STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 1998
v	No. 190061 Oakland Circuit Court
RONALD K. GRAVES, JR., Defendant-Appellant.	LC No. 95-137836 FC ON REMAND

Before: Bandstra, P.J., and Griffin and Fitzgerald, JJ.

PER CURIAM.

In our prior decision, *People v Graves*, 224 Mich App 676, 677; 569 NW2d 911 (1997), rev'd 458 Mich 476; 581 NW2d 229 (1998), we reversed defendant's conviction only because we were compelled to follow the holding of *People v Vail*, 393 Mich 460, 464; 227 NW2d 535 (1975).[1] However, we expressed our disagreement with *Vail* and urged the Supreme Court to overrule its precedent. In light of our disposition, we found it unnecessary to address the other issues raised by defendant. After the Supreme Court agreed with our position and overruled *Vail*, it remanded the case for our consideration of defendant's remaining issues. We now affirm.

I

First, defendant argues that the trial court committed error requiring reversal when, over defendant's objection, it gave a supplemental and nonstandard deadlocked jury instruction. We disagree.

The deadlocked jury instruction given by Circuit Judge Robert Lewis Templin was substantially similar to the instruction that Judge Templin gave in *People v Taylor*, unpublished opinion per curiam of the Court of Appeals, issued 2/27/95 (Docket No. 159832), lv den 450 Mich 910 (1995).[2] Before giving the supplemental instruction in the present case, Judge Templin advised counsel in chambers that the instruction at issue had been recently affirmed by this Court in *Taylor*. *Id.* Although the unpublished opinion in *Taylor* is not precedentially binding, MCR 7.215(C)(1), we choose to address the decision because it was relied on by the trial court.

In a unanimous per curiam opinion by Judges Cavanagh, Holbrook, Jr., and Markey, the *Taylor* Court held that Judge Templin's supplemental deadlock jury instruction was not a substantial departure from the ABA standard jury instruction 5.4 because it did not have an undue tendency of coercion. The only difference in the instructions given by Judge Templin in the two cases is that in *Taylor, supra,* Judge Templin advised the jury that it costs the taxpayers $50,000 per day to operate one courtroom, while in the present case, Judge Templin instructed the jury to "also keep in mind that the taxpayers, we taxpayers, pay thousands of dollars per day to run a trial in this one court."[3] Although our Court in *Taylor, supra* at 1, did "not condone the trial court's reference to the daily cost of trial or the emotional costs of delay on the parties," we nevertheless held that the supplemental instruction did not have an undue tendency of coercion:

> In light of the deadlock, the trial court instructed the jury, in pertinent part, that it cost the taxpayers $50,000 per day to operate one courtroom, and it was not fair to keep the prosecution or defendant in doubt regarding the trial's outcome for an undetermined period of time. The jury returned its verdict on the same day that the court gave these instructions.
>
> Any substantial departure from the ABA's recommended standard jury instruction for deadlocked juries, ABA standard 5.4, constitutes error requiring reversal. *People v Hardin*, 421 Mich 296, 314-316; 365 NW2d 101 (1984). A substantial departure exists where the instruction given could cause a juror to abandon his conscientious dissent and defer to the majority solely for the sake of reaching agreement. *Id.* While we do not condone the trial court's reference to the daily cost of trial or the emotional costs of delay on the parties, we cannot conclude that the court's instructions to the jury coerced the jury into agreeing upon a verdict. *People v Kasem*, 230 Mich 278, 290-294; 203 NW 135 (1925). Further, we believe that the instruction was equally favorable to the defendant and the prosecution, and the court did not intimate his opinion as to the verdict the jury should render. *Id.* at 289. Finding no substantial departure from the ABA standard instruction and no error which deprived defendant of his substantial rights, we must conclude that the court's instructions to the jury did not necessitate reversal of the verdict. *Id.* at 290.

We agree with the above analysis and hereby adopt it as our own. See also *People v Pollick*, 448 Mich 376; 531 NW2d 159 (1995). Further, the alleged error regarding the supplemental jury instruction is nonconstitutional and therefore subject to the harmless error rule of *People v Gearns*, 457 Mich 170; 577 NW2d 422 (1998). In view of the total circumstances of the case and all the evidence presented, we hold that it is highly probable that the nonstandard supplemental jury instruction did not contribute to the verdict. On this issue, we are confident that the Supreme Court has abandoned the rule of automatic reversal set forth in *People v Goldsmith*, 411 Mich 555; 309 NW2d 182 (1981), and *People v Sullivan*, 392 Mich 324; 220 NW2d 441 (1974), in favor of the harmless error rule of *Gearns, supra*. Because the supplemental instruction was not unduly coercive and the error, if any, was harmless, we find no error requiring reversal.

II

Next, defendant argues that his conviction should be reversed because of alleged prosecutorial misconduct. We disagree.

The test for claims of prosecutorial misconduct is whether the acts of the prosecutor deprived the defendant of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). In the present case, with one exception, defendant raised no objection to the alleged instances of prosecutorial misconduct. Accordingly, as to these unpreserved allegations of error, defendant has waived appellate review absent manifest injustice. *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993). Further, "if defense counsel fails to object, review is foreclosed unless the prejudicial effect of the remark is so great that it could not have been cured by an appropriate instruction." *Id.* As to the unpreserved claims of prosecutorial misconduct, we find no miscarriage of justice because the alleged errors, if any, could have been remedied by a curative instruction.

As to the single incident of preserved alleged prosecutorial misconduct, we find no error. On this issue, defendant argues that he was denied a fair trial by the prosecutor's questions regarding the possibility of defendant's use of illegal drugs. Defendant's motion for a mistrial on this basis was denied by the trial court. During his opening statement, it was defense counsel who first informed the jury that "[h]e [defendant] went there [to the party store] to buy drugs and marijuana." Second, the prosecutor's questions to the medical examiner regarding whether defendant had cocaine or alcohol in his blood, while argumentative, were not unfairly prejudicial in light of defendant's admitted illegal drug use and the doctor's response that he did not know. For these reasons, we find no error requiring reversal regarding the claims of alleged prosecutorial misconduct.

Affirmed.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ E. Thomas Fitzgerald

[1] Judge Fitzgerald concurred on the basis that *Vail* was correctly decided.

[2] Justices Levin and Cavanagh would have granted defendant's application for leave to appeal.

[3] We reiterate that such statements are improper. We will review the coerciveness of nonstandard instructions on a case by case basis. In order to avoid the possibility of reversal, the trial courts are directed to give the standard instruction, CJI2d 3.12, to deadlocked juries. See *People v Pollick*, 448 Mich 376, 382, n 12; 531 NW2d 159 (1995).