the times of defendant's arrest and arraignment were not admitted into evidence. The trial court may not provide the jury with evidence not admitted at trial. *Davis, supra* at 57. Likewise, the police report was inadmissible as hearsay. *People v Herndon*, 246 Mich App 371, 410-411; 633 NW2d 376 (2001). Therefore, the trial court did not err when it refused to provide the jury with this evidence. While the trial court did not provide the requested trial transcript, there is no evidence that the trial court instructed the jury that it could not have the transcript at all or otherwise foreclosed the possibility of later review. In addition, the jury's notes indicated that the trial court provided the lineup photographs, exhibit list, hat, and photographs of the scratches and bra.

Later, the jurors asked to see the transcript of Froehlich's testimony concerning defendant's bus stop comment and one victim's testimony. An affidavit signed by one of the

prosecutors working on the case and attached to the prosecution's brief in opposition to defendant's motion for a new trial,[1] avers that Officer Froehlich's entire testimony was played for the jury, at defense counsel's request, and that defense counsel had no objection to the trial court replaying the victim's testimony. Because the trial court did not foreclose the possibility of rehearing testimony or examining evidence and did in fact provide the jury with the admissible evidence and transcripts, we find no error warranting reversal.

Defendant also argues that the trial court erred by having ex parte communications with the jury and failing to create a record of those communications. The communications implicate defendant's constitutional right to an impartial jury. *People v France*, 436 Mich 138, 162; 461 NW2d 621 (1990). This court reviews constitutional questions de novo. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996).

While Michigan law once provided an automatic reversal rule with respect to any trial court communication with the jury in violation of MCR 6.414(A), that rule was modified by our Supreme Court in *France*, *supra* at 162-163. In place of an automatic reversal rule, the Court instituted a rule that "centers on a showing of prejudice." *Id.* at 162. While the trial court's responses to the jury's requests were ex parte, they may be categorized as administrative communications because they concerned the availability of evidence. See *France, supra* at 143-144. Administrative communications do not carry a presumption of prejudice, *id.*, and defendant has failed to show how he was prejudiced. Because none of the communications were prejudicial, reversal is not warranted.

Defendant next argues that the trial court violated his right to have counsel present at all critical stages of the proceedings when it failed to ensure that defense counsel was present during the jury requests to rehear testimony and reconsider evidence. We disagree.

The Sixth Amendment to the United States Constitution guarantees the accused in a criminal prosecution the right to the assistance of counsel for his defense. US Const, Am VI; *People v Crusoe*, 433 Mich 666, 684 n 27; 449 NW2d 641 (1989). A defendant "is entitled to counsel not only at trial, but at all 'critical stages' of the prosecution, *i.e.*, those stages 'where counsel's absence might derogate from the accused's right to a fair trial.'" *People v Bladel (After Remand)*, 421 Mich 39, 52; 365 NW2d 56 (1984), abrogated on other grounds 431 Mich 315 (1988), quoting *United States v Wade*, 388 US 218, 226-227; 87 S Ct 1926; 18 L Ed 2d 1149 (1967). The United States Supreme Court has "uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the

[1] Defendant erroneously relies on *People v Taylor*, 383 Mich 338; 175 NW2d 715 (1970) and *People v Robinson*, 390 Mich 629; 213 NW2d 106 (1973) for the proposition that the prosecution's affidavit impermissibly enlarged the record. Unlike the affidavit in question, the affidavits in *Taylor* and *Robinson* were never submitted to the trial court, consequently, they were determined to impermissibly expand the record and were disregarded. *Taylor, supra* at 362; *Robinson, supra* at 631 n 1. However, the *Taylor* Court did note that appellate courts must examine the affidavits offered to the trial court on a motion for a new trial. *Id.* at 360. Consequently, the affidavit in this case is properly before us.

accused during a critical stage of the proceeding." *United States v Cronic*, 466 US 648, 659 n 25; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

Here, defense counsel appears to have been present during the jury requests. Defense counsel's initials appear at the bottom of at least one of the jury notes and the affidavit submitted by the prosecution states that defense counsel was present. Regardless, because the brief communications in this case were of the administrative variety, as opposed to a communication of substantive law, we conclude that they did not involve critical stages of the trial and that defendant must prove prejudice. *France, supra* at 142-143. Accordingly, because actual prejudice has not been shown, reversal is not warranted.

Defendant also argues that he was denied his right to be present during all critical stages of the trial. An accused has a right to be present at his trial. This right is conferred by statute, MCL 768.3, guaranteed by the federal and state Confrontation Clauses, US Const, Am VI; Const 1963, art 1, § 20, and also grounded in common law. *People v Mallory*, 421 Mich 229, 246 n 10; 365 NW2d 673 (1984). But a defendant's absence from a part of his trial warrants reversal only if "there was any reasonable possibility that defendant was prejudiced by his absence." *People v Armstrong*, 212 Mich App 121, 129; 536 NW2d 789 (1995). As stated, the stages of the proceeding that defendant did not attend were not critical stages. Furthermore, defendant has not demonstrated actual prejudice arising from his absence during the trial court's brief response to the jury's inquiry concerning an administrative matter or its comment to the jury.

Defendant next argues that the cumulative errors warrant reversal. We reject defendant's assertion that he was denied a fair trial by the cumulative effect of the alleged errors. "'Only actual errors are aggregated to determine their cumulative effect.'" *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999) (citation omitted). Because any actual errors were minor and had no prejudicial effect, the aggregation of those errors will not warrant reversal.

Finally, defendant argues the trial court erred when it sentenced him based on facts not supported by the jury verdict in contravention of the decisions in *Blakely v Washington*, 542 US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *US v Booker*, 543 US ___; 125 S Ct 738; ___ L Ed 2d ___ (2005). However, in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), our Supreme Court addressed the impact of *Blakely* on our sentencing system. The Court noted that the sentencing system addressed in *Blakely* was a determinate sentencing system as opposed to Michigan's indeterminate sentencing system and that the holding in *Blakely* was designed to protect defendants from higher sentences based on facts not found by a jury. *Id.* The Court then reasoned that, because the maximum sentence under Michigan's sentencing system is set by law and the trial judge cannot exceed it, the holding in *Blakely* did not affect our system. *Id.* Like the system in *Blakely*, and unlike Michigan's sentencing system, *Booker* dealt with a determinate sentencing system and the constitutionality of a departure in excess of the maximum sentence permitted by the statute based on facts not found by the jury. *Booker, supra*. Therefore, we do not believe that *Booker* alters the applicability of *Claypool*.

Consequently, the trial court did not err when it considered facts not necessarily found by the jury in rendering its verdict.

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Michael J. Talbot