

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT ALLEN DRISCOLL,

Defendant-Appellant.

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UNPUBLISHED

February 5, 2009

No. 281468

Cheboygan Circuit Court

LC No. 07-003622-FH

Before: Talbot, P.J., and Bandstra and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of larceny in a building, MCL 750.360, stealing or retaining a financial transaction device, MCL 750.157n(1), and possession or control of another's financial transaction device with intent to use, deliver, circulate, or sell, MCL 750.157p. Defendant was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of 25 months to 8 years for each conviction. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

**I. Factual History**

On February 1, 2007, defendant and David Hayes walked to a bar in Cheboygan to drink beer and shoot pool. They stopped along the way so that Hayes could withdraw \$40 from an ATM machine. While at the bar, Hayes returned from the restroom to find that defendant was gone. Later that night, Hayes discovered that his checkbook, which contained his ATM card and PIN number, was missing. A surveillance photo of a nearby ATM machine revealed defendant using Hayes's ATM card to withdraw \$100 at approximately 11:21 p.m., while Hayes was still at the bar.

Defendant argues that the trial court denied him a fair trial by permitting a juror to ask an inappropriate question and by answering the question in a prejudicial manner. He also contends that the trial court erred by allowing the prosecutor to communicate directly with the juror, and that the prosecutor committed misconduct by doing so. Specifically, defendant challenges the following dialogue, which transpired between the juror, the trial court, and the prosecutor:

*THE COURT:* Okay. Thank you.

Then the next phase of the case, since the evidence is now completed, would be the closing arguments of counsel and --

*JUROR MCENEANY:* Could I ask a question?

*THE COURT:* Okay.

*JUROR MCENEANY:* On one of the pictures of Robert it only showed one side. I'm just curious if the side that they showed if he's got a tattoo on that side, too -- on the right side.

*THE COURT:* Well, the evidence is in. There is [sic] pictures --

*JUROR MCENEANY:* Could he turn his head?

*THE COURT:* Well, I think there is pictures in that were taken on February 8<sup>th</sup> and you're going to have to just base it on what's in.

*JUROR MCENEANY:* Okay.

*THE COURT:* I understand what you're saying.

*JUROR MCENEANY:* And that ATM place I just seen one side.

*THE COURT:* Okay. Okay.

Mr. Kaiser, on behalf of the People?

*MR. KAISER:* Thank you, Your Honor.

I guess I can't ignore the most recent question from the juror. People's 10, which is the photograph that Officer Hartman said he got from live scan would show you the right side of the defendant's neck.

*JUROR MCENEANY:* Oh, okay. That's an actual picture of what he's got on his neck right now.

*MR. KAISER:* I can't get into that.

*THE COURT:* I guess we can't do a dialogue here. He's doing closing argument. I understand it's a natural tendency to want to do that.

*MR. KAISER:* Officer Hartman did testify that these photos were generated, I think, in early April of this year.

*JUROR MCENEANY:* Okay.

## II. Standard of Review

Because defendant failed to object to any of these alleged errors in the trial court, our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). Consequently, defendant must demonstrate that error occurred, that the error was plain, and that it affected the outcome of the lower court proceeding. *Id.*

## III. Analysis

In support of defendant's argument that the trial court denied him a fair trial by allowing the juror's question, he relies on MCR 6.414(E), which provides:

The court may, in its discretion, permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that ensures that inappropriate questions are not asked, and that the parties have the opportunity to object to the questions.

As an initial matter, we note that defendant's reliance on this provision is misplaced because it clearly pertains to the questioning of witnesses. Here, the juror did not ask a question of a witness. Rather, the juror posed the question immediately before closing arguments, after the proofs had been presented, and no witness was testifying at the time. It is unclear from the record to whom the question was directed. Thus, MCR 6.414(E) lacks applicability here.

A trial court has wide discretion regarding the conduct of trial. *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). To demonstrate trial court bias against a defendant, the record should be reviewed as a whole, and portions of the record should not be taken out of context. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). A trial court's conduct pierces the veil of judicial impartiality, thereby denying the defendant a fair and impartial trial, where its conduct or comments unduly influence the jury. *Id.*

A review of the record demonstrates that the trial court properly exercised its discretion in responding to the juror's question. The challenged verbal exchange reveals that the trial court did not anticipate the juror's inquiry and responded appropriately by directing the juror to rely on the evidence that had been admitted. The trial court's response to the question did not prejudice defendant. In addition, the trial court did not permit the prosecutor to communicate directly with the juror, as defendant contends. Rather, after the court responded to the juror's question, the court asked the prosecutor to begin his closing argument. At the beginning of his argument, the prosecutor directed the jury to the particular exhibit that answered the juror's question, and the juror interjected by posing another question. At that point, the trial court again properly exercised its discretion and informed the juror that it could not allow a dialogue. The prosecutor then resumed his closing argument. The record shows that the trial court responded appropriately, and that its conduct and comments did not prejudice defendant or unduly influence the jury. *Paquette, supra* at 340.

Defendant also contends that the prosecutor committed misconduct by communicating directly with the juror who asked the question. However, the record does not support this contention and, to the contrary, shows that the prosecutor did not communicate directly with the

juror. Rather, the prosecutor merely identified, at the beginning of his closing argument, which exhibit was responsive to the juror's question. The prosecutor's statement was not directed to the individual juror as evidenced by the trial court's response to the juror's second inquiry. The court remarked that it could not allow a dialogue and that the prosecutor was attempting to give his closing argument. Thus, the record does not support defendant's contention that the prosecutor committed misconduct by communicating directly with the juror.

Defendant next argues that trial counsel's failure to object to the juror's question and alleged prosecutorial misconduct denied him the effective assistance of counsel. Because defendant failed to raise this issue in a motion for a new trial or evidentiary hearing<sup>1</sup> in the trial court, and this Court denied his motion to remand, our review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

As previously discussed, the trial court properly responded to the juror's questions and the prosecutor did not communicate directly with the juror in pointing out which exhibit answered the juror's first inquiry. Thus, defendant has not established prejudice because the result of the proceeding would not have been different had defense counsel objected. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Further, counsel cannot be deemed ineffective for failing to make futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Affirmed.

/s/ Michael J. Talbot  
/s/ Richard A. Bandstra  
/s/ Elizabeth L. Gleicher

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<sup>1</sup> See, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).