

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LANCE BRIAN DAVIS,

Defendant-Appellant.

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UNPUBLISHED

February 16, 2001

No. 219475

Oakland Circuit Court

LC No. 98-160111-FC

Before: Whitbeck, P.J., and Murphy and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right, challenging the trial court's denial of his motion for a new trial, predicated on allegations of juror misconduct. We affirm.

Defendant was charged with assault with intent to commit murder, MCL 750.83; MSA 28.278. The prosecutor presented evidence that defendant tried to electrocute his then wife, with an electrical appliance while she was in the shower. The complainant testified at trial that while she was in the shower, defendant turned up the water in the tub and slid an electric hair appliance into the bathtub. She indicated that she tried to get out of the shower, but defendant held the shower doors closed. Complainant turned off the water and left the shower without a towel or robe, going immediately to another room to call 911. One of the police officers who responded to the scene stated that he noticed no water on the floor by the phone, and only two quarter-sized spots of water near the bathtub. Defense counsel argued that those findings were inconsistent with the complainant's account of events. The jury found defendant guilty of the lesser crime of attempted assault with intent to murder, MCL 750.92(2); MSA 28.287(2). The trial court sentenced defendant to one to five years' imprisonment.

After trial, a local newspaper article revealed that the jury foreperson, before coming to court for the second day of deliberations, had taken a shower, specifically noted how the water dripped from her, and then went on to discuss her findings with her fellow jurors. Characterizing this activity as the introduction of extrinsic evidence, or the conducting of an unauthorized experiment, defendant requested a new trial. The trial court heard testimony from the foreperson and nine other jurors at an evidentiary hearing, and concluded that there was no juror misconduct. We agree.

We review a trial court's decision on a motion for a new trial for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998). A trial court's factual findings are reviewed for clear error, while its application of the law to the facts is reviewed de novo. *People v Barrera*, 451 Mich 261, 269; 547 NW2d 280 (1996).

"During their deliberations, jurors may only consider the evidence that is presented to them in open court." *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). Where a jury considers evidence not properly introduced at trial, a defendant is denied the rights of confrontation, cross-examination, and assistance of counsel. *Id.* "An investigation is improper where it 'amount[s] to additional evidence supplementary to that introduced during the trial.'" *In re Beverly Hills Fire Litigation*, 695 F2d 207, 214 (CA 6, 1982), quoting *Womble v JC Penney*, 431 F2d 985, 989 (CA 6, 1970). A party claiming error in this regard bears the burden of proving that the jury was in fact exposed to an extraneous influence, and that the influence created "a real and substantial possibility" that it influenced the verdict. *Budzyn, supra* at 88-89. Further, there should be some demonstration "that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict." *Id.* at 89 (citations omitted).

In this case, the foreperson testified that when she departed from her morning showering routine, she paid more attention to how the water dripped from her person, because the trial and deliberations had heightened her interest in the matter at the moment. We agree with the trial court that the foreperson's observations did not constitute any kind of extrinsic evidence or experiment, but was instead part of the everyday experience and common sense that she and the rest of the jury were instructed to call upon. CJI2d 2.6. Moreover, all of the jurors who testified at the hearing agreed that they followed the court's instruction to decide the case based only on the evidence at trial and law as explained by the court. The trial court thus properly denied the motion for a new trial.

However, we note a minor clerical error on the judgment of sentence. The document contains the correct statutory citation for assault with intent to murder, MCL 750.83; MSA 28.278, but not the applicable citation for attempt, MCL 750.92(2); MSA 28.287(2). Because defendant was ultimately convicted only of an attempt crime, we remand this case for the ministerial purpose of correcting the judgment of sentence to reflect the correct statutory citation for attempt.

Affirmed, but remanded for correction of the judgment of sentence.

/s/ William C. Whitbeck  
/s/ William B. Murphy  
/s/ Jessica R. Cooper