STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2012
v DEVONDRE WALKER, Defendant-Appellant.	No. 302567 Wayne Circuit Court LC No. 10-008026-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v ANDRE WALKER, JR., Defendant-Appellant.	No. 302696 Wayne Circuit Court LC No. 10-008026-FH

Before: O'CONNELL, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

In docket number 302567, defendant Devondre Walker appeals as of right his conviction for felonious assault, MCL 750.82. In docket number 302696, defendant Andre Walker, Jr. appeals as of right his conviction for carrying a firearm with unlawful intent, MCL 750.226. We affirm.

Defendants are brothers who were involved in a neighborhood dispute with the victim. During the dispute, Devondre aimed a shotgun at the victim and threatened to kill him, and Andre, Jr. brandished a handgun and threatened to shoot the victim. The police arrived at the scene shortly after and retrieved a shotgun from the Walkers' house and a handgun from Andre, Jr.'s car. Defendants were tried in a joint trial before a single jury.

First, in both docket numbers 302567 and 302696, defendants argue that the trial court gave an improper deadlock instruction. We disagree. "Jury instructions are to be read as a whole rather than extracted piecemeal to establish error." *People v Waclawski*, 286 Mich App

634, 675; 780 NW2d 321 (2009). "Claims of coerced verdicts are reviewed case by case, and all the facts and circumstances, including the particular language used by the trial court, must be considered." *People v Vettese*, 195 Mich App 235, 244; 489 NW2d 514 (1992).

Where a jury is deadlocked, the court may provide an instruction that "will generate discussion directed towards the resolution of the case but will avoid forcing a decision." *People v Sullivan*, 392 Mich 324, 334; 220 NW2d 441 (1974). The Michigan Supreme Court adopted the American Bar Association's (ABA) Minimum Standard for Criminal Justice 5.4 as the instruction that should be read to juries that are deadlocked. *People v Pollick*, 448 Mich 376, 381-382; 531 NW2d 159 (1995). As adapted for a deadlocked jury, the ABA standard jury instruction 5.4 is incorporated in CJI2d 3.12. *Id.* at 382 n 12. When a trial court gives a deadlock instruction that substantially departs from the ABA standard instruction, such departure is grounds for reversal. *Id*. at 382. "[T]he test for determining whether instructional language substantially departs from the ABA standard is whether the instruction is unduly coercive," not whether the words used match the words of the ABA standard. *Id.* at 383, citing *People v Hardin*, 421 Mich 296, 314-316; 365 NW2d 101 (1984).

Here, the jury deliberated for about one hour on December 9, 2010. The jury resumed its deliberations the following morning. By 12:49 p.m., the jury had sent the trial court multiple notes indicating that they were deadlocked, including one note stating that the jury was split 11 to 1. The trial court brought the jury into the courtroom, readministered the jury's oath to render a true verdict unless discharged by the trial court, and read the jury the deadlock instruction found in CJI 3:1:18A. After instructing the jury, the trial court told the jury that it was giving them a 45-minute lunch break and that they should then return to the jury room to continue deliberation. If no verdict was reached by about 4:00 p.m., the jury was to return the following Monday for further deliberations. On appeal, neither defendant challenges the language of the trial court's deadlock instruction, which substantially complied with CJI2d 3.12. Rather, defendants argue that the trial court's deadlock instruction was unduly coercive on the basis of the court's statement regarding the jury's deliberation schedule, the court's emphasis on the jury's duty to reach a verdict, and the fact that the jury was split 11 to 1.

We conclude the trial court's statement regarding the deliberation schedule was not unduly coercive. In *Vettese*, 195 Mich App at 245, the trial court instructed the jury as follows: "And if you have not arrived at a verdict by 5:00 [p.m.], you will be excused and asked to report back here tomorrow morning at 8:30 and commence your deliberations in the morning." We held that the trial court's instruction did not deny the defendant his right to a fair trial because it was "clear that the trial court's instruction . . . merely indicated that the jurors would have to return the next day if they did not reach a verdict by 5:00 p.m." and did not "suggest that the jurors had to reach a verdict by that time." *Id.* In the present case, the trial court informed the jury of the anticipated deliberation schedule shortly after instructing each juror not to "surrender" his or her independent judgment regarding defendants' guilt "solely because of the opinion of the fellow jurors or just for the mere sake of reaching a verdict." Thus, we do not find that the trial court's statement regarding the deliberation schedule was unduly coercive. See *id*. Moreover, the record before us provides no reason to conclude that the trial court "required, or threatened to require, the jury to deliberate for an unreasonable length of time or for unreasonable intervals." *Pollick*, 448 Mich at 384, quoting *Hardin*, 421 Mich at 316.

We also find no reason to conclude that the trial court's instruction and its decision to readminister the jury's oath emphasized the jury's civic duty to reach a verdict. See *Hardin*, 421 Mich at 316, citing *People v Goldsmith*, 411 Mich 555, 561; 309 NW2d 182 (1981) ("[A deadlock] instruction that calls for the jury, as part of its civic duty, to reach a unanimous verdict and which contains the message that the failure to reach a verdict constitutes a failure of purpose, is a substantial departure, but the reason it is, is because it tends to be coercive."). The trial court's comments regarding the jury's oath did not suggest that the jury would fail its purpose unless it reached a unanimous verdict. See *Goldsmith*, 411 Mich at 558, 561. Moreover, the trial court subsequently instructed the jurors not to "surrender" their independent judgments for the sake of reaching a unanimous verdict. Thus, we do not find that the trial court's comments were coercive. See *Pollick*, 448 Mich at 383-385. Similarly, we are not persuaded that the mere fact that the trial court knew the jury was split 11 to 1 rendered the trial court's instruction coercive. The jury informed the trial court of its numerical division despite the court's instruction to the contrary. Further, the jury never indicated whether the majority was in favor of a guilty verdict, and the trial court did not affix any special significance to the jury's numerical division.

Next, in docket number 302696, Andre, Jr. argues that the trial court denied him his right to a fair trial by demeaning defense counsel in the presence of the jury. We disagree. We review Andre, Jr.'s unpreserved issue for plain error affecting his substantial rights. See *People v Conley*, 270 Mich App 301, 305; 715 NW2d 377 (2006), citing *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). Generally, "[t]he appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." *Id.* at 308. Under the plain-error rule, however, a defendant must show that an obvious error occurred and "that the error affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763.

"Michigan case law provides that a trial judge has wide discretion and power in matters of trial conduct. This power, however, is not unlimited. If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed." *Conley*, 270 Mich App at 307-308 (internal citations omitted). The trial court has the authority and duty to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." MRE 611(a). "It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." MCL 768.29.

In this case, Andre, Jr. argues that the cumulative effect of numerous statements made by the trial court denied him his right to a fair trial. Specifically, Andre, Jr. cites multiple instances in which the trial court interrupted defense counsel's cross-examination and argues that the trial court's "consistent interruption of defense counsel showed an inherent prejudice toward the defense." However, the trial court had wide latitude to impose reasonable limits on cross-examination, such as limits on interrogation that is repetitive, irrelevant, or only marginally relevant. See *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). Andre, Jr. fails to articulate how or offer authority supporting that the challenged statements were not a

reasonable exercise of the trial court's authority and duty to control the proceedings. See *id*.; MRE 611(a); MCL 768.29. Reviewing the record before us, we are not persuaded that the trial court unduly influenced the jury and, thus, deprived Andre, Jr. of his right to a fair and impartial trial. See *People v Jackson*, 292 Mich App 538, 598; 808 NW2d 541 (2011). We note that Andre Jr. also challenges statements made at sentencing and made to an adverse witness; however, these instances do not involve statements made to defense counsel in the presence of the jury. Accordingly, Andre, Jr. has not demonstrated the existence of any plain error requiring reversal with respect to this issue.

Finally, in docket number 302696, Andre, Jr. argues that the jury was unable to render a proper verdict because it received instructions from two different trial judges. We disagree. We review this unpreserved issue for plain error affecting defendant's substantial rights. See *Carines*, 460 Mich at 763-764.

"It is far preferable that a single judge preside over all aspects of a trial." *People v McCline*, 442 Mich 127, 134; 499 NW2d 341 (1993). "The general rule . . . is that a judge may not be substituted to preside over the remainder of a trial after evidence has been adduced before the original judge." *Id*. at 133, quoting *State v Johnson*, 55 Wash 2d 594, 596; 349 P2d 227 (1960). "MCR 6.440(A) provides for the substitution of a judge during a jury trial" in the case of death, sickness, or other disability to the original judge as long as the substitute judge certifies that he or she has become familiar with the record of the trial. *People v Bell*, 209 Mich App 273, 275; 530 NW2d 167 (1995). A defendant is not entitled to automatic reversal of his conviction upon a showing that a judge was improperly substituted but, instead, must show that the substitution prejudiced him. *McCline*, 442 Mich at 132, 134; *Bell*, 209 Mich App at 275.

In this case, the original judge assigned to defendants' case had a scheduling conflict on the first day of trial, so a substitute judge presided solely for the jury-selection phase of trial. The substitute judge instructed the prospective jurors during voir dire and selected the jury, but he did not swear in the jury panel following jury selection, and neither party offered any evidence while the substitute judge presided over jury selection. Following jury selection, the original judge swore in the jury, delivered all of the jury instructions to the empanelled jury, and presided over the remainder of the trial.

"While it is not the best practice to have a substitute judge preside over part of an ongoing trial, the rule against substitution is designed to insure that the judge who hears the testimony as to the facts also applies the law thereto." *McCline*, 442 Mich at 132 (quotations and citations omitted). Here, the substitute judge merely presided over jury selection, which occurred before any evidence was adduced and did not require any "exercise of judgment and the application of legal knowledge to, and judicial deliberation of, facts known only to" the original judge. *Id*. at 133, quoting *Johnson*, 55 Wash 2d at 596. A defendant cannot demonstrate prejudice stemming from judicial substitution where the substitute judge "did nothing that required his presence at the trial and did not make any decision that was dependent in any way on any information presented during the trial." *People v Wilson*, 265 Mich App 386, 390; 695 NW2d 351 (2005). "The examination of jurors during voir dire does not elicit any information that can be used in the trial of the case; rather, such examination is merely for the purpose of securing a competent, fair, and unprejudiced jury. That function can be properly performed by any judge." *McCline*, 442 Mich at 131 (quotation omitted).

Although Andre, Jr.'s question presented implies that the use of two trial judges prejudiced him, Andre, Jr. fails to clearly articulate how having the substitute judge preside over jury selection, while the original judge presided over the remainder of the trial, prejudiced him. Andre, Jr. raised no objection below and does not raise any claim of error on appeal regarding jury selection or the substitute judge's performance. Additionally, although Andre, Jr. argues that having jury instructions from two different judges rendered the jury unable to understand its instructions or reach a proper verdict, he does not cite any specific error regarding the jury instructions. "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001) (citation omitted). Accordingly, we conclude that Andre, Jr. has not shown that he is entitled to reversal on the basis of the substitution or the resulting jury instructions.

Affirmed.

/s/ Peter D. O'Connell
/s/ Pat M. Donofrio
/s/ Jane M. Beckering