

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

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KUMARA K. HUBBERT,

Defendant-Appellant.

---

UNPUBLISHED  
December 3, 2002

No. 226318  
Wayne Circuit Court  
LC No. 98-013443

Before: Jansen, P.J., and Holbrook, Jr. and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; assault with intent to rob while armed, MCL 750.89; and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of forty to sixty years for the murder conviction and five to fifteen years for the assault conviction. These sentences were to be served consecutive to a two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant was tried jointly with codefendant Hubert Marshall, before a separate jury, for the shooting death of Carl Higginson. Evidence at trial indicated that Mr. Higginson, who was in an automobile, stopped at an apartment complex to ask for directions from the two defendants. According to witnesses, when Mr. Higginson stopped, defendant made a statement about robbing him. Witnesses saw Marshall pass a gun to defendant shortly before hearing shots fired. However, Marshall subsequently claimed responsibility for shooting and killing Mr. Higginson.

**I. Removal of A Juror**

Defendant initially argues that the trial court improperly removed a seated juror during trial. We disagree. A trial court's decision to remove a juror is reviewed for a clear abuse of discretion. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). Such an abuse exists "only when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made." *Id.* Further, to obtain appellate relief the defendant must show prejudice as a result of the court's decision. *People v Weatherspoon*, 171 Mich App 549, 560; 431 NW2d 75 (1988).

A trial court's decision to dismiss a juror is governed by MCL 768.18, which provides, in relevant part:

Should any condition arise during the trial of the cause which in the opinion of the trial court justifies the excusal of any of the jurors so impaneled from further service, he may do so and the trial shall proceed, unless the number of jurors be reduced to less than 12.

The removal of a juror is warranted if “the interests of the public or of the individual juror will be materially injured by his attendance.” *Weatherspoon, supra* at 560, quoting MCL 600.1335. The reasons for removing a juror must be similar in character to those which would permit excusing a person during voir dire. *People v Van Camp*, 356 Mich 593, 605; 97 NW2d 726 (1959). A trial court should weigh “a defendant’s fundamental right to a fair and impartial jury with his right to retain the jury originally chosen to decide his fate.” *Tate, supra* at 562.

In this case, the trial court dismissed the juror because: (1) the juror was acquainted with an employee of defense counsel’s law firm; and (2) the juror disregarded the court’s instructions not to speak with anyone while the trial was pending. We cannot conclude that the trial court abused its discretion. The juror’s acquaintance with a member of the defense team was adequate justification for the trial court’s decision. See *People v Beasley*, 55 Mich App 583, 587-588; 223 NW2d 77 (1974). Further, by refusing to follow the trial court’s instructions, the juror’s continued participation in the trial might have adversely affected the case. See *Weatherspoon, supra* at 560. Contrary to defendant’s assertion, the trial court did not dismiss this juror because it believed he was only an alternate juror. Rather, the trial court observed that dismissal of the juror would still leave twelve jurors, as required by MCL 768.18.

Defendant has also failed to demonstrate that he was prejudiced because the dismissed juror was the only African-American selected for the jury. The racial composition of the remaining jurors is not apparent from the record. Moreover, defendant has failed to identify the factual basis for his claim that none of the remaining jurors were African-American. Although defense counsel asserted below that the dismissed juror was the only African-American *male*, he never indicated that he was the only African-American to serve on the jury. Thus, the record does not factually support defendant’s assertion that the trial court’s decision prejudiced him in this regard.

## II. Prosecutorial Misconduct

Defendant next asserts that the prosecutor engaged in misconduct during closing argument by referring to witness statements that were not admitted into evidence and disparaging defense counsel. We disagree. Prosecutorial misconduct claims are reviewed case by case, examining any remarks in context, to determine if the defendant received a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). “Appellate review of allegedly improper conduct is precluded if the defendant fails to timely and specifically object, unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice.” *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Unpreserved constitutional error only warrants reversal if it is plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Viewing the prosecutor’s comments in context, it is apparent that his remarks were in response to defense counsel’s arguments regarding the witness’ statements. Considered in this light, the remarks did not constitute plain error. *People v Kennebrew*, 220 Mich App 601, 608;

560 NW2d 354 (1996). Further, we do not believe that the prosecutor's use of the term "legal trickery" in reference to defense counsel was so prejudicial that it amounted to plain error requiring reversal. *Carines, supra* at 763-764.

### III. Admission of Evidence

Defendant further argues that the trial court erred in admitting certain evidence. A trial court's decision to admit evidence is reviewed on appeal for an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). "However, where decisions regarding the admission of evidence involve preliminary questions of law such as whether a rule of evidence or statute precludes admissibility, our review is de novo." *Id.*

#### A. Consistent Prior Statement

Defendant opines that the trial court erred when it permitted the prosecutor to elicit testimony that a witness' preliminary examination testimony was consistent with her trial testimony. We disagree.

In this case, the prosecutor read select questions and responses from a witness' preliminary examination testimony to rebut defense counsel's implications that she was lying. Under MRE 801(d)(1)(B), the prior statement of a witness is not considered hearsay if the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication . . . ." Moreover, defendant has not shown that he was prejudiced by this line of questioning given the overwhelming evidence against him. MCL 769.26; *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

#### B. Past Recollection Recorded

Defendant also claims the trial court erroneously permitted the prosecutor to refresh a witness' recollection by reading portions of the witness' previous statement to the jury, despite the fact that the witness initially denied his memory was refreshed by that statement. We disagree.

We find that the prosecutor properly offered the statement into evidence. Contrary to defendant's claim on appeal, the witness read the statement to himself and not aloud to the jury. There is also no foundation in the record for defendant's claim that the prosecution extensively read from the witness' prior statement to the jury. Further, when the relevant portion of the transcript is reviewed, it is apparent that the witness eventually admitted that his memory was refreshed by the prior statement and that the statement was accurate. Because the witness adopted the substance of the prior statement, it could properly be considered as substantive evidence. Thus, defendant was not prejudiced by having a portion of the statement read into the record. *Lukity, supra* at 495-496.<sup>1</sup>

---

<sup>1</sup> We also note that during cross examination, the defense attorney questioned the witness about the same portion of the statement that the prosecutor brought out during redirect examination.

#### IV. Ineffective Assistance of Counsel

Defendant claims that his attorney was ineffective for not objecting to the prosecutor's remarks discussed in part II of this opinion. We disagree. Because defendant did not raise this issue before the trial court, our review is limited to error apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). An unpreserved constitutional error warrants reversal only when it is plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764.

Based on our analysis, we conclude that a defense objection would not have affected the result of this proceeding. Accordingly, defendant has not established that counsel was ineffective. See *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Because we are satisfied that this issue may be decided on the basis of the existing record, and defendant's failure to explain what additional evidence would support an ineffective assistance of counsel claim, we deny defendant's request to remand for an evidentiary hearing on this issue.

#### V. Jury Oath

Defendant next asserts that the oath administered to the jury at the beginning of the trial was improper. Specifically, defendant claims that the oath failed to comport with either MCL 768.14 or MCR 2.511(G). Because defendant did not object to the oath that was administered at trial, we review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764.

Matters of practice and procedure are controlled by court rule. *Staff v Johnson*, 242 Mich App 521, 530-531; 619 NW2d 57 (2000). Thus, the oath prescribed by MCR 2.511(G) controls over that set forth in MCL 768.14. After reviewing the oath in context with the judge's preceding comments, it is apparent that it *substantially* complied with MCR 2.511(G). The substance of the oath informed the jurors of their duties and the important role they were serving, and the jurors swore that they would truthfully deliberate the case according to the laws and the evidence. Accordingly, we find that the oath protected defendant's fundamental right to a trial by jury. See *People v Pribble*, 72 Mich App 219, 224-225; 249 NW2d 363 (1976). Defendant has failed to establish plain error. *Carines*, *supra* at 763-764.

#### VI. Reasonable Doubt Instruction

Defendant further contends that the standard reasonable doubt instruction given by the trial court mandates reversal because it was structural error. Specifically defendant notes that the instruction lacked the required "moral certainty" language or "hesitate to act" language. This argument is meritless. As recognized by this Court in *Snider*, *supra* at 420-421, the standard jury instruction, CJI2d 3.2, properly and sufficiently conveys the concept of reasonable doubt. See also *People v Allen*, 466 Mich 86, 90-92; 643 NW2d 227 (2002) (recognizing that the concept of reasonable doubt is commonly understood). Consequently, defendant has failed to establish plain error. *Carines*, *supra* at 763-764.

## VII. Cumulative Error Doctrine

In light of the foregoing, we find no merit to defendant's claim that the cumulative effect of multiple errors deprived him of a fair trial. See *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

## VIII. Sentencing

Defendant also claims that the trial court erred when it made an independent finding at sentencing that he was actually guilty of felony-murder, even though the jury found him guilty only of the lesser offense of second-degree murder.<sup>2</sup> We disagree. We review this issue de novo. *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

At sentencing, the trial court observed that all the elements of felony murder were essentially established by the jury's determination that defendant was guilty of second-degree murder and the underlying felony. The trial court then announced that it was going to exceed the sentencing guidelines recommended minimum sentence range because of the serious nature of the offense, which the court characterized as a "[c]old-blooded crime of opportunity." Defendant claims that this violated the rule established in *People v Grimmer*, 388 Mich 590, 607-608; 202 NW2d 278 (1972), overruled on other grounds in *People v White*, 390 Mich 245, 258; 212 NW2d 222 (1973), prohibiting courts from sentencing a defendant based upon an independent finding of guilt on another matter. However, in the instant case the trial court's sentencing decision was based only on the facts of the charged offense. A trial court may consider whether the defendant committed a more serious offense in its sentencing decision without violating *Grimmer*. See *People v Shavers*, 448 Mich 389, 393-394; 531 NW2d 165 (1995); *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998).

Affirmed.

/s/ Kathleen Jansen  
/s/ Donald E. Holbrook, Jr.  
/s/ Jessica R. Cooper

---

<sup>2</sup> Because the crimes in question occurred before January 1, 1999, the former judicial sentencing guidelines were in effect. MCL 769.34(1).