

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 8, 2011

v

RICHARD THOMAS TOLLIVER,

Defendant-Appellant.

No. 295560
Dickinson Circuit Court
LC No. 09-004247-FH

Before: MURPHY, C.J., and WHITBECK and MURRAY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 18 months to 15 years' imprisonment. Defendant appeals as of right. We affirm.

Defendant's conviction stems from an altercation with Mark Jacobson on June 26, 2009. Jon and Alice Nord, who were independent witnesses, testified that they observed the men arguing and then wrestling with each other on the ground. Jon saw defendant break free and pick up a wooden board. Testimony revealed that Jacobson had brought the board to the door when defendant arrived at his house. Jon and Alice observed defendant beat Jacobson with the board.

After closing arguments at trial, a juror informed the court that she knew the Nords, although she had not disclosed that she knew them when they were named as potential witnesses during voir dire. In the judge's chambers, the juror explained that the Nords were grandparents of her sons' best friends. However, she did not know their last name before trial because they were "always just grandma and grandpa at all the sports events." The juror had known them for six years. She did not participate in activities with them outside of sporting events, but she ate out with them four to five times a year. The trial court asked the juror if she could be fair and impartial in weighing their testimony, and the juror replied that she thought she could, but that the Nords were like second parents to their grandchildren, and she "felt good" about them and trusted them.

The trial court excused the juror as the thirteenth, alternate juror before deliberations. The court informed the remaining jurors that the excused juror "recalled some information," and that she would be excused, so the remaining 12 jurors would deliberate. Defense counsel informed the trial court before deliberations that he had attempted to meet the excused juror before she left the courthouse in order to ask if she had any discussions with the other jurors, but

she went to her car before counsel could speak with her. Counsel asked the court if he could attempt to locate the excused juror, and the court replied that it would allow counsel to question her off the record, but the court had “no doubt” that the juror did not speak with the other jurors because they were “told from the beginning and repeatedly not to discuss anything about the case amongst one another.”

Defendant argues that he was denied his right to a fair and impartial jury under *People v Daoust*, 228 Mich App 1, 9; 577 NW2d 179 (1998), overruled in part *People v Miller*, 482 Mich 540; 759 NW2d 850 (2008), in which this Court held that “when information potentially affecting a juror’s ability to act impartially is discovered after the jury is sworn, the defendant is entitled to relief only if he can establish (1) that he was actually prejudiced by the presence of the juror in question or (2) that the juror was properly excusable for cause.” Defendant points out that *Daoust* noted that a defendant is denied his right to an impartial jury when a juror removable for cause is allowed to serve on the jury, and this can be true even when the information justifying the removal is not discovered until after the trial. *Daoust*, 228 Mich App at 9. Defendant argues that defense counsel and the prosecutor, upon discovering the close relationship between the juror and the two witnesses, agreed that the juror was challengeable for cause. Defendant maintains that because the juror was excusable for cause and sat through the entire trial, he was denied a fair and impartial jury.

Trial counsel failed to object to deliberations proceeding after the juror was excused; therefore, this issue is not preserved. *People v Eccles*, 260 Mich App 379, 385; 677 NW2d 76 (2004). Unpreserved, constitutional errors are reviewed for plain error affecting a defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). A criminal defendant has a constitutional right to be tried by an impartial jury. US Const, Am VI; Const 1963, art 1, § 20; *Mu’Min v Virginia*, 500 US 415, 439 n 1; 111 S Ct 1899; 114 L Ed 2d 493 (1991); *People v Clark*, 220 Mich App 240, 245-246; 559 NW2d 78 (1996). Assuming that the juror was excusable for cause, defendant’s argument is without merit. The Michigan Supreme Court overruled *Daoust* in relevant part in *Miller*:

[A] preserved, nonconstitutional error is not a ground for reversal unless the defendant proves that it is “more probable than not that the error was outcome determinative.” *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Even a preserved, constitutional error is generally not a ground for reversal if the prosecutor proves that the error was harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994). An unpreserved error is not a ground for reversal unless the defendant can demonstrate that the error was plain, that it affected the outcome, and that it resulted in the conviction of an actually innocent person or “ ‘ “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings” ’ ” *Carines*, 460 Mich at 763-764 (citations omitted).

* * *

To the extent that in *Daoust* the Court of Appeals broadly states in dicta that a new trial is *always* required whenever a juror would have been excusable for cause, *Daoust* is wrong and overruled. As discussed earlier, the proper inquiry is

whether the defendant was denied his right to an impartial jury. If he was not, there is no need for a new trial. [*Miller*, 482 Mich at 559, 561 (emphasis in original).]

Defendant has not demonstrated that he was denied his right to a fair and impartial jury. See *Id.* at 559, 561. The trial court excused the juror as the alternate juror before deliberations began, so she did not participate in returning a guilty verdict. The trial court did not inform the other jurors why she was excused, only that she “had recalled some information.” There is no evidence that the remaining 12 jurors were not impartial, or that the excused juror discussed her acquaintanceship with the witnesses with the other jurors at any time.¹ The jurors were instructed not to discuss the case with each other at any time before deliberations, and “[j]urors are presumed to follow their instructions, and instructions are presumed to cure most errors.” *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Defendant has failed to show plain error affecting his substantial rights.

Affirmed.

/s/ William B. Murphy
/s/ William C. Whitbeck
/s/ Christopher M. Murray

¹ As previously noted, defense counsel was unsuccessful in locating the juror after she was excused in order to find out about any discussions she may have had with her fellow jurors.