S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 17, 2008
v	No. 273488 Ottawa Circuit Court
MICHAEL ALLEN MILLER, Defendant-Appellant.	LC No. 05-028876-FC

Before: Davis, P.J., and Murphy and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (sexual penetration with person under 13 years of age). Defendant was sentenced to 171 to 360 months' imprisonment. We reverse on the basis of juror misconduct.

Defendant argues that the trial court abused its discretion by denying his motion for a new trial predicated on juror misconduct. We agree. This Court reviews a trial court's decision denying a motion for new trial for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). To be entitled to a new trial on the basis of juror misconduct, a defendant must prove (1) that he was actually prejudiced by the presence of the juror in question, or (2) that the juror was properly excusable for cause. *Id*., citing *People v Daoust*, 228 Mich App 1, 9; 577 NW2d 179 (1998).[1]

[1] In *People v Manser*, 250 Mich App 21, 27; 645 NW2d 65 (2002), this Court additionally recognized that a defendant would be entitled to a new trial if the defendant would have otherwise dismissed the juror by exercising a peremptory challenge had the information been revealed before trial. The *Manser* panel, distinguishing *Daoust,* found that it was presented with facts in which a juror failed to disclose information that she absolutely should have come forward with and that it would not be too difficult to determine in hindsight whether the defendant would have exercised a peremptory challenge considering the circumstances; therefore, consideration of a potential peremptory challenge was appropriate. *Manser, supra* at 29.

After the verdict but before sentencing, defendant learned that, contrary to the information provided on his jury questionnaire, a juror was previously convicted of assault with intent to commit criminal sexual conduct involving sexual penetration in 1991 and 1999, which is a felony. Defendant moved for a new trial based on this information. The juror testified at the motion hearing that he answered "no" on the juror questionnaire relative to the question whether he had ever been a defendant in a criminal case. He explained that he answered "no" because his convictions occurred "a long time ago." The juror also testified that he refrained from volunteering information about his previous convictions during voir dire because they occurred "a long time ago."[2] According to the juror, he believed that his convictions would only remain on his record for approximately seven years.

Pursuant to MCR 6.412(A), the selection and impaneling of a jury in a criminal case is generally governed by MCR 2.510 and 2.511. MCR 2.511(E) addresses peremptory challenges, and MCR 2.511(D) controls challenges for cause. "[O]nce a party shows that a prospective juror falls within the parameters of one of the grounds enumerated in MCR 2.511(D), the trial court is without discretion to retain that juror, who must be excused for cause." *People v Eccles*, 260 Mich App 379, 383; 677 NW2d 76 (2004). Under MCR 2.511(D)(1), the juror at issue here would have been excusable for cause because he was "not qualified to be a juror," given that MCL 600.1307a(1)(e) provides that "[t]o qualify as a juror a person shall [n]ot have been convicted of a felony." There can be no dispute that had the juror's previous felony convictions been made known in a timely manner, the juror would not have sat on the jury in the criminal trial and prosecution against defendant.

Although the case law generally indicates that a defendant is entitled to a new trial if a challenged juror would have been excusable for cause, MCL 600.1354(1) requires a different analysis under the facts in this case. MCL 600.1354(1) provides that if there is a failure to comply with the provisions in the chapter on jurors, which includes MCL 600.1307a and the rule against seating felons on a jury, it "shall not . . . affect the validity of a jury verdict unless the party . . . claiming invalidity has made timely objection and unless the party demonstrates *actual prejudice* to his cause and unless the noncompliance is substantial." (Emphasis added.) Here, it appears that defendant raised the issue of the juror's qualifications as soon as the convictions became known, and the noncompliance was certainly substantial. Thus, we must resolve whether defendant was prejudiced when the convicted felon participated as a member of the jury in defendant's trial.

We find that the proper approach in examining prejudice is to view the issue under a defendant's constitutional right to a fair and impartial jury and verdict. US Const, Am VI; Const 1963, art I, § 20; *Daoust, supra* at 7 ("A criminal defendant has a constitutional right to be tried by a fair and impartial jury"). Stated otherwise, the question is whether defendant was denied a fair and impartial jury and verdict by the fact that the challenged juror, who had been convicted

[2] While the juror clearly misrepresented his status on the questionnaire with regard to criminal history, we agree with the trial court that the questions during voir dire, as framed and qualified, did not technically require the juror to divulge his past convictions, so it cannot be said that the juror lied or made a misrepresentation during voir dire.

of criminal sexual conduct related offenses, sat on the jury. We find that defendant was prejudiced on the basis of our Supreme Court's decision in *People v DeHaven,* 321 Mich 327; 32 NW2d 468 (1948).

In *DeHaven*, the defendant was convicted of the crime of "rape" for engaging in sexual conduct with his stepdaughter. During voir dire, the trial court asked the prospective jurors whether "any of them had any experience with any criminal case and as to whether any of their relatives had been involved in a similar case or any case involving the crime of rape." *Id.* at 330. The prospective jurors answered in the negative, including one of the jurors who the defendant subsequently claimed, in a motion for new trial and without dispute, had a family member (brother-in-law) who was convicted of raping a minor daughter. A second challenged juror, who was a replacement for an excused juror and who was not in the jury box at the time of the question quoted above, was directly examined by the trial court. This juror, who was also related to the same family member (cousin) as discussed in relation to the first juror, responded in the negative when asked by the court whether there was anything that had ever happened to family members that would make him feel different about the case than others. This second juror also repeatedly stated that there was nothing that would interfere with his ability to be fair and impartial *Id.* at 330-331. After the jury convicted the defendant, the nature of the family relationships was discovered, and the defendant moved for a new trial on the basis of juror misconduct. The trial court denied the motion, questioning whether the information needed to be disclosed and determining that the two jurors were not prejudiced against the defendant. The trial court believed that, if there was any prejudice, it would likely benefit the defendant. *Id.* at 331.

The Michigan Supreme Court reversed the conviction and remanded the case for a new trial. *Id.* at 335. The Court, first recognizing the constitutional right to be tried by an impartial jury, reasoned:

> In the case at bar the jurors stated on voir dire examination that they could fairly and impartially sit as jurors in the case; and that there was no other case that they had heard about which would influence their verdict. At the time jurors . . . were making these statements, they must have known that a relative of theirs had pleaded guilty to the crime of rape on his 13-year-old daughter. It can readily be seen why they did not want to acknowledge relationship to a confessed rapist, but their obligation and duty as jurors transcends in importance their hesitancy in admitting such relationship. The normal person revolts at the thought of a father or stepfather raping a 13-year-old girl. We are of the opinion that the relationship of these two jurors to one who had committed a similar crime was such that it deprived them of the capacity to act impartially. Defendant has the right to a trial by an impartial jury. We cannot say that he had such a trial.

Here, the crimes committed by the defendant and the challenged juror were also similar in nature, relating to criminal sexual conduct. Moreover, the challenged juror himself had committed the crimes, not just a relative as in *DeHaven.* Further, while the challenged juror proclaimed that he was fair, impartial, and listened to the evidence, arguments, and instructions, the jurors in *DeHaven* also claimed an ability to be fair and impartial, yet the Supreme Court reversed. Accordingly, defendant was not afforded a fair and impartial jury and was thus prejudiced.

In light of our ruling, it is unnecessary to reach any of the other issues raised by defendant on appeal.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Helene N. White