STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 29, 2002
v	No. 202456 Recorder's Court
GREGORY D. POINDEXTER, Defendant-Appellant.	LC No. 96-005979

Before: White, P.J., Whitbeck, C.J., and Holbrook, Jr., J.

PER CURIAM.

The prosecutor charged defendant Gregory Poindexter with first-degree murder[1] under alternate theories of premeditation and felony-murder, as well as possessing a firearm during the commission of a felony (felony-firearm),[2] for killing twenty-seven-year-old Linda Summerville in June 1996. A jury found him guilty of first-degree premeditated murder, the lesser included charge of second-degree murder,[3] and felony-firearm. The trial court sentenced Poindexter to mandatory life in prison without parole for the first-degree murder conviction and a consecutive two-year term for the felony-firearm conviction. The trial court also sentenced him to life imprisonment for the second-degree murder conviction, but then immediately vacated that conviction and sentence. Poindexter appeals as of right. We affirm.

I. Basic Facts And Procedural History

The victim and her three-year-old daughter had been living with the victim's sister, Lisa Summerville, for about a year before the shooting. According to Lisa Summerville, the victim had dated Poindexter for about two years. Their relationship ended around May 25, 1996, because, as the victim reportedly told her, Poindexter had assaulted the victim violently and had thrown her down stairs, ultimately requiring her to have five stitches to close a wound on her head. When Lisa Summerville saw these stitches, she changed the locks on her home doors and security codes in the home alarm system. However, notably, the security system was wired only

[1] MCL 750.316.

[2] MCL 750.227b.

[3] MCL 750.317.

to the front and back doors, not to the windows, which could be opened from the outside if they were not locked inside; the kitchen window was frequently left open.

Lisa Summerville said that, on the night of the shooting, she locked the doors before going to bed in her upstairs bedroom, but did not check the windows. The victim and her daughter were also in the house and the women had left on the living room light, which also illuminated the hallway, as a nightlight for the little girl. Sometime after midnight, Lisa Summerville "was awakened by two gunshots and a scream." She got up and went part way down the stairs. Lisa Summerville called out a number of times to her sister, never receiving a response. Then she saw a "shadow" from under the door to her sister's room. Lisa Summerville called out to her sister again, but still heard no response, so she returned to her room and retrieved a .38 caliber revolver her boyfriend, a Detroit police officer, had given her. She went to her telephone to call 911, but the line was dead, so she ran to the window and "started screaming out of the window for help for someone to call the police."

Suddenly, Lisa Summerville said, the door to the stairway leading to her room opened and someone turned on and off the stairway light. She turned on the light from a switch in her room, looked down, and saw a hand in a white latex glove lightly spattered with blood reaching for the light switch. "And then the next thing that happens is I see Mr. Poindexter. . . . He turned and looked right up at me and I looked right down into his face." Fearing that Poindexter might shoot her, Lisa Summerville fired a shot at him. She testified that Poindexter, who had started up the stairway, "ran back down the stairs" and then she "heard him go into [the victim's] bedroom . . . and fire two more shots." She heard "the alarm go off on the front door," ran back to the window, and again called for help. A neighbor came over and said that she had called the police.

When the police responded to the scene, Lisa Summerville reported the shooting. The police secured the outside of the house and found a lawn chair "placed up against the rear of the building" directly "underneath the southeast bedroom window," which was open. Inside, the police found that the door or the doorframe of the southeast bedroom was "broken and cracked." The victim was on the floor behind the door wrapped in a sheet. She had multiple gunshot wounds, and medical personnel intitially believed that she had died from a gunshot wound to the head.

After a series of rather confusing phone calls, Poindexter apparently called Officer Timothy Broughton at the crime scene and police officers ultimately brought Poindexter in for questioning. Barbara Simon, a Detroit homicide investigator, questioned Poindexter after advising him of his rights. According to Officer Simon, Poindexter said he had not killed the victim and had not been at her house since their fight at the end of May. Officer Simon learned from police records that the victim had reported a domestic abuse incident to the police on May 23, 1996.

Before trial, Poindexter moved to exclude evidence of the assault as irrelevant and as more prejudicial than probative. The trial court ruled that it could "be relevant, assuming that [the prosecutor] can go ahead and tie it in and – it's admissible." Apparently, the prosecutor thought that the trial court's ruling eliminated the need for her to establish a foundation for this testimony. Consequently, after Lisa Summerville testified to what the victim had told her about the assault, the parties discussed the matter at a sidebar conference, following which the

prosecutor began to lay a foundation for the hearsay statement to be admitted as an excited utterance. The trial court excused the jury and, after hearing arguments, ruled that the prosecutor had not established grounds to admit the statement. Poindexter then moved to exclude all evidence regarding previous violent episodes between him and the victim. Outside the jury's presence, the prosecutor unsuccessfully tried to lay a proper foundation for this evidence again. This time, the trial court stated that it would "tell the jury to disregard it" and did so when the jury returned.

The jury also heard technical evidence from two witnesses concerning the crime. William Steiner, a forensic chemist qualified as an expert, testified that he had analyzed the contents of a gunshot residue test kit used on Poindexter. Steiner found residue on the samples taken from Poindexter's right arm and forehead, both of which were consistent with a gun having been fired. Steiner also examined the sheet that had been wrapped around the victim's body and found blood and unburned gunpowder particles, which indicated to him that the shooting occurred at "relatively close range," meaning up to three feet. Laning Davidson, a medical examiner, who was also qualified as an expert in his field, added that the victim died from multiple gunshot wounds. In addition to detailing the numerous bullet wounds the victim sustained, Davidson said that he had observed a contact gunshot wound to the back, right side of the victim's head, which went through her cerebellum and exited through the left side of her head. Davidson said that he could not determine in what order the wounds were inflicted, but thought that the head wound was inflicted last because "usually a person can't get close enough [to inflict a contact wound] unless the individual is somehow incapacitated."

The jury began deliberating on December 17, 1996. The next day, at 3:00 p.m., the jury announced that it had reached verdicts on the felony-murder (Count II) and felony-firearm (Count III) charges, but was unable to reach a verdict on the premeditated murder charge (Count I). With the attorneys' agreement, the trial court had the jury seal their verdicts on Counts II and III in an envelope. The trial court then gave the deadlocked jury instruction and had the jury continue deliberating on Count I, the premeditated murder charge. At 4:04 p.m., the jury again stated that it could not reach a verdict on the premeditated murder charge and disclosed that it was split eleven to one. Because the jury had been deliberating for less than two days, the trial court thought it should take additional time to consider a verdict. Thus, the trial court denied Poindexter's motion for a mistrial on all counts and sent the jury home for the day with instructions to return the following day to continue deliberations.

The jury resumed deliberations on December 19, 1996. At 11:42 a.m., the jury again reported that it could not reach a verdict and asked to be dismissed. Poindexter's counsel, James Shaw, moved for a mistrial on the premeditated murder charge only, but Poindexter disagreed and demanded a mistrial on all counts. Because Poindexter and Shaw disagreed, the trial court said it would instruct the jury to continue deliberating. Acceding to Poindexter's wishes, Shaw then moved for a mistrial on all counts. The trial court denied the motion and sent the jury to lunch. The jury resumed deliberations at 1:30 p.m., and, one hour later, returned a unanimous guilty verdict on the premeditated murder charge. Poindexter now appeals.[4]

---

[4] Unfortunately, this appeal has been pending for more than four years. The first delays related to filing transcripts and Poindexter's brief. Subsequently, Poindexter filed a supplemental brief
(continued…)

II. Mistrial

A. Standard Of Review

Poindexter contends that the trial court improperly coerced the jury into finding him guilty of first-degree murder by requiring the jury to continue deliberating even after it had announced several times that it was deadlocked. The somewhat unusual twist to this case is that Poindexter does not challenge the trial court's instructions or comments to the jury. Rather, he claims that the trial court's decision to require the deadlocked jury to engage in further deliberations was as coercive as any of the comments and instructions mentioned in the case law. This substantive argument, coupled with Poindexter's assertion that the trial court's error lies in its failure to "declare a hung jury," reveals that he actually contends that the trial court erred in denying his motion for a mistrial. Appellate courts review a trial court's decision to deny a defendant's motion for a mistrial to determine whether the trial court abuse its discretion.[5]

B. Additional Deliberation

Because a verdict in a criminal case must be unanimous,[6] the court rules provide that when a jury is unable to agree unanimously on the verdict, the trial court "may" declare a mistrial.[7] However, both the court rules[8] and case law[9] make clear that a trial court need not declare a mistrial at the first sign of disagreement among the jurors concerning the verdict. Rather, the trial court may choose to issue supplemental instructions to the jury and require it to deliberate further[10] so long as the trial court's instructions or actions would not cause "a juror to abandon his conscientious dissent and defer to the majority solely for the sake of reaching agreement."[11]

Michigan case law does not examine the precise argument Poindexter poses, which is that, even without improper instructions, forcing a jury to continue deliberations alone may coerce a verdict. Taken to the extreme, that may very well be true. For instance, if a jury were to express its inability to agree on a verdict every day for a significant period, prompting the trial

(…continued)

raising an ineffective assistance of counsel claim and a motion to remand for an evidentiary hearing, which this Court granted in November 1998. The hearing, which was originally set for January 1, 1999, was repeatedly adjourned because of difficulties in finding an attorney to represent Poindexter. The hearing finally began in January 2001 and ended in February 2001. The trial court issued a ruling in August 2001 denying Poindexter's motion for a new trial.

[5] See *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001).

[6] See MCR 6.410(B); *People v Booker*, 208 Mich App 163, 169; 572 NW2d 42 (1994).

[7] See MCR 6.420(B), (C).

[8] MCR 6.420(C).

[9] See *People v Sullivan*, 392 Mich 324; 220 NW2d 441 (1974).

[10] See MCR 6.420(C) ("the court may . . . .order the jury to retire for further deliberations"); *Sullivan*, *supra* at 335, 341 (adopting the ABA model instruction for a deadlocked jury).

[11] *People v Hardin*, 421 Mich 296, 314; 365 NW2d 101 (1984).

court to order it to continue deliberating each time, the jury might eventually infer that it would not be discharged until it reached a unanimous verdict, regardless of the jurors' individual and honest conclusions regarding the evidence. In such an instance, the additional deliberation would not serve to allow the jurors work through the difficult deliberative process necessary to sort and weigh the evidence, but to force the jury to ignore fatal deficiencies in the proofs themselves.[12] Surely, that would constitute coercing a verdict, no matter how perfect the trial court's instructions to the jury might be.

This case, however, does not present any such extreme circumstances. The trial took longer than a week, and the jury spent no more than three days deliberating, in total. For the majority of the first and second days of deliberations, the jury considered the evidence without informing the trial court of any problems. Only late on the second day of deliberations did the jury first alert the trial court that it could not reach a unanimous verdict on the murder charge. This unanimity problem resolved itself less than twenty-four hours later when, in the afternoon of the third day of deliberations, the jury rendered its verdict on the murder charge. We see nothing inappropriate in the trial court's conclusion that less than two days was inadequate to consider the voluminous evidence and reach a final decision.

Though Poindexter points out that the jury was forced to deliberate up to six days before Christmas, there is nothing inherently coercive about this timing in the sense that the jurors would be forced to choose between being allowed to observe the holiday and rendering an honest verdict.[13] Further, he makes a leap in his argument, unsupported by the evidence, that the upcoming holiday forced a lone dissenting juror to change his mind. Though the jury indicated without prompting[14] that eleven jurors were willing to find Poindexter guilty of first-degree murder and the twelfth juror would find him guilty of second-degree murder, there is no way to know that the same juror, or even the same number of jurors, disagreed on the verdict in the additional time they spent deliberating. The jurors, who were polled after rendering the verdict in open court, each indicated that they had found Poindexter guilty of first-degree, premeditated

[12] See *Sullivan*, *supra* at 334, n 8.

[13] See, generally, *People v Cadle*, 204 Mich App 646, 657-658; 516 NW2d 520 (1994), overruled on other grounds in *People v Perry*, 460 Mich 55; 594 NW2d 477 (1999) (requiring jury to deliberate relatively late into the evening was improper, but not so "unreasonable" that it was coercive); *People v Vettese*, 195 Mich App 235, 244-245; 489 NW2d 514 (1992) (instruction that jury would be excused for the evening and would return the next morning not coercive because it did not imply that jury had to return verdict by certain time); *People v Cook*, 130 Mich App 203, 206; 342 NW2d 628 (1983) (trial court's comment that it would send deadlocked jury home for the evening and have them return the next day to continue deliberations not coercive).

[14] In his supplemental brief, Poindexter contends that it was error requiring reversal to reveal the split between the jurors. However, we agree with the statement in *People v Dietrich*, 87 Mich App 116, 141-142; 274 NW2d 472 (1978), rev'd in part on other grounds 412 Mich 904; 315 NW2d 123 (1982), that "[w]hile the disclosure of the division among the jurors may create the possibility of prejudice, we think that, in this case, there is no reasonable possibility that the disclosure of this information . . . aided in convincing even one undecided juror of defendant's guilt beyond a reasonable doubt."

murder. Additionally, we note that the transcript makes it fairly apparent that Poindexter's personal insistence on a mistrial with respect to all three charges after the jury indicated it had reached a verdict on two charges was a dilatory tactic, not a response to any concerns about the jury's deliberations and the possibility of coercion.[15] Consequently, in the absence of any factors from which we could infer that the jury was coerced by the trial court's refusal to grant a mistrial and to continue deliberations, we cannot say that the trial court abused its discretion.

III. Prosecutorial Misconduct

A. Standard Of Review

Poindexter contends that the prosecutor engaged in misconduct by deliberately eliciting the testimony that he had assaulted the victim about a month before she was killed, which the trial court had ruled inadmissible. We review de novo claims that a prosecutor engaged in misconduct.[16]

B. Fair Trial

When analyzing a prosecutorial misconduct claim, this Court "evaluates the challenged conduct in context to determine if the defendant was denied a fair and impartial trial."[17] A prosecutor's attempt to reveal inadmissible evidence to the jury might constitute misconduct.[18] However, there is nothing in the record indicating that the prosecutor in this case acted in bad faith in attempting to introduce the evidence; she was apparently simply mistaken as to the scope of the trial court's pretrial ruling and her ability to lay a proper foundation. The prosecutor's attempt to introduce evidence she legitimately believed would be accepted by the court does not constitute misconduct.[19] In addition, considering that the trial court instructed the jury to disregard the testimony, that the statement was mentioned once and well-before deliberations, and that Lisa Summerville gave unequivocal testimony that she saw Poindexter in the house at the time of the shooting wearing bloody gloves, any error was harmless beyond a reasonable doubt.[20]

---

[15] In his supplemental brief, Poindexter also claims that his attorney was ineffective for failing to move for a mistrial because of the deadlocked jury. In fact, his attorney not only moved for a mistrial on the grounds the attorney thought were meritorious, the attorney altered the motion to meet Poindexter's request for a mistrial for all three charges over his own professional opinion. Simply put, there is no support in the record for this allegation.

[16] See *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

[17] *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

[18] See *People v Leo*, 188 Mich App 417, 428; 470 NW2d 423 (1991).

[19] See *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999).

[20] *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994).

IV. Effective Assistance Of Counsel

A. Standard Of Review

Poindexter claims that his trial attorney was ineffective for failing to call Poindexter's mother as a witness and for failing to investigate the case adequately, including counsel's failure to obtain evidence from the prosecutor during discovery. We review constitutional questions de novo,[21] a standard that is particularly relevant in this case because the legal test we apply to ineffective assistance of counsel issues does not require us to defer to the trial court to any extent.

B. Legal Standards

As this Court explained in *People v Knapp*,[22]

> To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

C. The Failure To Call Poindexter's Mother As A Witness

Case law settles that failing to present a witness can constitute ineffective assistance of counsel if the failure to do so deprives the defendant of a "substantial defense."[23] However, decisions concerning which witnesses to call and what evidence to present are often considered part of trial strategy.[24] In this case, Poindexter is not entitled to relief because of this argument, having failed to demonstrate what his mother would have said had she been called as a witness at trial. All we can discern from his brief is that she might have given him an alibi, but what that alibi would have been we do not know. Without this information it is impossible to determine how her absence from trial deprived Poindexter of a substantial defense and, therefore, whether her testimony would have made any difference in the outcome of this case.[25]

---

[21] See *People v Conat*, 238 Mich App 134, 144; 605 NW2d 49 (1999).

[22] *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

[23] *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

[24] *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988).

[25] *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

D. Investigation And Other Issues

Poindexter presented no evidence at the *Ginther*[26] hearing relating to his attorney's supposed failure to discover and use exculpatory evidence the prosecutor allegedly withheld. Because the record is silent about the nature of the evidence or its relevance, Poindexter has failed to establish a right to relief.[27] Furthermore, to the extent that Poindexter noted other alleged instances of ineffective assistance at the *Ginther* hearing, he has not addressed them adequately in this appeal and, therefore, has abandoned any claim of error with regard to those issues.[28]

V. Jury Instructions

Poindexter contends that the trial court improperly instructed the jury regarding its ability to return a not guilty verdict, an issue he failed to preserve at trial by objecting to the instructions given or requesting CJI2d 3.19 or 3.20.[29] Critically, the trial court never instructed the jury that it was required to find Poindexter guilty of any offense and the verdict form included not guilty as possible verdict with respect to each count. Consequently, we have no evidence of any plain error, much less the plain error affecting Poindexter's rights that would merit reversal.[30]

VI. Double Jeopardy

Poindexter's double jeopardy claims are equally without merit. Because the jury convicted Poindexter of premeditated murder but also found him guilty of the lesser included offense of second-degree murder, the trial court properly vacated the conviction and sentence for second-degree murder.[31] Furthermore, the prohibition against double jeopardy does not preclude separate convictions of murder and felony-firearm.[32]

VII. Other Arguments

Poindexter failed to present for appeal the issue of whether the evidence was insufficient to support the first-degree premeditated murder verdict by listing it in the statement of the issues presented[33] and failed to brief this issue's merits. Consequently, he has abandoned this issue.[34] Poindexter has failed to preserve for appeal his argument that the district court erred in binding

---

[26] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[27] *Avant, supra*.

[28] *People v Kean*, 204 Mich App 533, 536; 516 NW2d 128 (1994).

[29] See MCL 768.29; *People v Griffin*, 235 Mich App 27, 37; 597 NW2d 176 (1999); *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996).

[30] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[31] *People v Clark*, 243 Mich App 424, 429-430; 622 NW2d 344 (2000).

[32] MCL 750.227b(1); *People v Mitchell*, 456 Mich 693, 698; 575 NW2d 283 (1998).

[33] See MCR 7.212(C)(5).

[34] See *Kean, supra*.

him over on the premeditated murder charge because he did not file a motion to quash in the trial court.[35] Despite these procedural defects, in brief answer to both issues, having reviewed the record, we are satisfied that the evidence was sufficient to convict Poindexter of the murder beyond a reasonable doubt.[36] According to the testimony, Poindexter broke into his former girlfriend's home and shot her several times. That the evidence suggests he came prepared with a gun and gloves only indicates that he committed this crime with premeditation.[37] Because this evidence was sufficient, any error in the bindover decision was harmless.[38]

Poindexter also argues that the trial court engaged in misconduct by coercing the jury into finding him guilty of murder. Not only has our analysis failed to reveal any coercion, we can find no other evidence that the trial court did anything to influence the jury "unduly" in a manner that denied Poindexter a fair trial.[39] Consequently, aside from the fact that Poindexter failed to preserve this issue for appeal, it is meritless.

Affirmed.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Donald E. Holbrook, Jr.

---

[35] *Noble, supra* at 658.

[36] See *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998).

[37] See *People v Coy*, 243 Mich App 283, 315-316; 620 NW2d 888 (2000) (premeditation can be inferred from circumstances of crime).

[38] See *People v Dunham*, 220 Mich App 268, 276-277; 559 NW2d 360 (1996).

[39] *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988).