STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v BENNY JOHNSON, JR., Defendant-Appellant.	FOR PUBLICATION April 6, 2001 9:10 a.m. No. 212482 Oakland Circuit Court LC No. 97-156672-FC

Before: O'Connell, P.J., and Kelly and Whitbeck, JJ.

O'CONNELL, P.J.

A jury convicted defendant of two counts of kidnapping, MCL 750.349; MSA 28.581, and one count of domestic violence, MCL 750.81(2); MSA 28.276(2). He appeals as of right. We affirm.

I. Facts

Complainant in this case testified that she dated defendant for about six weeks, but ended the relationship the week before the events at issue. She had a three-year-old son, who was not related to defendant, for whom she had arranged defendant's mother to baby-sit while complainant was at work. After the completion of her work day on September 26, 1997, complainant arrived at defendant's mother's house to pick up her son, when she noticed a police car parked outside the house. As she approached the house she saw and heard defendant telling some police officers that everything was all right and that they could not enter the house. After the police left, complainant took her son to her car, and defendant followed and entered the car on the passenger side. Defendant's mother asked complainant to take defendant somewhere for a little while to cool off because a fight had occurred earlier.

After running some errands and getting dinner, complainant returned to defendant's mother's house to drop defendant off. Defendant, however, stayed in the car and wanted to talk with complainant about their relationship. After complainant told defendant that she did not want to get back together, defendant's demeanor changed. He became agitated and began questioning her about who had given her the money for a down payment on her new home. When complainant told him that it was none of his business, defendant took the car keys and refused to give them back unless she told him who gave her the money. At that point, complainant left the car and went into the house to call her brother for a ride home. In response,

defendant threatened to kill complainant's brother if she called him. Complainant became frightened, and her son began crying.

Complainant left the house with her son to find a pay phone to call her brother. Shortly thereafter, defendant caught up with her and told her that he was not through with her and that he was going to make her suffer. When complainant started walking in another direction, defendant shoved her, blocked her way, and threatened her with a stick. Complainant went back to defendant's mother's house with the hope of making a phone call. However, when complainant tried to get the phone, defendant, who seemed to be delusional, was yelling at his mother, who was telling him to leave complainant alone.

Complainant and her son then went back outside because complainant was afraid that defendant was going to hit his mother. Running to the next block, she sought a place to hide. Defendant, however, caught up with her and threatened to kill her if she did not get into the car. She complied, and defendant drove to a gas station. Once there, defendant took the keys and got out of the car. Complainant testified that she tried to escape, but was not able to get her son out of the back seat before defendant returned.

Defendant then drove to a party store, asked an individual who he knew to buy him some beer, and drove back to his mother's house. Defendant drank the beer in his mother's driveway and told complainant that she could have her keys back if she had sex with him. After initially refusing, complainant complied with defendant's demand so that she could take her son home. Afterward, defendant refused to return the keys to the car and laughed at complainant, telling her that he was not done with her and that she was going to die that night.

Defendant then demanded that complainant take him to her new house. Because of his threats, complainant agreed to do so. All three slept on the floor together that night, defendant with his arm around the complainant's son to prevent complainant from seeking help.

The next morning, defendant woke complainant up and demanded that she take him to work. Along the way, a Warren police officer pulled the vehicle over. Complainant stated that she did not alert the police officer about her situation because she was afraid that defendant would hit her with an empty beer bottle that was in the car. Afterward, she continued to drive to defendant's place of employment and dropped defendant off between two trailers. Defendant went into one of the trailers, about ten feet away. As complainant was attempting to back out, defendant returned and got back into the car. He told her that everything was fine, and that his boss said that he could take the day off. He directed her to move the car to the front of the plant so that he could collect his paycheck. When complainant parked the car, defendant took the keys and told her that he was not done with her yet. Complainant thereafter ran from the car, approached a moving truck, and screamed for help. The driver allowed complainant to use his cellular phone to call her sister. When she saw that defendant had taken her son from the back seat of the car and was walking away, complainant left the truck and ran towards them. Defendant refused to return her son to her unless she agreed to drive him to his brother's house. Our of fear and concern for her son, she agreed.

At defendant's direction, complainant began driving around. When defendant became unhappy about complainant's driving, he grabbed the wheel and turned into a parking spot. He

grabbed her, flipped her over, slammed her into the passenger seat, and began to choke her. Complainant's son begged defendant not to kill his mother. Eventually defendant stopped.

During the struggle, complainant's kicking cracked the car's windshield. After visiting two repair shops and a fast-food restaurant, defendant eventually calmed down and they agreed that she would drop him off at his mother's house. When they arrived, defendant's mother came out and told defendant that the police were looking for him and that complainant's mother was waiting for her at the police station. En route to the station, defendant instructed complainant to tell the police that they had merely had a lover's quarrel and that a stone had hit the windshield at defendant's place of employment. At the police station, complainant spoke with the officers and told them what had happened, made a written statement, and went to a hospital. Complainant also testified that she was five weeks' pregnant with defendant's child at the time of the incident, and that defendant knew it. At one point during the incident, defendant threatened to punch her in the stomach.

The prosecution charged defendant with first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), felonious assault, MCL 750.82; MSA 28.277, two counts of kidnapping, MCL 750.349; MSA 28.581, and domestic violence, MCL 750.81(2); MSA 28.276(2). The jury acquitted him of the CSC I and felonious assault charges, but convicted him of both counts of kidnapping and domestic violence. The trial court sentenced defendant as a second habitual offender, MCL 769.10; MSA 28.1082, to concurrent prison terms of ten to thirty years for each of the kidnapping convictions and ninety-three days for the domestic assault conviction.

II. Juror 457

Defendant first contends that he is entitled to a new trial because one of the members of the jury did not reveal until after trial that she had been a complainant in a domestic violence prosecution. According to defendant, the juror concealed facts from the court which, if she had revealed them, would have led defense counsel to challenge her for cause. The trial court denied defendant's motion for new trial on the issue. We review a trial court's ruling on a motion for new trial for an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). We find no error requiring reversal.

During voir dire, the jurors learned that one of the charges against defendant was domestic violence involving an assault and battery. The trial court then asked the jury, "Now that you have heard all of the charges in this case do you know of any reason why you should not serve as a juror in this case?" None of the jurors responded. When the trial court then asked; "Are there any among you who have been previously a victim of a crime," Juror 457 responded, "I have been assaulted." The following colloquy then occurred:

> THE COURT: By virtue of that experience, would you be thinking about that experience and would it interfere with your ability to listen to the facts of this case and decide this case from the evidence here?
>
> JUROR: No, I can keep it separate.

THE COURT: Okay. You can keep it separate, good. Anyone else?

When the prosecutor questioned the prospective jurors, she asked whether they would have any difficulty sitting on a jury where the defendant was charged with felonious assault and assault and battery domestic violence. None of the jurors responded.

When defense counsel questioned the jurors, he asked, "Has anyone in this jury box every [sic] been where you felt you were threatened with some type of weapon?" Juror 457 responded that she had been hit in the head with a gun as a teenager, but stated that she could put it aside. When defense counsel asked whether any of the prospective jurors had "something weighing so heavily on your mind right now that you might not be able to give full attention to this case" and "wouldn't want themselves sitting as a juror if they were the Defendant in a case," Juror 457 did not respond. The trial court also asked each of the newly seated jurors if there were any reasons why they should not serve as a juror in the case. Defense counsel, after requesting the court to remove one juror for cause and exercising six peremptory challenges, expressed satisfaction with the jury.[1]

After trial, and before the sentencing hearing, defendant moved for a new trial on the basis of juror bias, contending that Juror 457 did not reveal during voir dire that, at the time of the trial, she was a complainant in a domestic violence case and that the same special unit in Oakland County was prosecuting that case. In response, the prosecutor stated that a new trial was not warranted because Juror 457 revealed during voir dire that she had been the victim of an assault and thus had not knowingly given false or misleading answers. The prosecutor emphasized the juror's statement that she could remain unbiased, and that defense counsel did not question her further. The prosecutor, who was not involved in Juror 457's domestic violence case, further asserted that she had not cooperated with the prosecution in the case against her husband. In reply, defense counsel contended that he had learned that the juror had told the assistant prosecuting attorney assigned to her case that she was ready to convict defendant even before the trial began. The trial court observed:

> As to the issue of juror bias, this Court finds such argument without merit. The defendant argues that he was denied an impartial jury panel as a result of Juror #457's bias. There has been no showing that the Juror knowingly concealed, mislead [sic] or gave false information during voir dire. In fact, when the Juror notified the Court that she was the victim of an assault, the Defense Counsel did not conduct further inquiry and failed to exercise a preemptory [sic] challenge or challenge for cause. Moreover, as a result of the disclosure by Juror #457, this Court asked whether the Juror could remain fair and impartial. Juror #457 responded that she could.

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[1] Notably, when responding to the trial court's inquiry regarding the composition of the jury shortly before the jury was sworn, defense counsel replied that she was "very satisfied" with the jury panel.

We agree with the trial court and decline to reverse on this issue. Our review of the record did not reveal, as defendant asserts, that Juror 457 "concealed" information from the trial court. When the court asked the juror whether she had "been previously a victim of a crime," she responded, "I have been assaulted." When defense counsel asked the juror whether anyone had ever threatened her with a weapon, she admitted that someone had hit her on the head with a gun when she was a teenager. The juror did not, however, reveal that she had made allegations of domestic violence against her husband in the past.[2] Nevertheless, in our view, the juror's history as a victim of domestic violence was there for defense counsel to discover through further questioning. Defendant correctly argues that jurors have a duty to reveal relevant information, even though the information is personal or embarrassing. *People v DeHaven*, 321 Mich 327, 334; 32 NW2d 468 (1948). Nevertheless, Juror 457 truthfully answered the trial court's question. That defense counsel did not ask more specific questions to learn the full details of the juror's past experiences did not, in our view, constitute concealment on her part.[3]

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[2] Apparently, she later denied to authorities that the episode ever happened, she recanted at a preliminary examination, bonded her assailant, and was uncooperative with the prosecutor.

[3] Our dissenting colleague opines that defense counsel inquired with reasonable diligence into Juror 457's background. Our review of the record, however, indicates to the contrary. We simply do not consider defense counsel's failure to inquire further, on learning that the juror had been the victim of violence in the past, as diligent. We are not of the opinion, as the dissent suggests, that defense counsel was required to read the juror's mind or "engage in a far-flung fishing expedition." However, follow-up questioning regarding the juror's response that she had been assaulted would have been appropriate. For the same reason, we reject the dissent's assertion that the juror's admission that she had been assaulted in the past "gave no clue" that further inquiry was necessary.

The cornerstone of our dissenting colleague's argument regarding due diligence is that "[t]here is no evidence that any additional questioning during voir dire would have revealed that [J]uror 457 could have been challenged for cause." *Post* at 11. We strenuously disagree with this line of reasoning. The dissent fails to recognize that defendant had ample opportunity to challenge Juror 457 for cause solely on the basis of her candid admission that she had been assaulted in the past. Alternatively, defendant could have challenged Juror 457 for cause if he had posed further inquiry regarding the nature of the admitted assault. In our view, granting defendant a new trial under these circumstances, where he (1) neglected to exercise a challenge for cause, and (2) expressed satisfaction with the jury as impaneled, would be tantamount to allowing defendant to build error into the jury selection process. This we will not do. See generally, *People v Hubbard (After Remand)*, 217 Mich App 459, 466; 552 NW2d 493 (1996) (an expression of satisfaction with the jury as impaneled may waive a defendant's right to challenge the composition of the jury); *People v DePlanche*, 183 Mich App 685, 691; 455 NW2d 395 (1990) (defendant failed to show he was denied right to an impartial jury where defense counsel expressed satisfaction with the jury panel and failed to take appropriate action to remove jurors defendant claimed were not impartial); *People v Acosta*, 16 Mich App 249, 250; 167 NW2d 897 (1969) (defendant who announced satisfaction with the jury at close of voir dire

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This is not a case, as in *DeHaven, supra*, where jurors answered questions falsely and otherwise failed to disclose information that would have revealed their relation to a person who had committed a crime that was similar to the one for which they were to sit as jurors. Moreover, this case is distinguishable from *People v Hannum*, 362 Mich 660, 667; 107 NW2d 894 (1961), where our Supreme Court stated: "That the lack of disclosure of the pertinent fact can be attributed to failure to expressly ask the prospective juror about it can hardly be thought to have insured an impartial trial . . . ." In the present case, the court did ask the potential jurors whether any of them had ever been the victim of a crime, and Juror 457 answered truthfully that she had been the victim of assault in the past.[4]

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waived any error relating to trial court's refusal to give requested instruction to venire); *People v Russell*, 182 Mich App 314, 326; 451 NW2d 625 (1990) (Sawyer, J., dissenting) (defendant who "affirmatively demonstrated" satisfaction with the jury panel by failing to use peremptory challenges and "explicitly stat(ing) to the trial court that he was satisfied with the jury," waived issue relating to composition of jury) rev'd 434 Mich 922; 456 NW2d 83 (1990) for the reasons set forth in Sawyer, J.'s dissent.

[4] We reject the dissenting opinion's suggestion that Juror 457 was not forthright. We recognize that in certain circumstances, a juror's wilful failure to disclose relevant information may warrant a new trial. However, in the instant case Juror 457, on being questioned by the trial court and defense counsel, disclosed that she was assaulted in the past. Consequently, Juror 457 cannot be said to have concealed or misrepresented any information sought by either the trial court or defense counsel. In our view, the dissent's veiled implication that Juror 457 was less than forthright is untenable.

Moreover, the dissent's attempt to analogize the present case to *DeHaven, supra* and *Hannum, supra* is patently unsuccessful. For instance, in *DeHaven*, the juror at issue was related to an individual who had been convicted of statutory rape. *DeHaven, supra* at 331. While being questioned during voir dire, the juror gave false and misleading answers. For example, after the trial court pointedly asked the juror about "anything that has happened to any members of your family that would make you feel different about this case than others?" the juror, despite knowing his cousin was convicted of a crime identical to that of which the defendant was charged, responded in the negative. *Id.* at 330. Similarly, when specifically asked if his knowledge of any other case would influence his verdict, the juror responded in the negative. *Id.* Similarly, in *Hannum, supra*, one of the jurors, when filling out a required questionnaire asking specifically about employment status, deliberately failed to disclose that he was a township police officer. This information was not discovered during voir dire. *Hannum, supra* at 666. Conversely, the instant case presents no such evidence of purposeful deceit on the part of a juror.

Interestingly, the dissent accords little weight to the fact that Juror 457 clearly admitted to being assaulted on two different occasions. That Juror 457 did not articulate specifically that she was the victim of a *domestic* assault is attributable more to defendant's failure to specifically question her in this regard, rather than to any intentional concealment on her part.

A necessary implication of the dissent's argument is that assault and *domestic* assault are

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Finally, under the facts of this case, the juror's promise to keep the matters of her personal life separate from defendant's case was sufficient to protect defendant's right to a fair trial. See *Patton v Yount*, 467 US 1025, 1034-1035; 104 S Ct 2885; 81 L Ed 2d 847 (1984) (distinguishing between jurors with fixed opinions and those without fixed opinions); *Irvin v Dowd*, 366 US 717, 723; 81 S Ct 1639; 6 L Ed 2d 751 (1961) ("It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."); *People v Lee*, 212 Mich App 228, 248-252; 537 NW2d 233 (1995). Jurors are presumptively competent and impartial, and the party alleging the disqualification bears the burden of proving its existence. *People v Collins*, 166 Mich 4, 9; 131 NW 78 (1911); *People v Walker*, 162 Mich App 60, 63; 412 NW2d 244 (1987). In light of defendant's failure to further question the juror after she admitted that she had been the victim of assault in the past, and the juror's statement that she could keep her personal life separate from defendant's case, defendant did not meet his burden of proving the juror's disqualification.[5]

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distinct and separate entities. We find this line of reasoning baffling. By its very nature, the crime of *domestic* assault is comprised of an assault. See MCL 750.81(2); MSA 28.276(2). Juror 457 clearly admitted to being assaulted. The dissent's persistence in maintaining this illusory distinction is meritless. We find no cognizable difference between assault and domestic assault.

Had Juror 457 deliberately chosen to withhold information like the jurors in *DeHaven, supra and Hannum, supra,* she presumably could have done so. However, in our view, Juror 457's answers reflect a layperson's concerted effort to truthfully answer the trial court's questions in open court while not divulging sensitive and no doubt embarrassing details that are too often associated with domestic assault matters. In our view, the dissent does a great disservice to the average civilian juror's attempts to properly answer questions put to her during the voir dire process by criticizing Juror 457's choice of words with the benefit of hindsight.

[5] Our dissenting colleague devotes considerable effort to a discussion of MCR 2.511(D)(13), and criticizes us for failing to do the same. The dissent, however, disregards certain principles basic to our jurisprudence: (1) defendant bears the burden of proving a juror's disqualification, *Collins*, *supra* at 9; *Walker*, *supra* at 63; (2) our review of a trial court's rulings on challenges for cause on the basis of bias, as well as a court's ruling on a motion for new trial, is for an abuse of discretion, *People v Williams*, 241 Mich App 519, 521; 616 NW2d 710 (2000); *Jones*, *supra* at 404; (3) a "trial court's determination of a juror's ability to render an impartial verdict is reversed only where an appellate court finds a clear abuse of discretion," *People v Johnson*, 103 Mich App 825, 830; 303 NW2d 908 (1981); and (4) reviewing courts give great deference to the superior ability of the trial court in matters relating to credibility, *Id*.; *People v Eggleston*, 149 Mich App 665, 671; 386 NW2d 637 (1986). In our opinion, jurors with real life experiences, who acknowledge that they can be free of bias and prejudice, can and do make excellent jurors, and the trial court was in the best position to make this determination. *Lee*, *supra* at 251.

The dissent suggests that under 2.511(D), a party may challenge a juror for cause at any time during the proceedings. *Post* at __. However, even a cursory reading of that rule reveals that it governs the jury selection process. Post-verdict biases or prejudices are not determined by

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During the hearing on defendant's motion for new trial, defense counsel asserted that the juror "apparently told the prosecutor assigned to her case that she was ready to hang [defendant] before the trial even began . . . ." When the trial court questioned defense counsel regarding the source of the statement, he responded only that the statement was true "according to what I was told." The prosecutor denied that the juror ever made such a statement to him. Defendant seizes on this discussion as further evidence for the need to reverse and remand for a new trial. Even if we were to disregard that the alleged statement was not a matter of record, we would nevertheless decline to accept defendant's argument. A juror may not impeach his or her verdict

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use of a jury selection court rule. The dissent has employed this court rule, along with its assertion that Juror 457 withheld relevant information, in an attempt to justify its conclusion. We decline to follow the dissent's invitation to rely on dicta, analogy, and implication, to create a new rule of law that would allow defendant in this case to now challenge the juror for cause. While we admire the dissent's tenacity, we find its reasoning to be unsupported. While a defendant may move for a new trial pursuant to MCR 2.611, we decline to hold that he may challenge a juror for cause after the jury has rendered its verdict when he failed to adequately utilize the challenge for cause process in the first instance.

A review of footnote 54 in our dissenting colleague's opinion demonstrates that he has inferred from our opinion the proposition that juror bias may be addressed only during voir dire. We find this to be an incorrect statement of the prevailing law in Michigan. Rather, it is clear that allegations of juror bias that result from a juror's deliberate withholding of pertinent information may serve as grounds to challenge the jury's verdict at any point in the proceedings. See *Hannum, supra* and *DeHaven, supra.* That we decline to reverse defendant's convictions under the present circumstances, where he (1) failed to exercise challenges for cause at the proper procedural interval, and (2) expressed unequivocal satisfaction with the jury as impaneled, should not be interpreted as suggesting that we are not cognizant of this well-settled proposition.

In its goal to reverse the lower court, the dissenting opinion minimizes the juror's admission that she had been assaulted. We cannot ignore her answers to the court's questions, and we will not presume that the juror's past assaults precluded her from rendering a fair and impartial verdict. We recognize that *People v Daoust*, 228 Mich App 1, 7-9; 577 NW2d 179 (1998), states that a defendant is entitled to relief when a juror that he could have challenged for cause was allowed to serve on the jury. However, defense counsel in this case did not meet its burden of establishing the grounds for a challenge for cause during the voir dire process, and we concur with the trial court's conclusion that the juror did not lie or conceal any information. The trial court, who was in the best position to assess the juror, accepted her statement that she would keep her personal life separate from defendant's trial. We cannot accept a process that would excuse a defense attorney for failing to ask follow-up questions and thereby plant the seeds for a motion for new trial after his or her client is convicted. Therefore, assuming, without deciding, that Juror 457 was "interested in a question like the issue to be tried," MCR 2.511(D), defense counsel did not meet its burden of establishing that the juror was removable for cause. Our conclusion is limited to the facts of this case and we do not foreclose the possibility of a contrary result under different factual circumstances.

through testimony or affidavit. *Beaubien v Detroit United Railway*, 216 Mich 391, 397-398; 185 NW 855 (1921); *People v Stimer*, 82 Mich 17, 19; 46 NW 28 (1890). As our Supreme Court explained in *People v Pizzino*, 313 Mich 97, 105; 20 NW2d 824 (1945), "[t]o permit this would open the door for tampering with the jury subsequent to the return of their verdict." Therefore, even if the juror had reduced the alleged double-hearsay statement to affidavit form, or had she provided testimony to the same effect, the trial court could not have considered it.[6] The trial court did not abuse its discretion in denying defendant's motion for new trial.[7]

Moreover, we do not conclude that defense counsel's failure to make a further inquiry into the matter rose to the level of ineffective assistance of counsel. First, we note that an attorney's decisions relating to the selection of jurors generally involve matters of trial strategy, *Huls v Lockhart*, 958 F2d 212, 214-215 (CA 8, 1992); *Palacio v State*, 333 SC 506, 516-517; 511 SE2d 62 (1999); *People v Hebein*, 111 Ill App 3d 830, 848; 444 NE2d 782 (1982), which we normally decline to evaluate with the benefit of hindsight, *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000). Second, Juror 457 informed the court that she could keep her personal life separate from defendant's case, and answered affirmatively when the court asked whether she could be fair and impartial. Based on the juror's assurances, and the trial court's acceptance of her assurances, we see no reasonable probability that the outcome of the case would have been different. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).[8]

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[6] We acknowledge that a narrow exception exists to the general rule that a juror may not impeach his or her verdict. A juror may impeach his or her verdict where the evidence involves a matter inhering in the verdict and concerns overt acts, accessible to all the jurors. *People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997); *People v Graham*, 84 Mich App 663, 666; 270 NW2d 673 (1978). This exception does not apply in the present case, however, because the allegation, that the juror had decided defendant's guilt before the trial began, involved her alleged subjective feelings, and therefore were not within the jury's knowledge. Defendant does not allege that the juror shared her alleged preconceived opinion with any other jurors.

[7] Our colleague in dicta implies that defendant is entitled to a new trial because he was "actually prejudiced" by the juror in question. We disagree. The dissent's finding of actual prejudice is based solely on the double-hearsay statement allegedly made by Juror 457. The statement the dissent points to as evidence of actual prejudice is one allegedly made by Juror 457 to one prosecutor, repeated to another, and presented to the trial court by defense counsel during the hearing on defendant's motion for a new trial. We agree with the trial court that this double-hearsay statement is insufficient to demonstrate actual prejudice. Other than defense counsel's unsubstantiated allegations, there is no record evidence to demonstrate that Juror 457 intended to convict defendant regardless of the evidence. In our view, the double-hearsay statement does not serve to overcome the well-settled presumption of impartiality accorded to jurors.

[8] In Part IV of his opinion, our dissenting colleague accuses us, among other things, of failing to address the relevant law, overlooking a court rule, and ignoring defendant's arguments on appeal. The dissent further claims that we are endorsing a process that effectively permits jurors to avoid "speak[ing] the truth." *Post* at 14 (footnote and emphasis omitted). Perhaps most offensive is the dissent's claim that we have adopted a rule that precludes a defendant from ever seeking a new trial after voir dire on the basis of subsequently discovered evidence of bias. A review of

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III. Other Issues

Defendant next argues that the trial court abused its discretion and denied him due process of law in denying his request for a court-appointed investigator. We disagree. Defendant's claim rests on his speculation that an investigator would have retraced the events during the relevant period and would have found witnesses to testify that defendant did not commit the acts that the prosecution alleged. Defendant's claim relies on pure conjecture. He therefore did not show that, under the facts and circumstances of the case, an investigator was necessary to afford him due process, or that the trial court's ruling substantially prejudiced him. *Mason v Arizona*, 504 F2d 1345, 1352-1353 (CA 9, 1974) (requiring defendant to show that the denial "substantially prejudiced" him); *People v Blackburn*, 135 Mich App 509, 520-521; 354 NW2d 807 (1984).

Finally, we disagree with defendant that the trial court erred in barring evidence to establish that complainant had herpes. Before trial, the prosecutor moved to exclude any evidence that defendant had transmitted herpes to complainant. The trial court granted the motion, apparently concluding that the evidence was irrelevant. Defendant's theory at trial was that complainant made false allegations against him in retaliation for her contracting the disease. Therefore, the evidence would have been relevant for purposes of establishing that complainant was biased and had fabricated her testimony. Nevertheless, in our view, when balanced against the inflammatory nature of the evidence – complainant's alleged contraction of a sexually transmitted disease – we conclude that the prejudicial nature of the evidence outweighed any probative value. See MCL 750.520j(1)(a), (b); MSA 28.788(10)(1)(a), (b). Further, our review of the record indicates that defense counsel thoroughly cross-examined complainant over a two-day period in an attempt to impeach her testimony and discover whether she fabricated her testimony. Defendant's inability to introduce evidence of complainant's alleged contraction of the disease from defendant did not significantly hamper his attempt to attack complainant's credibility as a witness.

Defendant argues for the first time on appeal that the court's ruling excluding evidence of complainant's alleged disease violated the Confrontation Clause, US Const, Am VI. Because defendant did not raise this argument below, our review is for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Based on our foregoing analysis, we do not conclude that the trial court's ruling materially

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the majority opinion reveals that these accusations are completely unfounded.

restricted defendant's right to confrontation and therefore we find no error requiring reversal.

Affirmed.

/s/ Peter D. O'Connell

I concur in the result only.

/s/ Michael J. Kelly