STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE LEE NASH,

Defendant-Appellant.

UNPUBLISHED
August 9, 2007

No. 270382
Ionia Circuit Court
LC No. 05-013053-FH

Before: Smolenski, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of a weapon by a prisoner, MCL 800.283(4). The trial court sentenced defendant as a second habitual offender, MCL 769.10, to serve a term of imprisonment of 36 to 90 months, consecutive to any other sentence then in progress. Defendant appeals as of right. We affirm. This case is being decided without oral argument in accordance with MCR 7.214(E).

Defendant was in the custody of the Department of Corrections (DOC), serving a term of imprisonment for armed robbery, when a resident unit officer discovered on defendant's person, as defendant was leaving a bathroom with others, a padlock with a sock. The officer testified that the combination of a lock and a sock indicated use as a weapon, elaborating that, although a lock could be used as a weapon by itself, "normally when we've had those situations, you usually find a sock or belt nearby, if not attached to the weapon". The officer explained that a prisoner was allowed to possess a padlock only in his immediate living space.

Defendant testified that he had felt an urgent need to use the bathroom, and so opened his locker for his bathroom supplies and then went to the bathroom, at first failing to appreciate that he still had the lock, but then choosing to continue because of the urgency of his need for the facilities. A fellow prisoner testified that, on the occasion in question, he saw defendant use the sock to hold shut the door of his stall in the bathroom, a practice the witness described as commonplace and reflective of his own habits.

During the course of deliberations, the jury asked for the definition of "implement," for purposes of applying the statutory prohibition of a prisoner's possessing or controlling "a weapon or other implement which may be used to injure a prisoner or other person . . . ." MCL 800.283(4). The trial court explained that an implement was "an instrumentation (a piece of equipment or a tool) used to effect an end," and added that the jurors had to decide "whether the

lock or the lock and the sock are implements . . . .". The jury went on to find defendant guilty as charged.

On appeal, defendant argues that the trial court erred in denying motions for a mistrial predicated, respectively, on the jurors' having examined evidence that had not been admitted, and the prosecutor's having made some mention of the possible sentencing consequences defendant was facing. We review a lower court's decision on a motion for a mistrial for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). An abuse of discretion occurs when the trial court chooses an outcome falling outside a "principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial." *Haywood*, *supra* (citations omitted).

I. Improper Evidence

A month after the verdict, defendant filed a motion for a mistrial on the ground that the jury had seen evidence that had not been admitted. In particular, following the lock and sock, which were properly admitted, the jurors were given several DOC documents that had also formed part of the prosecution's Exhibit 1, but which were never admitted into evidence. These consisted of a contraband removal record, a request for a State Police investigation, defendant's basic information sheet, an evidence report, a photograph, and a major misconduct report.

Normally, a jury's verdict cannot be challenged through post-trial inquiry into its deliberations. See *People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997). An exception to this principle arises where there is a serious allegation that the jurors saw or discussed evidence not properly before them. *Id.* "Where the jury considers extraneous facts not introduced in evidence, this deprives a defendant of his rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment." *Id.* at 88.

A defendant bears the burden of proving that the jury was exposed to extraneous influences, and that there is a substantial possibility that those influences affected the verdict. *Id.* at 88-89. Once that burden is met, "the burden shifts to the people to demonstrate that the error was harmless beyond a reasonable doubt." *Id.* at 89. The prosecution can meet this burden by proving that the extraneous influence was duplicative of evidence properly produced at trial, or that the untainted evidence of guilt was overwhelming. *Id.* at 89-90. In this case, that the jurors were exposed to evidence not admitted at trial is not in dispute. The question, then, is the extent to which, if any, the extrinsic evidence affected the verdict.

The trial court took the extraordinary step of reassembling defendant's jury, and asking the individual jurors about the extent to which their deliberations were influenced by the improper evidence.

That most of the documents in question had little potential to bring any improper influences to bear was confirmed by the jurors' statements. That defendant was a prisoner was properly disclosed to the jury from the beginning, and so additional indications of his status in that regard were cumulative. Although several of these documents reflect the DOC's conclusion that defendant possessed the lock and sock as a weapon, those assertions were mostly attributed

to the same corrections officer who testified at trial, thus rendering the documentary evidence in this regard duplicative.

But the photograph depicts the sock partially wrapped around the lock, as if to suggest that the two were to be used together. One juror, when asked if the documents influenced her decision, answered in the affirmative, explaining, "they said it [the sock] wasn't wrapped around it [the lock]." The juror continued, "My view was, I didn't think he could be using it as a weapon if it wasn't in the sock and you were going to swing it or tied through it to be able to use it." Upon further questioning, however, the juror distinguished that initial thought from her subsequent understanding that "it didn't matter if the sock wasn't even part of it," and answered in the affirmative when asked if she had concluded that whether the lock was a weapon did not depend on whether the sock was wrapped around it. This progress in this juror's understanding parallels the question and answer concerning the definition of "implement," and reveals that the juror based her decision not on the extrinsic photographic evidence, but on the court's instruction to decide "whether the lock *or* the lock and the sock are implements . . ." (emphasis added) for purposes of violating the statute.

Another juror confirmed that examination of the improper documents led the jurors to ask for a definition of "implement," then added that he would have arrived at the same decision had he not seen them. Although this juror stated that the documents "[a]bsolutely" influenced his decision, the context of that statement indicates that they influenced the course of deliberations and the decision to ask a question, but not the final result.

For these reasons, we agree with the trial court that no miscarriage justice resulted from the inadvertent publication to the jury of the documents in question. As the trial court noted, a criminal defendant is entitled to a fair trial, not a perfect one. See *People v Mosko*, 441 Mich 496, 503; 495 NW2d 534 (1992).

II. Sentencing Consequences

During trial, the prosecutor asked defendant, "Mr. Nash, isn't this really why we're here today . . . because . . . if you're convicted of perjury, you could get in trouble but if you're convicted of this crime today, you're going to get in trouble?", to which defendant answered in the affirmative. Defense counsel thereafter unsuccessfully requested a mistrial. On appeal, defendant argues that with this inquiry the prosecutor improperly brought to the jury's attention some of the sentencing consequences defendant was facing. We disagree.

The policy of this state is to restrict the jury in criminal trials to deciding the facts, reserving sentencing decisions to the court. See *People v Houston*, 179 Mich App 753, 759; 446 NW2d 543 (1989). "The general rule . . . has always been that neither the court nor counsel should address themselves to the question of the disposition of a convicted defendant." *People v Szczytko*, 390 Mich 278, 285; 212 NW2d 211 (1973) (Brennan, J.).

But the question of which defendant makes issue raised the specter of sentencing possibilities only in the very general sense of acknowledging that conviction of perjury, or of the instant crime, would bring criminal punishment. Referring to such common knowledge is a thing far removed from inviting the jury to contemplate the minimum or maximum sentences a defendant may face.

Further, defense counsel had in fact elicited from defendant on direct examination that defendant had pleaded guilty to a robbery offense, was currently paying his debt to society, and faced penalties for the felony of perjury if he were lying on the stand. Having made capital of the penalties for perjury in an effort to show defendant's motive to be truthful, defense counsel opened the door to cross-examination that brought to light that if defendant had possible perjury penalties as an incentive to be truthful, he also had penalties for the instant charge as an incentive to testify so as to avoid conviction. Because the defense seized a strategic opportunity in pointing out that defendant was potentially at risk for additional criminal penalties, defendant cannot claim error from the prosecution's having done the same. See *People v Riley*, 465 Mich 442, 448-449; 636 NW2d 514 (2001).

Moreover, the trial court instructed the jury that "[t]he possible penalty should not influence your decision". To the extent that the questioning at issue might have caused the jurors to develop an improper concern for the sentencing consequences defendant faced, that instruction should have rectified their course. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Affirmed.

/s/ Michael R. Smolenski
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly