STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED January 27, 2011
v	No. 298065 Wayne Circuit Court
DANIEL BRATHER COLEMAN, Defendant-Appellee.	LC No. 10-000372

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

The prosecution appeals by leave granted[1] from the trial court's order granting defendant a new trial following his jury trial convictions of possession of marijuana, MCL 333.7403(2)(d), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. On appeal, the prosecutor argues that there were no grounds on which the trial court could order a new trial in this case. We agree and reverse.

The prosecutor argues that the trial court erroneously concluded that the jury was confused by the trial court's jury instructions. We agree.

A trial court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). A court abuses its discretion when it selects a course outside the range of principled outcomes. *Id.* Questions of law are reviewed de novo. *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007).

In criminal cases, a new trial may be granted "on any ground that would support appellate reversal of the conviction or because the trial court believes that the verdict has resulted in a miscarriage of justice." MCR 6.431(B); see also MCL 770.1 ("when it appears to the court that justice has not been done"). Further, the trial court "must state its reasons for granting or denying a new trial . . . on the record." MCR 6.431(B).

[1] *People v Coleman*, unpublished order of the Court of Appeals, entered September 19, 2010 (Docket No. 298065).

In this case, defendant was charged with manufacturing 200 or more plants of marijuana, MCL 333.7401(2)(d)(i), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. At the prosecutor's request, the trial court also instructed the jury on the "lesser included offenses" of manufacture of between 20 and 200 marijuana plants, MCL 333.7401(2)(d)(ii), and manufacture of fewer than 20 marijuana plants, MCL 333.7401(2)(d)(iii). At defendant's request, the trial court instructed the jury on possession of marijuana, MCL 333.7403(2)(d), also as a lesser included offense of manufacturing 200 or more plants of marijuana. During deliberations, the jury requested, and was given, the written jury instructions. Further, it returned without a unanimous verdict twice before reaching a unanimous verdict. The jury eventually convicted defendant of the lesser offense of possession of marijuana and felony-firearm.

Defendant moved for the trial court to set aside the felony-firearm conviction on the ground that the jury was confused. After further briefings and hearings, the trial court treated this motion as a motion for a new trial and granted it. The trial court's stated reasons for granting a new trial were as follows:

> [I]n carefully considering this case, the jury instructions on the case, the arguments of counsel on the case, and how it was presented, on the time frame, and all of the issues surrounding this case, I am of the very firm conviction that . . . there was jury confusion.
>
> * * *
>
> [T]he jury would have to have found that the defendant committed or attempted to commit a felony. It's neither clear by the viewing of the entire instruction nor by the questioning of the jury, or the argument of the prosecutor or defense attorney, as to these issues leave [sic] the court with the concern, great concern, that there was confusion in this case.
>
> * * *
>
> [T]he court does not presuppose inconsistent verdicts in this situation. It's more of a concern about the instructions, the feedback we got from the jury.

At the outset, we note that our Supreme Court has confirmed that a jury need not convict a defendant of the underlying felony in order to convict the defendant of felony-firearm. *People v Duncan*, 462 Mich 47, 54; 610 NW2d 551 (2000), citing *People v Lewis*, 415 Mich 443; 330 NW2d 16 (1982). "Juries are not held to any rules of logic nor are they required to explain their decisions." *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980). However, if an inconsistent verdict is evidence of jury confusion that "taints the verdict" new trial on all charges may be required. *Lewis*, 415 Mich at 450 n 9; see also *People v Duncan*, 462 Mich at 53-54; (evidence that jury thought two charges were "tie-barred" requires a new trial); *People v McKinley*, 168 Mich App 496, 510; 425 NW2d 460 (1988) (following *Lewis*).

The circumstances under which the instruction for the possession of marijuana charge arose were confusing. The trial court appeared to misunderstand the prosecutor's request for an

instruction regarding constructive possession of the marijuana plants and the firearms, predicated on the fact that defendant was not at the house at the time the items were seized. As a result of this confusion, defense counsel volunteered that defendant would like an instruction on possession of marijuana as a lesser included offense of the manufacturing marijuana charge. Further, defense counsel noted that there was evidence presented of a small baggie of marijuana inside the house, separate from evidence presented regarding 280 marijuana plants growing outside the house. The trial court agreed, and the prosecutor assented to the instruction. Clearly the addition of this instruction arose under confusing circumstances. However, none of these negotiations took place before the jury. The fact that the parties and the trial court were confused at this point does not, by itself, provide evidence that the jury was confused.

It is therefore necessary to consider the actual statements made to the jury in assessing whether the jury might have become confused. In the prosecutor's closing argument, he never discussed the possession of marijuana charge. He only discussed possession as it relates to constructive possession of marijuana plants or firearms. Defense counsel presented the issue as follows:

> *Defense Counsel.* Another crime you have to pay attention to, and the judge is going to read to you, is possession of marijuana. And I want you to be very careful. Possession of marijuana is totally different from manufacturing marijuana. Manufacturing marijuana, the judge will tell you, is a felony.
>
> *Prosecutor*. Objection, your honor.
>
> *Trial Court.* Sustained.
>
> *Defense Counsel.* Possession of marijuana—the judge will give you different crimes and, therefore, one crime she's going to read to you is the instruction which is [sic] possession of marijuana. And if for some odd reason you feel someone possesses marijuana while in possession of a gun, that is not felony-firearm. . . . I want to make sure you understand possession of marijuana, while having a gun, is not felony-firearm. And that you have to have the gun in your possession in furtherance of the crime, to make it a felony-firearm.

In rebuttal, the prosecutor did not mention possession of marijuana, but reiterated, "[I]f you decided you are going to manufacture marijuana and have guns you're guilty of felony-firearm." Finally, the trial court clearly instructed the jury that they must find that defendant "committed or attempted to commit the crime of manufacture of marijuana" in order to convict defendant of felony-firearm. The court also instructed the jury, "It is not necessary, however, that the defendant be convicted of [the crime of manufacture of marijuana]."

Thus, the jury was not presented with confusing information regarding what was required to convict defendant of felony-firearm. Defense counsel made it very clear that mere possession would not support a conviction of felony-firearm. The trial court made it clear that defendant must commit or attempt to commit, *but not necessarily be convicted of,* manufacture of marijuana to support a conviction of felony-firearm. Further, the jury was given the written

instructions to review during deliberations. There is no basis for concluding, merely from the parties' argument and trial court's instructions, that the jury was confused.

Next, during deliberations, the jury asked to view the trial court's instructions and asked, "Did the prosecution stipulate to the fact that the defendant had the guns?" They received the written instructions and were reread the parties' stipulations regarding the substance and number of the marijuana plants and firearms.[2] Further, during deliberations the jury indicated that one juror was being uncooperative and preventing a unanimous verdict. After hearing deadlocked jury instructions twice, the jury reached a unanimous verdict. Here, again, there is no actual evidence that the jury was confused. The jury did not ask any questions regarding the relationship between the possession of marijuana instruction and felony-firearm charge. Further, a failure to reach a unanimous verdict is not dispositive evidence of confusion, especially when the jurors indicated themselves that the single holdout was being uncooperative, not that there was a disagreement regarding the jury's duty.

The circumstances surrounding the jury instructions and jury's verdict were indeed confusing. However, most of the confusion manifested itself outside the presence of the jury. Further, we are unable to identify any evidence that the jury was actually confused. Finally, the jury's superficially inconsistent verdict was neither improper nor a logical implication of the confusing circumstances that gave rise to the jury instructions. Thus, there was no evidence of a miscarriage of justice, justifying the grant of a new trial. MCR 6.431(B). Accordingly, the trial court abused its discretion when it granted defendant a new trial. *People v Giovannini*, 271 Mich App 409, 417; 722 NW2d 237 (2006) (an error of law constitutes an abuse of discretion).

Reversed and remanded. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Donald S. Owens
/s/ Douglas B. Shapiro

---

[2] Defendant presented no evidence at trial and stipulated to the admission of the prosecutor's physical evidence. Defendant's sole defense was that the prosecutor had not proved that defendant lived at the house from which the marijuana and firearms were seized.