

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
July 31, 2014

v

No. 310090  
Oakland Circuit Court  
LC No. 2011-238344-FC

TONG LOR,  
Defendant-Appellant.

---

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

v

No. 310097  
Oakland Circuit Court  
LC No. 2011-238341-FC

TOU LOR,  
Defendant-Appellant.

---

Before: SERVITTO, P.J., and FORT HOOD and BECKERING, JJ.

PER CURIAM.

Defendants Tong Lor and Tou Lor were tried jointly, before separate juries. One jury convicted Tong Lor of second-degree murder, MCL 750.317, two counts of assault with intent to commit murder, MCL 750.83, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b.<sup>1</sup> The other jury convicted Tou Lor of second-degree murder, two counts of felonious assault, MCL 750.82, and three counts of felony-firearm. The trial court sentenced Tong Lor to concurrent prison terms of 30 to 80 years for the murder conviction and 15 to 40 years for each assault with intent to commit murder conviction, to be served consecutive to three concurrent two-year terms of imprisonment for the felony-firearm convictions. The

---

<sup>1</sup> The jury also convicted Tong Lor of two counts of felonious assault, MCL 750.82. The trial court rescinded those convictions because they arose from the same offenses as the assault with intent to commit murder convictions.

court sentenced Tou Lor to concurrent prison terms of 30 to 80 years for the murder conviction and 23 to 48 months for each felonious assault conviction, to be served consecutive to three concurrent two-year terms of imprisonment for the felony-firearm convictions. Defendant Tong Lor appeals as of right in Docket No. 310090, and defendant Tou Lor appeals as of right in Docket No. 310097. We affirm in both appeals.

Defendants Tong Lor and Tou Lor are brothers. Tong Lor hosted a graduation party for his sister and Tou Lor was in attendance. A group of men, at least one of whom had been invited to the party by defendants' sister, arrived at Tong Lor's house sometime after midnight. While they were clustered around their car, defendants and several other men confronted them. Both defendants were armed with guns and started shooting. Cher Kue was fatally wounded. Both defendants were convicted of second-degree murder in connection with Cher Kue's shooting death,<sup>2</sup> and they were convicted of the assault offenses against brothers Nou Lee and Mou Lee.

## I. ISSUES COMMON TO BOTH DEFENDANTS

### A. DISCOVERY

Both defendants first claim error with respect to the prosecutor's failure to provide certain discovery materials before trial in accordance with MCR 6.201. Specifically, defendants complain that their attorneys were not furnished with a photo array that included Tou Lor's photo, which was shown to the Lees, or with police reports indicating that the Lees were unable to identify defendant Tou Lor.

An issue of prosecutorial misconduct is reviewed de novo to determine whether the defendant was denied a fair and impartial trial. *People v Akins*, 259 Mich App 545, 562; 675 NW2d 863 (2003). The trial court's ruling on a discovery matter, including the appropriate remedy for a discovery violation, is reviewed for an abuse of discretion. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003); *People v Rose*, 289 Mich App 499, 524; 808 NW2d 301 (2010).

Initially, we conclude that any claim of error was waived by defendant Tong Lor. When the issue of Tou Lor's photographic lineup was first raised, Tou Lor's attorney moved for a mistrial. The court initially denied that motion. Tong Lor's attorney stated that "on behalf of Mr. Tong Lor I don't believe that the . . . line-up of Tou Lor affects us in any way in our case, so I will stand by the Judge's – (inaudible)." An issue is waived where the defendant approves of the manner in which the court resolved the dispute. *People v Carter*, 462 Mich 206, 219-220; 612 NW2d 144 (2000). By affirmatively approving the trial court's ruling and affirmatively representing "I don't believe that the . . . line-up of Tou Lor affects us in any way in our case," counsel waived any claim of error with respect to Tong Lor.

This issue was preserved by defendant Tou Lor. The trial court entered a pretrial discovery order requiring the prosecutor to provide evidence in accordance with MCR 6.201.

---

<sup>2</sup> Both defendants were charged with open murder, MCL 750.318.

MCR 6.201(A)(6) requires a party to produce photographs “that the party may introduce at trial[.]” MCR 6.201(B)(1) and (2) require the prosecutor to produce “any exculpatory information or evidence known to the prosecuting attorney” and “any police report and interrogation records concerning the case[.]”

There is nothing in the record to show that the prosecutor intended to admit at trial the photo array used in Tou Lor’s lineup. Apart from the evidentiary hearing at which the lineup was discussed, Detective Buchmann never mentioned the lineup involving Tou Lor and the photo array was never offered into evidence as part of the prosecutor’s proofs. Therefore, Tou Lor has not shown a violation of MCR 6.201(A). The record does show that there were police reports regarding Tou Lor’s lineup and that Tou Lor’s attorney may not have had at least one of them. However, it is not enough to merely show that a discovery violation has occurred; “the complaining party must show that the violation caused him or her actual prejudice.” *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 454 n 10; 722 NW2d 254 (2006). The police reports apparently indicate that the photo array was shown to the Lees, who were unable to identify Tou Lor. There is nothing in the record to indicate that the Lees ever identified Tou Lor, and they were unable to identify him as one of the gunmen at trial. Accordingly, there is no basis to conclude that Tou Lor was prejudiced by the failure to produce one or both of the police reports.

In addition to discovery permitted under the court rules, a criminal defendant has a due process right to certain information in the prosecutor’s possession. *People v Canter*, 197 Mich App 550, 568; 496 NW2d 336 (1992). In *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), the Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” In *United States v Bagley*, 473 US 667, 682; 105 S Ct 3375; 87 L Ed 2d 481 (1985), the Court held that “evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” Thus, one element a defendant must prove to establish a *Brady* violation is that “had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.” *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). Regarding this element, the United States Supreme Court has stated:

The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A “reasonable probability” of a different result is accordingly shown when the government’s evidentiary suppression “undermines confidence in the outcome of the trial.” [*Kyles v Whitley*, 514 US 419, 434; 115 S Ct 1555; 131 L Ed 2d 490 (1995), quoting *Bagley*, 473 US at 678.]

There is nothing in the record to indicate that the Lees ever identified Tou Lor, and they were unable to identify him as one of the gunmen at trial. Nou Lee testified that they arrived at the graduation party, and a group of men, including defendant Tong Lor, came from the backyard. Tong Lor appeared to be carrying a stick or a baseball bat, but it was actually a rifle.

Although he acknowledged that a second person carrying a smaller gun was with Tong Lor, Nou Lee did not identify the person as Tou Lor. After the shooting that fatally wounded Cher Kue, Tong Lor stood outside the vehicle and pointed the rifle at Mou Lee. After Mou Lee identified himself as Tong Lor's brother-in-law, Nou Lee testified that Tong Lor walked away. Additionally, Mou Lee testified that it was dark when they arrived at the graduation party, but a group of men came from the side of the house. The group was led by Tong Lor who was holding a gun. Tong Lor told them to leave, but shots were fired from a member of Tong Lor's group. Mou Lee could not testify regarding the individual who fired those shots. With regard to defendant Tou Lor, Mou Lee testified that he assisted them in trying to aid Cher Kue. In light of this testimony, there is no basis for concluding that Tou Lor's right to a fair trial was compromised by the absence of the evidence. Therefore, Tou Lor has failed to show a due process violation.

## B. SUFFICIENCY AND GREAT WEIGHT OF THE EVIDENCE

Both defendants also argue that the respective jury verdicts were against the great weight of the evidence. This issue has not been preserved for appeal. When a defendant is tried before a jury, he must raise this issue in a timely filed motion for a new trial in the trial court to preserve the issue. *People v Williams*, 294 Mich App 461, 471; 811 NW2d 88 (2011). The filing of a claim of appeal typically divests a trial court of jurisdiction over a case. MCR 7.208(A). In a criminal case, however, the trial court may "grant a timely motion under subrule (B)." *Id.* To be timely, the motion must be filed within 56 days (eight weeks) after the commencement of the time for filing an appeal brief. MCR 7.208(B)(1). The commencement of the time for filing an appeal brief runs from the time the claim of appeal is filed or the transcript is filed with the trial court, whichever is later. MCR 7.212(A)(1)(a)(iii). Both defendants filed their claims of appeal on May 7, 2012, and the transcript was filed in the trial court on August 14, 2012. Defendants filed their motion in November 2012, more than eight weeks after the latter date. Therefore, the trial court appropriately denied the motions for lack of jurisdiction without reaching the merits of the motions. Accordingly, this issue is unpreserved and appellate relief is precluded unless defendants demonstrate a plain error that affected their substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Cameron*, 291 Mich App 599, 617-618; 806 NW2d 371 (2011).

A verdict is against the great weight of the evidence when "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). Generally, a verdict may be vacated only when it is not reasonably supported by the evidence and was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence. *People v Plummer*, 229 Mich App 293, 306; 581 NW2d 753 (1998); *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993). "In general, conflicting testimony or questions concerning the credibility of the witnesses are not sufficient grounds for granting a new trial," *People v Brantley*, 296 Mich App 546, 553; 823 NW2d 290 (2012), amended 296 Mich App 801 (2012), because "[i]t is the province of the jury to determine questions of fact and assess the credibility of witnesses." *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). Therefore, "unless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe

it, or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Id.* at 645-646 (internal quotation marks and citation omitted).

The issue as raised by both defendants is limited to the murder conviction. Further, each defendant's argument is principally directed at the legal sufficiency of the evidence. They argue that the evidence was insufficient to prove one or more elements of the offense. In reviewing a challenge to the legal sufficiency of the evidence, a reviewing court must examine the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Parker*, 288 Mich App 500, 504; 795 NW2d 596 (2010).

The juries found both defendants guilty of second-degree murder. The elements of second-degree murder are (1) a death, (2) caused by an act of the defendant, (3) with malice and (4) without lawful justification or excuse. *People v Randy Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). Malice is defined as "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). A person who aids and abets in the commission of an offense may be convicted and punished as a principal. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995), disapproved on other grounds by *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001). The elements that must be proved to convict the defendant as an aider and abettor are that (1) the defendant or some other person committed the crime charged, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended to commit the charged offense, or the defendant aided the principal with knowledge that the principal intended to commit the charged offense, or the defendant aided the principal and the charged offense committed by the principal was a natural and probable consequence of the intended offense. *Turner*, 213 Mich App at 568-569; *People v Robinson*, 475 Mich 1, 9, 15; 715 NW2d 44 (2006). "The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime." *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992). Further, the defendant's state of mind may be inferred from all the facts and circumstances. *Carines*, 460 Mich at 758.

The evidence showed that Tong and Tou Lor headed up a group of men who confronted the victims outside Tong's house. Tou Lor, who owned a .45-caliber Taurus semi-automatic handgun, was armed with a handgun and Tong Lor was armed with some type of long gun. Another unidentified member of the group was armed with some type of handgun. There was conflicting evidence regarding who opened fire, but evidence indicated that both defendants fired in the victims' direction. Cher Kue was shot and killed. The evidence did not conclusively show who fired the shots that struck Cher Kue. However, the evidence supported an inference that the shots could only have come from one or more of the guns possessed by defendants and the other man in their group because they were the only persons armed with and firing weapons outside the house that night.

Regardless of who fired the actual shots that struck Cher Kue, the evidence was sufficient to show that both defendants possessed the requisite malice to be convicted of second-degree murder. Malice may be inferred from the use of a deadly weapon. *Carines*, 460 Mich at 759. Further, the evidence showed that each defendant allied himself with others who confronted Cher

Kue and his friends while openly armed with guns. Both defendants thus had reason to know that the others at least intended an assault, and the evidence showed that both defendants participated in that assault. The death of Cher Kue was a natural and probable consequence of each defendant's participation in the assault "because a homicide might be expected to happen if the occasion should arise within the common enterprise of committing" an armed assault. *Robinson*, 475 Mich at 11 (internal quotation marks omitted). There was no evidence suggesting that the shooting could be justified or legally excused. Cher Kue and his friends were unarmed and had done nothing to threaten defendants or anyone else. Accordingly, the evidence was sufficient to support each defendant's conviction of second-degree murder beyond a reasonable doubt. In addition, the evidence does not preponderate so heavily against the jury's verdicts that it would be a miscarriage of justice to allow either verdict to stand. *Lacalamita*, 286 Mich App at 469.

## II. ISSUES RAISED BY TONG LOR ONLY

### A. TONG LOR'S MOTION FOR A DIRECTED VERDICT

Tong Lor argues that the trial court improperly denied his motion for a directed verdict on the open murder and assault with intent to commit murder charges. The trial court's ruling on a motion for a directed verdict is reviewed de novo on appeal. *Parker*, 288 Mich App at 504. This Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational Trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* In ruling on a motion for a directed verdict, the trial court must consider the evidence presented by the prosecutor up to the time the motion is made and determine whether a rational Trier of fact could have found that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). In deciding the motion, the trial court is not permitted to determine the credibility of witnesses, no matter how inconsistent or vague that testimony might be, *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997), because questions regarding the witnesses' credibility are for the Trier of fact to determine, *People v Peña*, 224 Mich App 650, 659; 569 NW2d 871 (1997), mod 457 Mich 885 (1998), and any conflict in the evidence must be resolved in the prosecution's favor. *People v McGhee*, 268 Mich App 600, 624; 709 NW2d 595 (2005). An appellate court applies the same standards in reviewing the trial court's ruling. *Schultz*, 246 Mich App at 702.

Both defendants were charged with open murder. Open murder is a charge of murder without a specific degree; a defendant can ultimately be found guilty of either first- or second-degree murder. MCL 750.318; *People v Watkins*, 247 Mich App 14, 20; 634 NW2d 370 (2001), aff'd 468 Mich 233 (2003). As previously discussed in section I(B), the evidence, viewed in a light most favorable to the prosecution, was sufficient to establish Tong Lor's guilt of second-degree murder beyond a reasonable doubt.

The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). "The intent to kill may be proved by inference

from any facts in evidence,” *People v Jackson*, 292 Mich App 583, 588; 808 NW2d 541 (2011), and minimal circumstantial evidence of intent to kill is sufficient. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). The intentional discharge of a firearm at someone within range, done under circumstances that do not justify, excuse, or mitigate the crime, is sufficient to prove assault with intent to commit murder. *People v Lipps*, 167 Mich App 99, 105; 421 NW2d 586 (1988); *People v Johnson*, 54 Mich App 303, 304; 220 NW2d 705 (1974). As previously discussed, the evidence showed that while armed with a gun, Tong Lor confronted a group of unarmed men gathered outside his house. Nou and Mou Lee were part of that group. Tong Lor did not know who they were and did not want them there. He suddenly began shooting at them. The Lees and their friends were unarmed and had done nothing to provoke the attack. The evidence was sufficient to prove that Tong Lor assaulted the Lees with the intent to commit murder. Accordingly, the trial court properly denied Tong Lor’s motion for a directed verdict of the murder and assault charges.

## B. PROSECUTORIAL MISCONDUCT

Tong Lor next argues that the prosecutor improperly shifted the burden of proof by suggesting in his closing argument that Tong Lor should have called certain witnesses to testify. Although Tong Lor objected to the prosecutor’s comments, he did not do so on the ground that they shifted the burden of proof. An objection on one ground is insufficient to preserve an appellate challenge on a different ground. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996). Therefore, this issue is not preserved and our review is limited to plain error affecting Tong Lor’s substantial rights. *Carines*, 460 Mich at 763-764; *People v Goodin*, 257 Mich App 425, 431-432; 668 NW2d 392 (2003).

“The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted).” *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). The reviewing court must examine the prosecutor’s remarks in context on a case-by-case basis. *Id.* at 272-273. The propriety of a prosecutor’s remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Because a defendant is presumed innocent until proven guilty, a prosecutor “may never shift its burden to prove that defendant is guilty beyond a reasonable doubt and obligate the defendant to prove his innocence.” *People v Rosales*, 160 Mich App 304, 312; 408 NW2d 140 (1987). Thus, “a prosecutor may not comment on the defendant’s failure to present evidence because it is an attempt to shift the burden of proof.” *People v Fyda*, 288 Mich App 446, 464; 793 NW2d 712 (2010).

A principal theory argued in defense counsel’s closing argument was that the police did such a poor job investigating the crime that neither they nor the prosecutor really knew what happened that night. Defense counsel specifically took issue with the prosecutor’s failure to call other party guests who might have more information and asked the jury to consider “Where’s everyone else in that house? Why didn’t he call more witnesses? Where’s Jennie Lor? Jack Lor? . . . [T]here’s 15, 20 people in that house, where they at, why aren’t they not [sic] here?” In response, the prosecutor argued:

It amazes me when a defense attorney will stand up here and say to you, where are all the people that were at the defendant’s party? You notice the ones

he listed all had the same last name of the defendant? You think there's a reason I didn't call them? . . . Detective Buchmann told you they were uncooperative. Start from there.

Second of all, although the defendant does not have to produce any witnesses, he does not, not his duty to do anything, ask your sense – common sense wise why they're not here?

The prosecutor did not actually argue that Tong Lor should have called the other party guests as witnesses. At most, he implied that Tong Lor could have called the other party guests but had a reason for not doing so. Even if that is deemed an improper attempt to shift the burden of proof, the argument was clearly prompted by defense counsel's argument that the prosecutor was somehow remiss in not calling the other party guests to testify. An otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Viewed in context, the argument is better understood as an explanation for why the prosecutor did not call other party guests as witnesses as opposed to a comment on Tong Lor's failure to call other guests as witnesses. Indeed, the prosecutor even reminded the jury that Tong Lor was not obligated to produce any witnesses, thereby reinforcing that the prosecutor's comments were not intended to shift the burden of proof. Any prejudicial effect caused by the remark could have been cured by a timely instruction had one been requested. Error requiring reversal will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). In fact, the trial court advised the jury in its preliminary instructions that Tong Lor "does not have to prove his innocence or produce any evidence" and again in its final instructions that Tong Lor "is not required to prove his innocence or to do anything." The court's instructions were sufficient to protect Tong Lor's substantial rights. Therefore, to the extent any error occurred, it was not plain and was not so egregious as to have affected Tong Lor's substantial rights.

### III. ISSUES RAISED BY TONG LOR ONLY

#### A. ISSUES CONCERNING JUROR RM

Tong Lor raises three related issues involving a note sent to the trial court by one of the jurors. Tong Lor contends that the trial court mishandled the note in violation of MCR 6.414(A), that the note constituted a substantive communication that denied him a fair trial, and that the trial court erred in denying his motion for a mistrial based on the basis of the note.

We note that MCR 6.414 was repealed in September 2011, and the matter is governed by MCR 2.513. See MCR 6.001(D). At the time of trial, MCR 6.414(A) provided<sup>3</sup>:

---

<sup>3</sup> MCR 6.414 was repealed, effective September 1, 2011. 489 Mich clxxvi, cxci-cxcvi (2011). Unless otherwise specified, the rules of procedure for civil actions apply to criminal actions.



The court may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present. The court must ensure that all communications pertaining to the case between the court and the jury or any juror are made a part of the record.

The first sentence prohibits the trial court from engaging in ex parte communications with a deliberating jury. Such conduct constitutes error, but the error does not warrant reversal unless it prejudiced the defendant. *People v France*, 436 Mich 138, 161-163; 461 NW2d 621 (1990). As every reported case makes clear, the focus is on the trial court's communication with the jury. See *id.* at 145-146 (court responded to jury's request for evidence, clarification of instructions), *People v Anderson*, 418 Mich 31, 45-46; 340 NW2d 634 (1983) (court instructed jury to begin deliberations), *People v Kangas*, 366 Mich 201, 205; 113 NW2d 865 (1962) (court instructed sheriff to speak to jury), *People v Gonzalez*, 197 Mich App 385, 402-403; 496 NW2d 312 (1992) (court responded to jury's request for a transcript), *People v Marji*, 180 Mich App 525, 531-532; 447 NW2d 835 (1989), remanded sub nom *People v Thomas*, 439 Mich 896 (1991) (court responded to jury's request for information), *People v Wytcherly (On Rehearing)*, 176 Mich App 714, 715-716; 440 NW2d 107 (1989) (court responded to jury's notes), *People v Montgomery*, 176 Mich App 501, 502-503; 440 NW2d 21 (1989) (court responded to jury's request for lunch break), *People v Lyons*, 164 Mich App 307, 309; 416 NW2d 422 (1987) (court responded to jury's announcement that it was deadlocked), and *People v Kent*, 157 Mich App 780, 789-792; 404 NW2d 668 (1987) (court clerk took jurors' lunch orders).

The note in this case was sent by Juror RM. In it, Juror RM complained about some of his fellow jurors, whom he believed were not giving due consideration to his opinions regarding the case, and he asked the trial court to remind the other jurors of their obligations. The jury is not prohibited from communicating with the court (although it cannot disclose how it's voting stands). CJI2d 3.14 (now M Crim JI 3.14). The note from Juror RM was technically improper because it was not a collective inquiry submitted through the foreperson, *id.*, but the parties agreed that the trial court could entertain a question from the juror. It is not the trial court's fault that Juror RM felt the need to preface his question with a lengthy list of complaints regarding some of his fellow jurors. The trial court did not communicate with Juror RM, ex parte or otherwise, in response to the note. Instead, with the parties' consent, the jury was called into the courtroom and given the deadlocked jury instruction. Because the trial court did not engage in ex parte communications with Juror RM, Tou Lor has not shown any error. *People v Marshall*, 298 Mich App 607, 622-625; 830 NW2d 414 (2012), vacated in part on other grounds 493 Mich 1020 (2013).

Tou Lor also contends that the trial court improperly denied his request "to review the note in its entirety" and failed to make the note a part of the record. We disagree. A review of the record shows that presiding Judge Anderson, who was absent from court on the day the issue arose, was informed about Juror RM's note. The contents of the note apparently were not shared with counsel at that time, but both parties nonetheless agreed with the judge's decision to give

---

MCR 6.001(D). When MCR 6.414 was repealed, MCR 2.513 was amended. 489 Mich clxxvi, clxxx-clxxxvi (2011). Current MCR 2.513(B) contains the same provision regarding jury communications as MCR 6.414(A).

the deadlocked jury instruction. Tou Lor's counsel later asked to see the note. Judge Anderson's colleague elected to defer to Judge Anderson because she had actually read the note. Although there was a delay in obtaining Judge Anderson's consent, the note was disclosed to counsel that afternoon. Further, the note was made a part of the record and appears in the lower court file. While there was a delay in filing the note, Tou Lor was not prejudiced by the delay because the note is available for this Court's review in connection with the other issues raised by Tou Lor.

Tou Lor also argues that the trial court erred in denying his motion for a mistrial based on Juror RM's note. The trial court's ruling on a motion for a mistrial is reviewed for an abuse of discretion. *People v Waclawski*, 286 Mich App 634, 708; 780 NW2d 321 (2009). An abuse of discretion occurs when the trial court chooses an outcome outside the range of principled outcomes. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010).

A motion for a mistrial should be granted "for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial," *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995), and when the prejudicial effect of an error cannot be cured in any other way. *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). The trial court should refrain from declaring a mistrial until "a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *People v Hicks*, 447 Mich 819, 829; 528 NW2d 136 (1994) (GRIFFIN, J.), quoting *United States v Jorn*, 400 US 470, 485; 91 S Ct 547; 27 L Ed 2d 543 (1971).

A motion for a mistrial based on juror misconduct should be granted only if "the misconduct was such that it affected the impartiality of the jury or disqualified its members from exercising the powers of reason and judgment." *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997). Misconduct can be demonstrated with evidence pertaining to outside or extraneous influences, but cannot be demonstrated with evidence indicating matters which inhere in the verdict, such as juror thought processes and inter-juror inducements. *Id.* Jury "conduct, even if misguided, that is inherent in the deliberative process" is not extraneous and "is not subject to challenge or review." *People v Fletcher*, 260 Mich App 531, 540; 679 NW2d 127 (2004).

In this case, Juror RM's note reflected conduct inherent in the deliberative process. He specifically took issue with the fact that other jurors were disrespectful of his opinions. With the parties' consent, the trial court attempted to resolve the conflict between RM and other jurors by giving the deadlocked jury instruction. The jury later returned a unanimous verdict. Because there was no evidence of an outside or extraneous influence on the jury's verdict, Tou Lor has not shown juror misconduct warranting a mistrial. Therefore, the trial court did not abuse its discretion by denying Tou Lor's motion.

Tou Lor's reliance on *People v Wilson*, 390 Mich 689; 213 NW2d 193 (1973), is misplaced. In that case, the jury reported that it was deadlocked. The trial court questioned the foreperson regarding how the voting stood and, upon hearing the tally remarked, "Well, that is not very far from a verdict." *Id.* at 690. The Court held that the trial court's "inquiry into the numerical division of the jury," coupled with its comment, were "impermissibly coercive with respect to the single reluctant juror" and constituted error requiring a new trial. *Id.* at 691-692.

Before the jury rendered its verdict in this case, the trial court never questioned the jury regarding how its voting stood, never learned how its voting stood, and never commented on the vote. Further, Juror RM's note did not disclose how the voting stood. He stated that he was in the minority, but he did not say if that was a minority of one or more. The remainder of the note indicated that RM's view of the evidence differed from that of several other jurors and he believed that they were not treating his view with respect. There is nothing to indicate that the alleged "bullying" by those jurors had any coercive effect on Juror RM. To the contrary, he opposed them and contacted the trial court seeking assistance.

Finally, there is simply no merit to Tou Lor's claim that the trial court acted improperly when it took the jury's verdict "without first addressing the questions raised by the perspective [sic] juror during deliberations." As noted, the trial court resolved the problem raised in Juror RM's note by giving the deadlocked jury instruction. After the jury resumed deliberations, the issue regarding disclosure of the note to counsel arose. While the parties were waiting for Judge Anderson to become available to decide the matter, the jury sent out a note stating that it had reached a verdict. Judge Wendy Potts, acting for Judge Anderson, indicated that she would not take the verdict until Judge Anderson was able to address the disclosure of Juror RM's note. After speaking to Judge Anderson, the note was disclosed, and counsel for Tou Lor moved for a mistrial in light of the note's contents. Judge Potts reviewed the letter, the proposed resolution to the letter, the response agreed to by counsel, the resulting instruction, and discussed the matter with Judge Anderson before denying the motion for a mistrial. Then, the verdict was read in open court. Thus, contrary to Tou Lor's assertion, the trial court did address the issues raised in the note before the jury returned, and the court received the verdict.

## B. TRIAL COURT'S TREATMENT OF DEFENSE COUNSEL

Tou Lor lastly argues that he was denied a fair trial due to the trial court's "intemperate demeanor" toward defense counsel. Claims of judicial misconduct are reviewed de novo to determine whether the trial court's conduct or comments evidenced partiality that could have influenced the jury to the detriment of the defendant's case. *In re Hocking*, 451 Mich 1, 5 n 8; 546 NW2d 234 (1996); *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996).

A defendant in a criminal trial is entitled to expect a "neutral and detached magistrate of justice," *People v Moore*, 161 Mich App 615, 619; 411 NW2d 797 (1987), and the judge is presumed to be fair and impartial. *S C Gray, Inc v Ford Motor Co*, 92 Mich App 789, 810; 286 NW2d 34 (1979). A criminal defendant also "has a right to be represented by an attorney who is treated with the consideration due an officer of the court." *People v Ross*, 181 Mich App 89, 91; 449 NW2d 107 (1989). "Trial judges who berate, scold, and demean an attorney, so as to hold him up to contempt in the eyes of the jury, destroy the balance of impartiality necessary for a fair hearing." *Id.* Although such conduct is improper, reversal is required "only where the court's conduct denied a fair and impartial trial by unduly influencing the jury." *Id.* This Court has held that where the trial court's comments were provoked by defense counsel's "quarrelsome" behavior and apparently indicated annoyance with defense counsel but did not belittle or berate him, reversal is not required. *People v Anderson*, 166 Mich App 455, 461-462; 421 NW2d 200 (1988).

Having reviewed the record, we conclude that the trial court's conduct toward Tou Lor's attorney was not so prejudicial as to deny Tou Lor a fair trial. The judge's first mention of counsel's loud voice was not rude or disparaging, and Tou Lor does not seem to take issue with it. Likewise, the judge's second mention of counsel's loud voice was not rude or disparaging; she simply asked him to speak more quietly. The problem arose when counsel responded to the judge's request by speaking in an inaudible whisper. That prompted the court to ask if counsel was making fun of it, which question did not demean or belittle counsel, but indicated that his conduct was disrespectful. The judge's question whether counsel was hard of hearing was likewise prompted by counsel's persistence in asking the same question of a witness several times. The remark was impertinent, as the judge acknowledged, but she apologized to counsel and to the jury as well, telling the jury that the fault was with her and not with counsel, whose conduct had been "nothing but professional." The trial court's conduct did not pierce the veil of judicial impartiality or deprive Tou Lor of a fair trial.

Affirmed.

/s/ Deborah A. Servitto  
/s/ Karen M. Fort Hood  
/s/ Jane M. Beckering