STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2011
v	No. 298416 Oakland Circuit Court
ALLEN A. CAIN, Defendant-Appellant.	LC No. 2009-225346-FH

Before: MURPHY, C.J., and JANSEN and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 10 to 30 years' imprisonment for each count. We affirm.

On appeal, defendant argues that the trial court, in response to a note from the jury informing the court that it was at an impasse, gave a coercive jury instruction that denied defendant a fair trial. We disagree.

In order to preserve a challenge to jury instructions, a party must object to the proposed instruction or request that a different instruction be given prior to jury deliberations. *People v Sabin*, 242 Mich App 656, 657; 620 NW2d 19 (2000), citing MCL 768.29. In this case, defendant neither objected to the jury instructions nor requested an alternative instruction prior to jury deliberations, so this issue is not preserved for appellate review. An unpreserved claim of error will be reviewed only for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). Moreover, "this Court will grant relief only when necessary to avoid manifest injustice." *Sabin*, 242 Mich App at 658. Finally, jury instructions must be reviewed in their entirety before determining if an error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001), citing *People v Brown*, 239 Mich App 735, 746; 610 NW2d 234 (2000).

In *People v Sullivan*, 392 Mich 324; 220 NW2d 441 (1974), our Supreme Court adopted ABA standard jury instruction 5.4 for deadlocked jury deliberations.[1] The Court, in *Sullivan*,

[1] ABA standard jury instruction 5.4, as provided in *Sullivan*, 392 Mich at 335, reads:

stated that any "substantial departure [from ABA standard 5.4] shall be grounds for reversible error." *Id.* at 342. Whether a deviation from this standard jury instruction "is substantial in the sense that reversal is required depends upon whether the deviation renders the instruction unfair because it might have been unduly coercive." *People v Hardin*, 421 Mich 296, 313, 316; 365 NW2d 101 (1984). In other words, the "'optimal instruction will generate discussion directed towards the resolution of the case but will avoid forcing a decision. If the instruction given can cause a juror to abandon his conscientious dissent and defer to the majority solely for the sake of reaching agreement, then that charge should not be used.'" *Id.*, quoting *Sullivan*, 392 Mich at 334.

In this case, the jury sent a note informing the trial judge that the jury was at an impasse. The trial judge, via the bailiff, instructed the jurors to continue their deliberations and rely on their notes and their collective memories. While this instruction was not the ABA standard 5.4 jury instruction, the mere failure to give the ABA standard instruction 5.4 for deadlocked juries is not plain error, as "a trial court cannot be compelled to give the deadlocked jury instruction [although] such an instruction is generally an appropriate step before declaring a mistrial." *People v Lett*, 466 Mich 206, 222-223; 644 NW2d 743 (2002). The adoption of ABA standard 5.4 "was not designed to create or promote an appellate exercise in semantic comparison regarding whether the syntax and language of a given instruction comports with that of ABA standard 5.4." *Hardin*, 421 Mich at 314. Instead, the focus should be on whether the instruction given was "more coercive than the ABA instruction." *Id.*

The first part of the instruction, urging the jurors to continue their deliberations, was not coercive. Such an instruction was consistent with ABA standard 5.4(b), which states that a trial judge may require the jury to continue its deliberation. The standard instruction does clarify, however, that the trial court must not require or threaten to require "the jury to deliberate for an

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Length of deliberations; deadlocked jury.

(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:

(i) that in order to return a verdict, each juror must agree thereto;

(ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

unreasonable length of time or for unreasonable intervals." See also *Hardin*, 421 Mich at 316. In this case, the actual time the jury spent deliberating only amounted to a little over one day, and there is no indication that the trial judge threatened the jury with an unreasonable time or intervals of deliberation.

The second part of the instruction, urging jurors to rely on their collective memories and notes, also lacked any coercive effect. Our Supreme Court has stated that, where additional language contains "'no pressure, threats, embarrassing assertions, or other wording that would cause this Court to feel that it constituted coercion,'" *Hardin*, 421 Mich at 315, quoting *People v Holmes*, 132 Mich App 730, 749; 349 NW2d 230 (1984), then that language will "rarely constitute a substantial departure" from the standard instruction, *Hardin*, 421 Mich at 315. A simple instruction guiding jurors to rely on their collective memories hardly amounts to threatening language. The term "collective memories" also does not pressure the jurors to come to the exact same conclusion or opinion. The phrase only refers to the juror's ability to recall the facts presented, and does not require that the interpretations of those facts or the conclusions drawn from the facts be identical. Rather than coercing the jury, this instruction had the "overall effect" of stressing "the need to engage in full fledged deliberation." *Hardin*, 421 Mich at 321.

Finally, the lack of coerciveness is especially apparent when this instruction is reviewed in the context of all the instructions given to the jury. Prior to the beginning of jury deliberations, the trial court specifically instructed that each juror had to make up his or her own mind, and that no one should give up an honest opinion just because other jurors disagree. The court further explained that it was a juror's duty to exchange opinions and reasons and to enter into a full discussion with the other members of the jury. Thus, when the later instruction, urging a reliance on collective memories, is viewed in the context of these prior jury instructions, the later instruction can more aptly be characterized as encouraging discussion and a collaborative exchange of facts, rather than an attempt to coerce a dissenting juror to change his mind. See *Hardin*, 421 Mich at 321.

Defendant also argues that defense counsel's failure to object to the alleged coercive instruction constituted ineffective assistance of counsel. We disagree.

In order to preserve the issue of ineffective assistance of counsel, a defendant must make a motion in the lower court for a new trial or for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 444; 212 NW2d 922 (1973). *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). Since there is nothing on the record indicating that either of these two motions occurred, this issue is not preserved for appellate review. When reviewing a claim of ineffective assistance of counsel that has not been preserved for appellate review, a reviewing court is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

In order to establish a claim for ineffective assistance of counsel, a defendant must first demonstrate that "counsel's representation fell below an objective standard of reasonableness," which requires a showing "that counsel's performance was deficient." *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Second, "the defendant must show that the deficient performance prejudiced the defense," which "requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial." *Id.* at 687. The Court

has held that this second prong is asking whether "there was a reasonable probability that the outcome of the trial would have been different had defense counsel" adequately performed. *People v Grant*, 470 Mich 477, 496; 684 NW2d 686 (2004).

As discussed previously, there was nothing improper in the judge's instruction in response to the jury's note. Therefore, defense counsel's objection to the instruction would have been futile. This Court has recognized repeatedly that trial counsel is not obligated to raise futile objections, and counsel will not be deemed ineffective for failing to do so. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004); *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003); *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002); *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Donald S. Owens