

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BENJAMIN HAYNES COLLINS,

Defendant-Appellant.

UNPUBLISHED

November 14, 2006

No. 263020

Mason Circuit Court

LC No. 04-191405-FH

Before: Whitbeck, C.J., and Murphy and Smolenski, JJ.

SMOLENSKI, J. (*dissenting*).

I cannot agree with the lead opinion's conclusion that the trial court did not err when it refused to grant defendant's motion for a new trial on the basis that defendant was denied an impartial jury. Therefore, I must respectfully dissent.

In the present case, after defendant's conviction, defendant's trial counsel learned that one of the jurors had allegedly disclosed during deliberations that she had been in a situation involving unwanted sexual intercourse. The juror who allegedly made this revelation, did not disclose this experience during voir dire, despite the fact that the prosecutor had asked the potential jurors whether any of them had been a victim of sexual assault. Defendant's new counsel later obtained declarations from two jurors indicating that another juror had made statements during deliberations concerning her involvement in an "undesired" sexual encounter or "sexual attack." The trial court held two hearings to examine, in part, the evidence concerning the statements allegedly made by the juror during deliberations and whether those statements warranted the conclusion that defendant was deprived of his right to an impartial jury.

At the hearings, the jurors who signed the declarations concerning the statement allegedly made by the juror at issue both indicated that they got the impression that the other juror had been involved in a situation where she had unwanted sexual intercourse. One juror stated that the juror described the situation as one that would be considered "date rape" today. When the juror who allegedly made the statement was called to testify, she denied ever having been the victim of a sexual assault. She also denied stating during deliberations that she had been the victim of a sexual assault or that she had been involved in an "unwanted" sexual experience. Instead, she testified that she had been involved in unwise sexual encounters.

Well, I did say that I had been in situations like date rape, and as I have explained, where a woman goes someplace with a man, and by virtue of her going there, he

expects that they will have sex. And the question had become, the question had come up is why didn't this girl report this immediately. And in a sense I could understand it not, not necessarily specifically because of my situations, but just in general being a woman. And as I said, probably every woman in this room understands what I'm saying is, you know . . . the girl felt ashamed and embarrassed about what happened, felt that she might have been to blame by the fact that she went to his bedroom, that she felt guilty and didn't believe anyone, didn't think anyone would believe her. And that was why she hadn't reported it originally.

Based on the testimony of these witnesses, the trial court found that the juror was not the victim of sexual assault and that her experiences were not at all similar to the facts of defendant's case. Given the evidence before the trial court, I conclude that the trial court clearly erred in coming to these conclusions. See *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). Two jurors indicated that the juror in question said that she was involved in unwanted sexual encounters. Further, although the juror in question denied being the victim of sexual assault at the hearing, she did admit to stating that she had been involved in situations similar to date rape. Had the juror revealed this fact after the prosecutor's inquiry concerning involvement in sexual assault, the juror would likely have been excusable for cause. See *People v Daoust*, 228 Mich App 1, 7-8; 577 NW2d 179 (1998). Even if the juror had not been excusable for cause, I would conclude that she was less than forthcoming with the information regarding her past experiences and, had that information been revealed, defendant's trial counsel would clearly have used a peremptory challenge to remove her. *People v Manser*, 250 Mich App 21, 28-30; 645 NW2d 65 (2002).

During the hearing, the juror at issue indicated that when a woman accompanies a man to a secluded or private place, the man will often expect sex. She elaborated that, with date rape, "the woman does not want to have sex and may do something to indicate actually, you know, verbally even indicate that she does not want to have sex and the man demands it and forces her to have it anyway." The juror stated that this was the "typical date. I mean when I was 18 years old, if you went in a car with a guy out on a lonely road, you were expected, he was expecting that you were going to have sex." On examination the following exchange explored this area of the juror's understanding.

Q. Now, did you indicate that in the jury room that you had been a victim under those circumstances?

A. I have been in the situation where I went somewhere with someone and they were going to expect sex because of that.

Q. Did you use the term that it would be considered to be date rape today what happened to you?

A. Well, that's the situation that that type of, that date rape takes place in.

Q. So that when that happens in your mind that that is a form of date rape?

A. No, because . . . I wasn't objecting to it. I wasn't not going along with it. It wasn't that I didn't want to do it. I mean for me personally it was just that it was not something I should have been doing.

The juror further explained that during deliberations she “equated it to date rape because it was the situation, going into the situation it was similar. And I saw, did see a certain parallel with this case.” However, the difference was that, in her experience, she went with the men willingly knowing how they understood her actions, whereas “this girl went to his . . . bedroom, but she didn't indicate any, anything that she was thinking about or willing to have sex with him.”

This testimony indicates that the juror had preconceived notions about consent and date rape that might have affected her ability to impartially decide the facts of the case. Furthermore, when asked if she could apply the law as instructed by the Judge, even if it conflicted with her personal beliefs, the juror was not able to unequivocally answer “yes.” I conclude that, after being presented with information of this nature during voir dire, a reasonable defense attorney representing a client in a sexual assault case would have used a peremptory challenge to remove this juror. *Manser, supra* at 28-30. Therefore, defendant was deprived of his right to an impartial jury and, on that basis, the trial court should have granted defendant a new trial.

For these reasons, I would reverse and remand for a new trial.

/s/ Michael R. Smolenski