

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY JAMES DAVIS,

Defendant-Appellant.

UNPUBLISHED

September 29, 2009

No. 286704

Wayne Circuit Court

LC No. 08-004505-FH

Before: Murphy, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon (“CCW”), MCL 750.227, and possession of a firearm during the commission of a felony (“felony-firearm”), second offense, MCL 750.227b. He was sentenced to five years’ incarceration for the felony-firearm conviction and two years’ probation for each of the other two convictions. We affirm.

Detroit Police Officer Eric Jones was driving a police car with Officers James McDonald and John Mitchell when he passed a car traveling in the opposite direction and observed that the driver, defendant, was not wearing a seatbelt. Officer Jones made a U-turn, activated his emergency lights, and pulled the car over. Defendant was the car’s only occupant. Officer Jones approached defendant’s car on the driver’s side and observed defendant “appear to be placing a seat belt on.” Defendant’s hands made a motion from the left toward the right midsection portion of his body. Officer McDonald approached the passenger side of the car and observed defendant remove his right hand from his right jacket pocket. A handgun was in defendant’s hand, and Officer McDonald saw defendant drop the gun behind the driver’s seat and bring his hand back to the front seat. Officer McDonald then told Officer Jones about the gun. Officer Mitchell approached the car from the rear. He did not see a gun in the car. After Officer McDonald reported that there was a gun in the car, Officer Jones ordered defendant to step out of the car. Officer McDonald recovered the gun from behind the driver’s seat, and Officer Jones arrested defendant. The car was released to its owner, Ghvonna Gilbert, who was defendant’s girlfriend. She testified that she did not know there was a gun in the car.

Forensic Technician Chana Gudger testified that fingerprints are not found on every surface a person touches. Although some prints were found on the gun recovered from the car, the parties stipulated that the prints did not belong to defendant.

After the jury began deliberations, it advised the court that it was having “a confrontation” and “a difference of understanding” regarding the meaning of “possession.” The trial court twice reread its prior instructions regarding the meaning of possession, and the jury indicated that it was satisfied. A few hours later, the jury asked to be reinstructed on the elements of the charged offenses, and one juror asked, “possession exactly what does that mean?” The trial court again instructed the jury on the elements of the offenses. Later, the jury indicated that it could not reach agreement on all three counts, and the trial court asked it to resume deliberations, but allowed it to go home and return the following Monday morning. When the trial resumed, the court again read the instructions to the jury, which then continued deliberations. A short while later, the court recalled the jury to the courtroom and stated that it had “come to the Court’s attention that somebody may have discussed one of the charges with someone who is not a member of the jury.” The court cautioned the jury not to discuss the case with anyone other than fellow jurors and then only in the jury deliberation room. The court further stated:

So if anyone has discussed this case with anyone else or has talked about the law to anyone else, I want to caution you you cannot consider it.

The only law you can consider is the law that I give you. Is there anyone who cannot do what I just said? Only discuss the case amongst yourselves and only in the jury room and only use the law that I give you no other law from friends or TV.

Is there anyone that cannot do this raise your hand and bring it to my attention.

There is no indication in the record that any of the jurors raised their hand or brought further concerns to the trial court’s attention. After the jury returned to the jury room, defense counsel informed the trial court, “after discussing the matter with my client and informing him of the note that one of the jurors had potentially talked to a police officer we are moving for a mistrial at this time.” The court denied the motion, stating:

I don’t see a basis for a mistrial. What the note says is[:] [“W]hat are the procedures when a fellow juror ask[s] for clarity on the definition of CCW from a friend? On Friday a juror made the comment that while we went to lunch she phoned her friend to define this.

Is this allowed?[]”]

On that in itself there is no reason for a mistrial. The jury has indicated that their verdict is going to be based only on the evidence and the law that I give them.

If you want me to inquire any further questions from the defense or from the prosecution please present them and the court will accommodate you on that.^[1]

But I think that the explanation that the Court read to them in discussing with them concerning their deliberations and not to have contact with anyone else outside of the jury as well as their basic promise to use the law that I gave them in arriving at a verdict should solve the problem.

Defendant now argues that he was denied a fair and impartial trial because a juror consulted a police officer regarding one of the charges.²

This Court reviews a trial court's denial of a motion for a mistrial for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005); *People v Gonzales*, 193 Mich App 263, 265; 483 NW2d 458 (1992). Misconduct on the part of a juror does not automatically require a new trial. *People v Strand*, 213 Mich App 100, 103; 539 NW2d 739 (1995). "A trial court's denial of a motion for a mistrial based on juror misconduct is an abuse of discretion only where the misconduct was such that it affected the impartiality of the jury or disqualified its members from exercising the powers of reason and judgment." *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997). "A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Bauder*, *supra* at 195 (citation and internal quotations omitted).

A violation of the trial court's instruction not to discuss a case during the trial except with other jurors during deliberations is generally not a ground for a new trial. *People v Rohrer*, 174 Mich App 732, 737; 436 NW2d 743 (1989). "The proper remedy is for the court to review the alleged violation to determine whether or not the jurors' impartiality had been affected by the jurors' discussion." *Id.* A trial court should grant a new trial only if the court "finds the defendant to have been prejudiced." *Id.*

In the present case, after denying defendant's motion for a mistrial, the trial court stated that either counsel could submit any further questions they wanted the court to ask the jury. No questions were presented to the court on the record. Therefore, defendant waived his opportunity to further develop the record regarding whom the juror called and to what extent the phone call affected the jury. See *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000) (waiver is defined as the intentional relinquishment of a known right, and one who waives a right cannot then seek appellate review of a claimed deprivation). Accordingly, we reject defendant's request to remand the case for an evidentiary hearing in order to fully ascertain the nature of the

¹ Counsel did not ask the trial court to make further inquiry of the jurors regarding the subject.

² We note that the only mention on record that the outside source was a police officer came from defendant's attorney in his motion for a mistrial. The note read by the trial court stated only that a juror had called "a friend" about the meaning of possession. In a brief filed in this Court in connection with defendant's earlier motion to remand for an evidentiary hearing, defendant's appellate attorney acknowledged that "it is not clear whom the juror contacted."

communication between the juror and the person contacted, the identity of the person contacted, and the nature of the juror's conversation with the other jurors. The existing record does not show that defendant incurred any prejudice.

Moreover, the trial court issued a cautionary instruction in which it instructed the jury not to consider anything a juror might have heard that came from outside the courtroom and that it was to only follow the law as given by the court. Upon questioning by the court, no juror indicated that he or she could not decide the case in accordance with the court's instructions. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

Because the trial court instructed the jury to disregard anything a juror may have heard outside the courtroom, asked the jurors whether they would be able to follow the court's instructions and decide the case only in accordance with those instructions, with the jurors responding in the affirmative, and because defendant declined the trial court's offer to further question the jurors on this issue, we find no abuse of discretion in the trial court's denial of defendant's motion for a mistrial.

Affirmed.

/s/ William B. Murphy

/s/ Patrick M. Meter

/s/ Jane M. Beckering