

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSE SANCHEZ,

Defendant-Appellant.

---

UNPUBLISHED

July 28, 2000

No. 216052

Muskegon Circuit Court

LC No. 98-041516-FH

Before: McDonald, P.J., and Neff and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). The trial court sentenced him to three to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court erred when it failed to grant him a new trial on the basis of juror misconduct and when it declined to hold an evidentiary hearing to determine whether the alleged misconduct resulted in prejudice to defendant. Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed on appeal absent a clear abuse of that discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). To justify granting a new trial on the basis of juror misconduct, prejudice must be shown, or facts must be adduced clearly establishing the inference that prejudice occurred from the jurors' conduct; a mere possibility of prejudice is insufficient to set aside a jury verdict. *People v Nick*, 360 Mich 219, 227; 103 NW2d 435 (1960). The misconduct complained of must be such as to affect the impartiality of the juror or to disqualify the juror from exercising the powers of reason and judgment. *Nick, supra* at 230. A new trial will not be granted on the basis of misconduct of the jury if no substantial harm was done to the party seeking a new trial, even though the misconduct would merit rebuke if made known to the trial court. *Id.* However improper the conduct may have been, if it does not appear that it was occasioned by the prevailing party or by anyone in his behalf, and there is nothing to indicate any improper bias on the juror's mind, and the court cannot see that it either had, or might have had, an effect unfavorable to the party moving for a new trial, the verdict ought not be set aside. *Id.* Where a court has instructed a jury

not to discuss the case during trial and a juror violates the instruction, the violation is not per se a ground for 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 the juror's impartiality was affected by the discussion. *Id.*

Defendant contends that a conversation between two jurors violated his right to an impartial jury because they deliberated on the question of defendant's guilt despite instructions by the court not to discuss the case until all the evidence was presented. Defendant also asserts that, because the conversation took place in a public setting, this was an indication that the jurors did not take the court's instructions seriously and that it was likely the jurors discussed the case in more detail on other occasions. Our review of the record indicates that the exchange between the two jurors, assuming as the trial court did that it occurred as averred by defendant's daughter, did not amount to deliberations and did not express a commitment by either juror that defendant was guilty. In fact, the alleged misconduct was not an extended discussion but one comment by each juror that indicated no conclusions regarding defendant's guilt.

Defendant provided no evidence of prejudice. Defendant made no showing that the misconduct complained of affected the impartiality of either juror. *Nick, supra* at 230. Nor was there any evidence that the alleged misconduct was occasioned by the prosecution, and there is nothing to indicate any improper bias on the jurors' mind. *Id.* To paraphrase *Nick*, a conclusion that prejudice to defendant *may* have resulted because of the improper remarks does not justify a conclusion that defendant was prejudiced. *Id.* at 231-232. A mere possibility of prejudice is insufficient. *Id.* at 227. The court afforded defendant a proper remedy by reviewing the alleged juror misconduct to determine whether the jurors' impartiality was affected by the discussion. When the court found no prejudice, it properly determined that a new trial was not justified.

## II

Defendant next claims that the trial court reversibly erred in allowing the complainant's mother to testify that defendant volunteered to, and in fact did, baby sit the complainant and her sister shortly after defendant met complainant's mother. Defendant objected to this testimony on relevancy grounds. On appeal, defendant claims this testimony constituted impermissible "other acts" evidence under MRE 404(b). Because defendant failed to object to this evidence under MRE 404(b), any error is unpreserved. To avoid forfeiture of an unpreserved issue on appeal, an appellant must show: (1) that an error occurred; (2) that the error was plain, i.e., clear or obvious; and (3) that the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Once an appellant has satisfied these three requirements, the appellate court must "exercise its discretion in deciding whether to reverse." *Id.* at 763. Reversal is warranted "only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* at 763-764 (internal punctuation omitted).

We cannot conclude that any error that occurred was plain, clear or obvious error that affected defendant's substantial rights and merits reversal. Relevant other acts evidence does not violate MRE

404(b) unless it is offered *solely* to show the criminal propensity of an individual to establish that he acted in conformity therewith. Other acts of the defendant may be admissible to show such things as intent. MRE 404(b)(1). Defendant's alleged inordinate interest in the complainant arguably establishes defendant's intent to commit the offense of which he stands convicted.<sup>1</sup>

### III

Finally, defendant argues that the trial court reversibly erred when it allowed a case worker for child protective services to testify that acts defendant described to her constituted criminal sexual conduct. Defendant maintains the case worker impermissibly expressed a legal conclusion that resulted in defendant's conviction.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673, reh den 459 Mich 1203 (1998); *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Snider, supra*, 239 Mich App at 419. Even where the trial court abused its discretion, a new trial may not be granted unless the action is inconsistent with substantial justice or results in a miscarriage of justice. MCR 2.613(A); MCL 769.26; MSA 28.1096.

The case worker testified that defendant called her to report inappropriate sexual behavior by the complainant toward defendant. On cross-examination defense counsel inquired into the case worker's legal obligations to report allegations of criminal activity. On redirect, the prosecutor asked about the concerns the case worker had that prompted her to call the police after defendant called her to allegedly report inappropriate behavior by a child. Defense counsel objected on the grounds of speculation and relevancy. The court overruled defendant's objection. The response ultimately elicited was that the case worker was familiar with the criminal code and that she felt the actions defendant described would be a criminal offense and that she believed it should be investigated.

Defendant argues that given her background, this was pure speculation, that the information was not relevant to the issue of whether the offense occurred and was an invitation to speculate on whether defendant committed the offense. The prosecutor, persuasively argues that defendant opened the door to the testimony and cannot now be heard to complain.

We need not decide whether the admission of this testimony was error. Any error resulting from the admission of this testimony is harmless and does not require reversal. MCR 2.613(A). The

---

<sup>1</sup> We acknowledge that this evidence must also survive the balancing test of MRE 403. We cannot find that the proffered evidence was substantially outweighed by the factors under MRE 403. We also acknowledge that the prosecution failed to fulfill the notice requirement of MRE 404(b)(2). However, defendant has failed to demonstrate prejudice resulting from the lack of notice and therefore we cannot find that the admission of this evidence affected defendant's substantial rights.

trial court properly instructed the jurors that the court was the sole authority on the law and that the jurors were to apply the facts as they found them to be to the law as provided by the court.

Affirmed.

/s/ Gary R. McDonald

/s/ Janet T. Neff

/s/ Brian K. Zahra