

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
February 6, 2014

v

THOMAS LEE JONES,  
Defendant-Appellant.

No. 310988  
Genesee Circuit Court  
LC No. 11-028110-FC

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Before: SERVITTO, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of first-degree, premeditated murder. He was sentenced to life imprisonment. We affirm.

In the early morning hours of November 16, 2010, City of Flint police were dispatched as the result of a 911 report of a woman's body in the road, lying in a pool of blood. On their arrival at the scene, police found Amanda Lambson, 23, deceased in the road. She had been severely beaten and run over with a vehicle. Defendant and another man, Cody Asbury, were ultimately charged with Lambson's murder.

On appeal, defendant first claims that the trial court violated his right of confrontation by limiting cross-examination of his codefendant, Cody Asbury. We agree that the court erred in not allowing defendant to cross-examine Asbury on subjects raised during direct examination, but conclude that this error was harmless.

Whether a defendant's Sixth Amendment right of confrontation was violated is a question of constitutional law that is reviewed de novo. *People v Nunley*, 491 Mich 686, 696-697; 821 NW2d 642 (2012). When constitutional issues are preserved, this Court must determine if the error was harmless beyond a reasonable doubt. *People v Dendel (On Second Remand)*, 289 Mich App 445, 475; 797 NW2d 645 (2010). An error is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* If this Court determines that the jury would have convicted defendant even without the error, the defendant is not entitled to a new trial. See *id.* at 476.

Under the Confrontation Clause, a defendant has the right "to be confronted with the witnesses against him." US Const, Am VI; see also Const 1963, art 1, § 20. The primary purpose of this right is to cross-examine and challenge the witness's credibility, such as by

showing that, “a witness is biased, or that the testimony is exaggerated or unbelievable.” *Pennsylvania v Ritchie*, 480 US 39, 51-52; 107 S Ct 989; 94 L Ed 2d 40 (1987). This right, however, does not prevent a trial court judge from imposing reasonable limits on cross-examination to address concerns of “harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” *Delaware v Van Arsdall*, 475 US 673, 679; 106 S Ct 1431; 89 L Ed 2d 674 (1986); see also MRE 611(a); *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992).

After several minutes of questioning on direct examination, primarily concerning Asbury’s plea agreement, how Asbury knew defendant, and what they had been doing on the evening of November 15, 2010, prior to the murder, Asbury refused to answer any more questions. Defense counsel was allowed to cross-examine Asbury, but asked only three material questions before the trial court ended the cross examination. Counsel asked Asbury if he had been originally charged with first degree premeditated murder, which Asbury answered in the affirmative, and counsel asked his understanding of the potential sentence that he could have received had he been convicted of first degree murder, to which Asbury replied, “[n]atural life.” Defense counsel then asked Asbury what “maximum life” meant and the trial court ended the cross-examination before Asbury could answer, opining that since Asbury “seems to be willing to testify on cross,” direct examination should be attempted again. However, it was apparent that Asbury’s refusal to testify on direct examination was limited to the circumstances surrounding the victim’s murder. Asbury answered all of the prosecutor’s questions regarding his plea agreement and the events leading up to the victim’s murder. Thus, it appears that Asbury would have continued to answer defense counsel’s questions regarding his plea agreement, which was covered on direct examination before Asbury refused to testify. The trial court should have allowed defense counsel to continue cross-examining Asbury on the topics that the prosecutor covered in her direct examination.

Nonetheless, this error was harmless beyond a reasonable doubt. See *Dendel*, 289 Mich App at 475. Defense counsel asserted that he wanted to ask Asbury about the nature of his plea agreement. However, Asbury had already testified about the agreement. Asbury said that he pleaded to second-degree murder and assault with intent to do great bodily harm less than murder and agreed to a sentence of 30 to 50 years’ imprisonment. Part of his plea agreement required him to testify against defendant. Counsel also indicated that Asbury had gone into some aspects of the case regarding defendant’s presence at a friend’s house prior to the murder and indicated he had not been able to cross-examine Asbury about those aspects, nor had he been able to cross-examine Asbury about his relationship with defendant, whom he had testified that he had known since they were twelve years old. Defense counsel has not, however, identified what evidence he was unable to present because of the trial court’s limitation on his cross-examination. See *People v McPherson*, 263 Mich App 124, 137; 687 NW2d 370 (2004).

Furthermore, it is “clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.” *Dendel*, 289 Mich App at 475. There was significant evidence implicating defendant in the murder, including defendant’s own confession. Defendant does not explain how cross-examining Asbury on the topics that the prosecutor was able to cover on direct examination would negate that inculpatory evidence. Defendant admitted that he drove over the victim; he thought he went over her head. Next, Asbury drove over the victim and then got out of his car and began kicking her again because he saw her moving or heard her moaning.

Thus, defendant's own statement established that the victim was alive when he drove over her. Defendant also admitted that he kicked the victim twice in the head, "stomped on" her, and punched her once. Allecia Wilson, who performed the victim's autopsy, testified that the combination of the victim's blunt force injuries caused her death. The injuries to her head alone would have caused her death, as would the injuries to her chest or the injuries to her abdomen and pelvis.

Defendant briefly argues that his trial counsel was ineffective for failing to move for a mistrial or ask the court to instruct the jury to disregard Asbury's testimony. Defendant did not move for a new trial or a *Ginther* hearing in the trial court, so this Court's review is limited to facts apparent on the record. See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness," and, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Smith v Spisak*, 558 US 139, 149; 130 S Ct 676; 175 L Ed 2d 595 (2010) (internal citations omitted); see also *People v Buie*, 298 Mich App 50, 62; 825 NW2d 361 (2012). Generally, counsel has discretion over his or her method of trial strategy, and this Court will not substitute its own judgment or evaluate counsel's performance with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

When the court found Asbury in contempt and excused him, defense counsel did object and argue that he should be allowed to cross-examine Asbury on issues raised during the prosecutor's direct examination. The court denied defense counsel's request, so it is reasonable to assume that the court also would have denied a request for a mistrial or to instruct the jury to disregard all of Asbury's testimony. Counsel is not ineffective for failing to make a meritless argument or raise a futile objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Furthermore, because defense counsel did object on confrontation clause grounds, the issue was preserved for appeal and reviewed for harmless error instead of plain error. See *Dendel*, 289 Mich App at 475. Finally, defendant cannot show that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." See *Smith*, 558 US at 149. As discussed above, there was significant evidence implicating defendant, including his confession.

Second, defendant argues that the trial court should have granted his motion for a mistrial based on jury interference. We disagree.

"This Court reviews for an abuse of discretion a trial court's ruling whether to grant a mistrial." *People v Waclawski*, 286 Mich App 634, 708; 780 NW2d 321 (2009). The trial court has abused its discretion when "it fails to select a principled outcome." *Id.*, quoting *People v Horn*, 279 Mich App 31, 35 n 1; 755 NW2d 212 (2008) (internal quotation marks omitted).

"A mistrial is warranted only when an error or irregularity in the proceedings prejudices the defendant and impairs his ability to get a fair trial." *Waclawski*, 286 Mich App at 708. "A defendant tried by jury has a right to a fair and impartial jury." *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). When a jury considers facts not introduced in evidence, the

defendant is deprived of his Sixth Amendment rights of confrontation, cross-examination, and assistance of counsel. *Id.* A defendant requesting reversal based on extraneous influence of the jury must show that the jury was exposed to such influences and there is “a real and substantial possibility that they could have affected the jury’s verdict.” *Id.* at 88-89. A defendant generally must show that “the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict.” *Id.* at 89. Whether extraneous influences affected the jury’s verdict is an objective inquiry. *Id.* at 89 n 10. If a defendant establishes that the jury was exposed to extraneous influences and there is “a real and substantial possibility that [the influences] affected the jury’s verdict,” the burden shifts to the prosecution, which must “demonstrate that the error was harmless beyond a reasonable doubt.” *Id.* at 88-89.

The court did not abuse its discretion in denying defendant’s motion for a mistrial. Defendant moved for a mistrial based on an incident that occurred on April 12, 2012, when the court’s law clerk escorted the jurors to lunch at a restaurant near the courthouse. At the restaurant, Anthony Lubkin, an attorney unrelated to the case, said the word, “guilty,” while looking at some of the jurors. When he was told not to speak to the jurors, Lubkin said something along the lines of, “would it make it better if – instead of saying guilty, if I said innocent?”

Lubkin’s comment, if directed to the jurors, was related to a material aspect of the case – defendant’s guilt. See *Budzyn*, 456 Mich at 89. However, the trial court informed the jurors that Lubkin had no knowledge of the case, or even what case the jurors were sitting on. Lubkin was not an attorney for one of the parties, a witness, or even a spectator in the courtroom. There was no reason for the jurors to believe that he knew anything about the murder case. In addition, only two of the jurors heard the word, “guilty.” All of the jurors agreed that the comment would not influence their verdict, and they would decide the case using only the evidence that was properly admitted in the courtroom. The comment was addressed by the trial court immediately, which helped ensure that the jurors would not discuss it or allow it to influence their decision.

Third, defendant asserts that he is entitled to a new trial because the trial court allowed the prosecution to introduce evidence that had no purpose except to procure the jury’s sympathy for the victim. We disagree. We review for an abuse of discretion a trial court’s decision to admit evidence. *People v Duncan*, 494 Mich 713, 722; 835 NW2d 399 (2013).

At trial, defendant objected to the prosecution’s questioning of Joanne Allsopp on relevancy grounds. MRE 402 provides that “[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.” MRE 401 defines “relevant evidence,” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” “All elements of a criminal offense are ‘in issue,’ and thus material, when a defendant enters a plea of not guilty.” *People v Aguwa*, 245 Mich App 1, 7; 626 NW2d 176 (2001).

Defendant contends that Allsopp’s testimony that the victim was homeless and used a walker had no purpose except to procure the jury’s sympathy. However, Allsopp’s testimony

regarding the victim was relevant for several reasons. First, Allsopp identified the body lying in the middle of the street, which was relevant background information and a necessary part of the events that led to the police investigation at the crime scene. Allsopp was able to identify the victim because she knew her. Allsopp's testimony that the victim was homeless and frequently sat in the empty lot next to Allsopp's house demonstrated how Allsopp knew the victim. Allsopp's testimony that she would give the victim food and clothing also explained how Allsopp knew the victim and how Allsopp was able to identify the victim's body right away – the victim was wearing a coat that Allsopp had given her and the victim's walker was lying near her body.

Second, Allsopp's testimony was relevant to establishing that the victim was the girl defendant referred to during his interview with Sergeant Jeff Collins. During his interview, defendant never said the girl's name. However, defendant said that he and Asbury found the girl where Asbury said she lives, by a tree on Minnesota Street. This information coincides with Allsopp's testimony that the victim was homeless and sat by a tree in the vacant lot next to Allsopp's home. Defendant also said that Asbury grabbed the victim's walker and threw it in the street. This corresponds with Allsopp's testimony that the victim used a walker because she had recently had hip surgery. Thus, Allsopp's testimony that the victim was homeless, frequented the empty lot next to Allsopp's house, and used a walker, was relevant to ensure that the victim was the same individual that defendant was referring to during his interview with Sergeant Collins.

Defendant also claims that the prosecution committed misconduct by referencing Allsopp's testimony and appealing to the jury's sympathies during its closing argument. We disagree.

It is improper for the prosecutor to ask the jury to sympathize with the victim. See *People v Akins*, 259 Mich App 545, 563 n 16; 675 NW2d 863 (2003); *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Reversal is not required when such a statement is isolated, "not so inflammatory as to prejudice defendant," and the jury is told to be uninfluenced by sympathy or prejudice. See *Watson*, 245 Mich App at 591-592. Defendant did not object that the prosecutor committed misconduct by making this argument, so this issue is unpreserved. See *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). Therefore, the issue is reviewed for "outcome-determinative, plain error." See *id.* at 235.

The prosecutor did not commit misconduct in referencing Allsopp's testimony during her closing argument. Rather, the prosecutor was summarizing the testimony presented at trial. All of her statements were based on evidence and she did not imply that the jury should sympathize with the victim because she was homeless or disabled. Even if the prosecutor's statement could be construed as improperly soliciting sympathy for the victim, this was an isolated statement that was not inflammatory. See *Watson*, 245 Mich App at 591-592. Furthermore, the court instructed the jury that the attorney's statements are not evidence. The court also told the jurors that they "must not let sympathy or prejudice influence [their] decision." "[J]urors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Snyder*, 301 Mich App 99, 112; 835 NW2d 608 (2013) (internal quotations omitted).

Affirmed.

/s/ Deborah A. Servitto  
/s/ Christopher M. Murray  
/s/ Mark T. Boonstra