STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOIS D. WATKINS,

Defendant-Appellant.

UNPUBLISHED
November 5, 2002

No. 230889
Wayne Circuit Court
LC No. 00-000991

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, felonious assault, MCL 750.82, intentional discharge of a firearm from a motor vehicle, MCL 750.234a, and felony-firearm, MCL 750.227b. The court sentenced defendant to concurrent prison terms of thirty-four months to ten years for the assault with intent to do great bodily harm conviction, seventeen months to four years for the felonious assault conviction, and seventeen months to four years for the discharge of a firearm from a motor vehicle conviction, plus a consecutive two-year term for the felony-firearm conviction. We affirm.

I

Defendant first argues that the trial court erred in refusing to declare a mistrial because the court coerced a juror into agreeing with the verdicts during polling and failed to immediately discontinue polling when the juror disagreed with the announced verdicts.

We review the trial court's decision denying a motion for a mistrial for an abuse of discretion. *People v Ortiz-Kehoe*, 237 Mich App 508, 513; 603 NW2d 802 (1999). A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *Id.* at 513-514. Further, we review claims of coerced verdicts case by case, considering all the facts and circumstances, as well as the particular language used by the trial court. *People v Malone*, 180 Mich App 347, 352; 447 NW2d 157 (1989).

MCR 6.420(C), which governs jury polling in a criminal trial, provides in pertinent part:

> If polling discloses the jurors are not in agreement, the court may (1) discontinue the poll and order the jury to retire for further deliberations, or (2) either (a) with the defendant's consent, or (b) after determining that the jury is deadlocked or that some other manifest necessity exists, declare a mistrial and discharge the jury.

If a juror expresses disagreement with the verdict when the jury is polled, the jury must be sent out for further deliberations. MCR 2.512(B)(3); *People v Echavarria*, 233 Mich App 356, 362; 592 NW2d 737 (1999). The continuation of the polling or the subsequent questioning of a dissenting juror is improper because of their potentially coercive effect. *Id.*; see Staff Comment to MCR 6.420.

Here, the record shows that, during the poll, when asked if the guilty verdicts announced were her verdicts, the fifth juror paused and then stated, "I guess so." In response to the juror's indistinct answer, the trial court asked the juror if her response was a yes. Following a pause, and the court repeating the same question, the juror responded "yes." Contrary to defendant's position, the juror's initial response was not tantamount to a disagreement with the verdicts announced. As such, the court was not required to cease polling and send the jury out for further deliberations based on the juror's initial response. Further, it is clear that the juror's ultimate response to the question of defendant's guilt was "yes." Moreover, we find nothing coercive in the trial court's questioning of the juror, particularly in light of the juror's initial response. Accordingly, defendant has not demonstrated that she was denied her right to a unanimous verdict.

Within this issue, defendant also cursorily notes that the fifth juror averred in an affidavit that she was browbeaten in the jury room. We initially note that the affidavit presented on appeal is not properly before this Court because it is not a part of the lower court record.[1] *People v Canter*, 197 Mich App 550, 556-557; 496 NW2d 336 (1992). In any event, the juror's affidavit concerning intimidation by other jurors does not entitle defendant to a new trial. Generally, jurors may not impeach their own verdict by subsequent affidavits showing misconduct in the jury room. *People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997). An exception exists where juror misconduct can be demonstrated with evidence pertaining to outside or extraneous influences. *Id.*; *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997). However, juror misconduct "cannot be demonstrated with evidence indicating matters that inhere in the verdict, such as juror thought processes and interjuror inducements." *Messenger*, *supra* at 175. Accordingly, defendant is not entitled to relief on this basis.

II

Defendant also contends that the trial court erred in denying her motion for a new trial on the basis that the jury was exposed to extraneous influences. In the affidavit presented to the lower court, the fifth juror averred that the jury foreperson and possibly another juror had visited the crime scene. In the affidavit presented on appeal, the juror added the allegation that the

[1] The affidavit presented in the lower court was not verified. In addition, the affidavit presented on appeal added several allegations, which were not in the affidavit presented in the lower court.

foreperson described various possible scenarios to the jury based on his view of the crime scene. We review the trial court's decision denying a motion for a new trial for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000).

During deliberations, jurors may consider only the evidence presented in open court. *Budzyn, supra* at 88. A jury's consideration of extraneous facts not introduced in evidence deprives defendant of his Sixth Amendment rights of confrontation, cross-examination, and assistance of counsel. *Id*. In order to establish that the extrinsic influence was error requiring reversal, the defendant must prove that the jury was exposed to extraneous influences, and that the influence "created a real and substantial possibility that they could have affected the jury's verdict." *Id*. at 88-89. In proving that an extraneous influence created a real and substantial possibility of prejudice, the defendant must generally "demonstrate 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. If the defendant makes such a showing, the burden shifts to the prosecution to demonstrate that the error was harmless beyond a reasonable doubt. *Id*. The prosecution may establish that the jury's consideration of extraneous influences was harmless beyond reasonable doubt by proving either that the extraneous influences were duplicative of evidence produced at trial or that the evidence of guilt was overwhelming. *Id*. at 89-90.

Even if we consider the affidavit presented on appeal containing additional allegations, defendant has failed to establish an error requiring reversal. Because the two jurors' observations of the crime scene occurred outside of the adversarial process, they may properly be characterized as an extrinsic influence. However, defendant did not demonstrate that this extraneous influence was "substantially related to a material aspect of the case," and that it created a real and substantial possibility that the jury's verdict was affected. *Id*. at 89. Rather, it is unclear what, if any, effect the jurors' alleged visit had on the other jurors. Indeed, the record shows that the jurors heard extensive testimony about the crime scene, and were shown numerous photographs, as well as a sketch, of the scene. The photographs and the sketch were admitted as exhibits. Moreover, there was strong evidence, including the testimony of the two victims and several eyewitnesses, that defendant committed the crimes, as a principal or as an aider and abettor. Under these circumstances, it is unlikely that the extraneous information had any affect on the jury's verdict. Accordingly, defendant is not entitled to a new trial on this basis.

III

Defendant argues that she was denied a fair trial because she was denied her right to be present during a jury view of the crime scene. Because defendant failed to expressly raise this claim below, this Court reviews this unpreserved claim for plain error affecting defendant's substantial rights, i.e., that it affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A criminal defendant "has the fundamental right to be present at every stage of trial where [her] substantial rights may be affected, including a jury view of the crime scene." *People v King*, 210 Mich App 425, 432-433; 534 NW2d 534 (1995) (citation omitted). Here, the trial court did not authorize a jury view of the crime scene, nor did such a view actually take place. Rather, according to a juror's affidavit, possibly two jurors, on their own accord, went to the

scene.[2] Even if a jury view had occurred, defendant has failed to establish any reasonable probability of prejudice related to the two jurors' unauthorized visit to the crime scene. A defendant's absence from a part of a trial requires reversal of her convictions only if there is any reasonable probability of prejudice. See *People v Woods*, 172 Mich App 476, 480; 432 NW2d 736 (1988). Accordingly, defendant has failed to demonstrate a plain error requiring reversal of her convictions.

IV

Defendant argues that her convictions of both intentional discharge of a firearm from a motor vehicle and felony-firearm violate her right to be free from double jeopardy, because she was subjected to multiple punishments for a single offense. US Const, Am V; Const 1963, art 1, § 15.

Because defendant failed to raise this double jeopardy claim below, we review this unpreserved constitutional claim for plain error affecting defendant's substantial rights. *Carines, supra*.

The double jeopardy provisions of the United States Constitution, US Const, Am V, and the Michigan Constitution, Const 1963, art 1, § 15, protect citizens from multiple punishments for the same offense. *People v Torres*, 452 Mich 43, 63-64; 549 NW2d 540 (1996); *People v Harding*, 443 Mich 693, 699; 506 NW2d 482 (1993). The intent of the Legislature is the determining factor in evaluating a double jeopardy claim under both the federal and state constitutions. *People v Denio*, 454 Mich 691, 706; 564 NW2d 13 (1997); *People v Robideau*, 419 Mich 458, 485; 355 NW2d 592 (1984). This Court determines legislative intent with regard to the federal constitution by applying the "same-elements test" set forth in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), which requires the reviewing court to determine "whether each provision requires proof of a fact which the other does not." *Denio, supra* at 707 (citation omitted). Under the state constitution, legislative intent is determined by "traditional means . . . such as the subject, language, and history of the statutes." *Id*. at 708. Relevant factors to consider in determining legislative intent include, but are not limited to, whether each statute prohibits conduct violative of distinct social norms, the amount of punishment authorized by each statute, whether the statutes are hierarchical or cumulative, and the elements of each offense. *Id*.; *People v Fox (After Remand)*, 232 Mich App 541, 556; 591 NW2d 384 (1998).

The felony-firearm statute provides that "[a] person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . is guilty of a felony, and shall be imprisoned for 2 years." MCL 750.227b. The intentional discharge of a firearm from a motor vehicle statute provides in relevant part: "[A]n individual who intentionally discharges a firearm from a motor vehicle . . . in such a manner as to endanger the safety of another individual is guilty of a felony, punishable by imprisonment for not more than 4 years, or a fine of not more than $2,000.00, or both." MCL 750.234a.

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[2] Defendant even states in her brief, "if in fact the jurors visited the crime scene." (See defendant's brief, p 39.)

We hold that defendant's dual convictions and punishments for felony-firearm and intentional discharge of a firearm from a motor vehicle do not violate either the federal or state protections against double jeopardy. A comparison of the elements of these two offenses reveals that each requires proof of a fact that the other does not. *Blockburger, supra*. The intentional discharge of a firearm from a motor vehicle requires proof that the defendant discharged a firearm from a motor vehicle in a manner so as to endanger another person, with no requirement that the discharge occur during the commission or attempted commission of a felony. CJI2d 11.37; see also *People v Cortez*, 206 Mich App 204, 205-206; 520 NW2d 693 (1994). By contrast, a conviction of felony-firearm requires proof that the defendant carried or possessed a firearm during the commission or attempted commission of a felony, with no requirement that the firearm was discharged or that the perpetrator was in a motor vehicle. *People v Williams (After Remand)*, 198 Mich App 537, 540-541; 499 NW2d 404 (1993).

In addition, each statute prohibits conduct that is violative of distinct social norms. The felony-firearm statute focuses on the act of utilizing a firearm to facilitate the commission of a felony, and its purpose is to reduce the possibility of injury to individuals posed by a criminal's use of a firearm and to deter the underlying felony itself. *People v Dillard*, 246 Mich App 163, 171; 631 NW2d 755 (2001). In contrast, the intentional discharge of a firearm from a motor vehicle statute is directed against the firing of a weapon from a motor vehicle, and addresses the danger posed by shootings in which rapid flight is possible for the shooter. *Cortez, supra* at 206. Also, the amount of punishment expressly authorized by the Legislature for each crime is different. Violation of the felony-firearm statute is punishable by a mandatory two-year sentence to be served consecutive to the underlying felony, while violation of the intentional discharge of a firearm from a motor vehicle statute is punishable by up to four years. MCL 750.227b; MCL 750.234a.

Because the crimes have disparate elements, each punishes conduct violative of distinct social norms, and each has differing penalties, it is apparent that the Legislature intended that the crimes of intentional discharge of a firearm from a motor vehicle and felony-firearm be punished separately. Accordingly, defendant's convictions do not violate the double jeopardy protection against multiple punishments. Therefore, defendant has failed to demonstrate plain error.

V

Defendant's final argument is that the evidence was insufficient to support her conviction of felonious assault.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), modified 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514. Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to prove the elements of a crime. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994).

In this case, viewing the evidence in a light most favorable to the prosecution, sufficient evidence was presented from which a jury could infer the elements of felonious assault. The

elements of felonious assault are (1) an assault,[3] (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The intent to place the victim in fear of an immediate battery may be inferred from the circumstances. See *People v Lawton*, 196 Mich App 341; 492 NW2d 810 (1992).

Here, the victim testified that defendant stated, "I got something for your a**. Now I got something for you." She then unwrapped a .22 caliber rifle, which is statutorily defined as a dangerous weapon, MCL 750.82, pointed it at the victim, and began advancing towards him while stating, "I got something for you MF's." The victim put his hands up and backed away from defendant. Several eyewitnesses also testified that defendant pointed a rifle at the victim, while making threats. This testimony was sufficient for a reasonable factfinder to find that the elements of felonious assault were established beyond a reasonable doubt.

Affirmed.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Patrick M. Meter

[3] A simple criminal assault is either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995).