Court of Appeals, State of Michigan

ORDER

People of the State of Michigan v David Lall

Docket No. 273165

LC No. 2004-405553-FC

Pat M. Donofrio
Presiding Judge

David H. Sawyer

William B. Murphy
Judges

The Court orders that the June 19, 2008 opinion is hereby AMENDED. The opinion contained the following clerical error: The caption indicated the source court as being Kent County Court No. 04-07008-DO and it should be corrected to reflect instead Berrien Circuit Court No. 2004-405553-FC.

In all other respects, the June 19, 2008 opinion remains unchanged.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUN 27 2008
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2008
v	No. 273165 Kent Circuit Court
DAVID LALL, Defendant-Appellant.	LC No. 04-07008-DO

Before: Donofrio, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of first-degree criminal sexual conduct (CSC I), MCL 750.520b. Because the trial court did not violate defendant's federal and state constitutional protections against double jeopardy, the doctrine of collateral estoppel did not bar the introduction of certain evidence in defendant's second trial, and juror communications and alleged misconduct did not constitute reversible error or warrant a mistrial, we affirm.

I. Substantive Facts

Defendant's conviction arises out of the sexual assault of the victim at Lakeland Hospital in Saint Joseph, Michigan. During the afternoon of August 21, 2004, the victim attended the Berrien County Youth Fair with her two daughters. The victim became ill at the fair and began to feel nauseous and started vomiting. As the condition worsened, the victim was transported by ambulance to the emergency room at Lakeland Hospital. Initially, the victim was placed on a bed in the hallway but was later transferred to a patient room. Defendant, a male nurse, was assigned to assist the victim. Defendant and a patient care assistant, Mandy McCrorey, came into the victim's room and assessed her condition. McCrorey helped her remove her shirt and bra and put on a hospital gown. The victim kept her jeans on under the hospital gown. A lab technician drew the victim's blood. Dr. Patrick Holbert examined the victim, including palpating her abdomen. Dr. Holbert advised the victim that her potassium was low, diagnosed her with dehydration and vomiting secondary to the fair rides, and prescribed her Phenergan to settle her nausea.

The victim testified to the following events. Defendant entered the room, told her he was going to give her Phenergan, and then injected a syringe into her. The victim stated that the injection hurt, she grabbed her arm, and then fell asleep. The victim was in and out of consciousness but woke up briefly several times and has memories of the waking moments. The

victim's memories include: defendant pulling her underwear down and the victim pulling them back up; defendant putting his tongue in her mouth and the victim trying to push him away; defendant pressing his penis against her mouth trying to open it and the victim backing her head away; the victim seeing defendant with his pants somewhat down and seeing defendant's pubic area; and, defendant administering a second shot and the victim complaining again that it hurt. Finally, the victim remembers defendant putting his hand between her legs and penetrating her vagina with his fingers. The victim removed defendant's hand and asked defendant what he was doing. The victim stated that defendant responded by saying, "you asked me to do this." The victim denied it and asked defendant where her pants were. The victim did not remember having her pants removed.

Defendant reached under her gurney and retrieved the victim's pants. Defendant assisted the victim in getting her pants on and then she grabbed her bra and shirt. The victim asked for her phone and defendant retrieved it and gave it to the victim. The victim called a coworker, Marco Reyna, to come to the hospital and pick her up. The victim asked defendant for directions to exit the hospital and defendant showed her the way to the door. The victim did not tell anyone at the hospital about her experiences. As the victim waited outside for Reyna to pick her up, the victim's husband, James, who was at work, called. The victim was very upset but did not tell her husband because she wanted to tell him in person. When Reyna arrived, the victim was crying. The victim entered Reyna's vehicle and told him that she had been raped. Reyna proposed going to another hospital or the police but the victim declined. Reyna took the victim to her vehicle. The victim picked up her daughters, dropped them off at home, and then proceeded to her husband's workplace. The victim told her husband what happened and they decided to go to another hospital.

The victim and her husband went to Saint Joseph's Regional Medical Center in South Bend, Indiana. The victim told a nurse examiner what she remembered about what happened at Lakeland Hospital. A doctor examined the victim and hospital staff took oral, vaginal, hair, urine, and blood samples. The victim told hospital staff that she medicated with Vicodin, Darvocet, and Fexeril for degenerative disc disease. She also stated that she had taken Valium about a month prior to these events. A nurse called the police while the victim was at the hospital. The victim spoke with a police officer over the phone. Tests revealed that only the victim's husband's seminal fluid was found. Tests also revealed that the victim's blood contained both Valium and Phenergan.

II. Procedural History

The prosecutor charged defendant with one count of first-degree criminal sexual conduct, MCL 750.520b (multiple variables), and one count of delivery of a controlled substance with the intent to commit criminal sexual conduct, MCL 333.7401a. The case proceeded to jury trial on both counts. The jury was unable to read a unanimous verdict on the charge of first-degree criminal sexual conduct and acquitted defendant of the charge of delivery of a controlled substance with the intent to commit criminal sexual conduct. Defendant moved for dismissal of the remaining count of first-degree criminal sexual conduct based on double jeopardy and the doctrine of collateral estoppel. The parties briefed the issue and the trial court issued an opinion and order concluding that the double jeopardy clause did not prohibit the prosecution from retrying defendant under two theories: force or coercion, MCL 750.520b(1)(f)(i), and mental or physical incapacitation, MCL 750.520b(1)(g). But the trial court also held that defendant's

double jeopardy protections prohibited the prosecution from again trying defendant for first-degree criminal sexual conduct based on the theory that sexual penetration occurred under circumstances involving the commission of any other felony, MCL 750.520b(1)(c), namely delivery of a controlled substance with the intent to commit a sexual act MCL 333.7401a. The trial court also held that the doctrine of collateral estoppel did not preclude the prosecutor from presenting evidence that defendant delivered Valium to the victim on retrial.

A second jury trial was held on the charge of first-degree criminal sexual conduct. After the close of the proofs, during jury deliberation, two incidents occurred involving separate jurors. At separate times during deliberation both Juror 19 and Juror 48 sent notes to the trial court indicating that they wanted to speak with the court. Details surrounding both communications and interactions with the trial court are included below in Section V of the opinion. Ultimately both jurors remained on the jury and the jury convicted defendant. The trial court sentenced him to a term of 56 to 112 months' imprisonment. Defendant appeals as of right.

III. Double Jeopardy

Defendant first argues that the trial court violated his federal and state constitutional protections against double jeopardy when it permitted the prosecution to try defendant a second time on the theory that he administered a drug without consent. In response, the prosecutor contends that the trial court properly ruled that double jeopardy principles did not prohibit the prosecution from retrying defendant on the charge of first-degree criminal sexual conduct under the theories, force or coercion, MCL 750.520b(1)(f)(i), and mental or physical incapacitation, MCL 750.520b(1)(g). "A double jeopardy issue constitutes a question of law that is reviewed de novo on appeal." *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995).

"A person may not be twice placed in jeopardy for a single offense." *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997). This protection is afforded under both the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 15. The constitutional prohibition against double jeopardy provides three separate protections: "(1) it protects against a second prosecution for the same offense after acquittal, (2) it protects against a second prosecution for the same offense after conviction, and (3) it protects against multiple punishments for the same offense." *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004).

In recent years, our Supreme Court held that the validity of successive prosecutions under the Michigan constitution is measured under the federal "same elements test" enunciated in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932).[1] *Nutt, supra* at

[1] In *Nutt*, our Supreme Court overruled its decision in *People v White*, 390 Mich 245; 212 NW2d 222 (1973), that articulated a "same transaction" test prohibiting serial prosecutions for completely different crimes if they occurred during a single criminal event. Instead, the *Nutt* Court adopted the *Blockburger* "same elements" test prohibiting serial prosecutions for crimes sharing identical elements. *Nutt, supra* at 567-568. The *Nutt* Court reasoned that the Michigan Constitution was intended to provide the same double jeopardy protection as the Fifth Amendment. *Id*. at 596.

592. The *Nutt* Court specifically considered what constitutes a "second offense" within the meaning of the constitutional prohibition. *Id*. at 575. *Nutt* concluded that the *Blockburger* test, i.e., the "same elements" test, "is the well-established method of defining the Fifth Amendment term 'same offence.'" *Id*. at 576. "'The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense.'" *Id*. at 577, quoting *Morey v Commonwealth*, 108 Mass 433, 434 (1871).

"In general, the *Blockburger* test 'inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution.'" *People v Ford*, 262 Mich App 443, 448; 687 NW2d 119 (2004), quoting *United States v Dixon*, 509 US 688, 696; 113 S Ct 2849; 125 L Ed 2d 556 (1993). The *Blockburger* "same elements" test "'focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.'" *Nutt, supra* at 576, quoting *Iannelli v United States*, 420 US 770, 785 n 17; 95 S Ct 1284; 43 L Ed 2d 616 (1975). In other words, under the *Blockburger* test, a subsequent prosecution for a crime from the same transaction is not barred as a subsequent prosecution for the "same offense" if establishing each crime "requires proof of a fact that the other does not."[2] *Id*.

In this case, although defendant concedes that his double jeopardy protections did not prohibit the prosecution from trying him again for first-degree CSC under the theory of force or coercion, MCL 750.520b(1)(f), he asserts that the trial court erred when it permitted the prosecution to proceed again on the charge of first-degree CSC under the theory of mental or physical incapacitation, MCL 750.520b(1)(g). *Nutt* teaches that the double jeopardy analysis must focus on the statutory elements of the underlying offenses. *Nutt, supra* at 576. Thus, our analysis of the issue starts with the elements of the offenses involved.

To prove defendant guilty of first-degree criminal sexual conduct, MCL 750.520b under the theory of mental or physical incapacitation, MCL 750.520b(1)(g), the prosecutor must prove that defendant (1) sexually penetrated the victim, (2) caused personal injury to the victim, and (3) knew or had reason to know that the victim was mentally incapable, mentally incapacitated, or physically helpless. MCL 750.520b(1)(g). Further, MCL 750.520a provides definitions for "mentally incapable," "mentally incapacitated," and "physically helpless." It states as follows:

> (h) "Mentally incapable" means that a person suffers from a mental disease or defect that renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.

---

[2] In applying the *Blockburger* test, the *Nutt* Court held that Oakland County could prosecute a defendant for possessing stolen firearms, even though she had already been convicted of second-degree home invasion in Lapeer County, without violating her double jeopardy protections, because these two crimes did not share the same elements. See *Nutt, supra*, at 592-593.

> (i) "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent.
>
> ***
>
> (l) "Physically helpless" means that a person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act. [MCL 750.520a.]

To prove defendant guilty of delivery of a controlled substance with the intent to commit criminal sexual conduct, MCL 333.7401a, the prosecutor must prove that defendant (1) delivered or caused to be delivered a controlled substance to the victim, (2) without the victim's consent, (3) to commit or attempt to commit criminal sexual conduct. See MCL 333.7401a.

Again, the double jeopardy analysis must focus on the statutory elements of the underlying offenses. *Nutt, supra* at 576. In reviewing the elements of the challenged offenses to perform the *Blockburger* "same elements" test, we conclude that the elements that must be proven for first-degree criminal sexual conduct, MCL 750.520b under the theory of mental or physical incapacitation, MCL 750.520b(1)(g), are not identical to those required to prove defendant guilty of delivery of a controlled substance with the intent to commit criminal sexual conduct, MCL 333.7401a. Establishing the charge of delivery of a controlled substance with the intent to commit criminal sexual conduct, MCL 333.7401a, requires a showing that defendant knowingly delivered a controlled substance to the victim. A careful reading of the elements of the statutes reveals that there is no similar delivery requirement necessary to establish the charge of first-degree criminal sexual conduct, MCL 750.520b under the theory of mental or physical incapacitation, MCL 750.520b(1)(g). Instead, all that is necessary is that the defendant took advantage of a "mentally incapable," "mentally incapacitated," or "physically helpless" victim.

In other words, establishing that defendant delivered a controlled substance to the victim is required to show that he committed the charge of delivery of a controlled substance with the intent to commit criminal sexual conduct, MCL 333.7401, but delivery is not required to establish that defendant committed the charge of first-degree criminal sexual conduct, MCL 750.520b under the theory of mental or physical incapacitation, MCL 750.520b(1)(g). Thus, defendant's subsequent prosecution for first-degree criminal sexual conduct, MCL 750.520b under the theory of mental or physical incapacitation, MCL 750.520b(1)(g) is not barred on double jeopardy grounds based on defendant's prior prosecution for delivery of a controlled substance with the intent to commit criminal sexual conduct, MCL 333.7401.

The plain language of the double jeopardy clause protects individuals from being twice put in jeopardy for the same offense, not for the same conduct or actions. *Nutt, supra* at 580. In this case, defendant was not subjected to successive prosecutions for either the same offense or the same conduct. Because the two prosecutions punished different conduct and different offenses arising from that conduct, defendant has not established error.

IV. Collateral Estoppel

Defendant next argues that the doctrine of collateral estoppel precludes the prosecution from presenting evidence that defendant administered a drug without consent. The prosecutor responds that collateral estoppel did not bar evidence of defendant's delivery of Valium to the victim in defendant's second trial. We review de novo the applicability of collateral estoppel. *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000).

Collateral estoppel is "embodied in the Fifth Amendment guarantee against double jeopardy." *Ashe v Swenson*, 397 US 436, 445; 90 S Ct 1189; 25 L Ed 2d 469 (1970). In *Ashe*, the United States Supreme Court defined collateral estoppel as follows:

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and full judgment, that issue cannot again be litigated between the same parties in any future lawsuit.
>
> ***
>
> The ultimate question to be determined, then, . . . is whether this established rule of federal law is embodied in the Fifth Amendment guarantee against double jeopardy. We do not hesitate to hold that it is. For whatever else that constitutional guarantee may embrace, it surely protects a man who has been acquitted from having to "run the gantlet" a second time. [*Id*. at 443, 445-446 (citations omitted).]

Ashe requires that, after a thorough search of the record, a reviewing court must determine what issues a jury must have decided in reaching its verdict. If the jury might not have decided a specific issue, that issue will not be foreclosed. The reviewing court must decide whether a jury could have based its decision on an issue other than that which the defendant seeks to preclude from consideration. *Ashe, supra* at 444. "The inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Id*. (internal quotation omitted.)

Our Supreme Court has stated that "[c]ollateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was (1) actually litigated, and (2) necessarily determined." *People v Gates*, 434 Mich 146, 154; 452 NW2d 627 (1990). *Gates* counsels that in analyzing whether an issue was "actually litigated" in a prior proceeding, this Court must consider "whether the party against whom collateral estoppel is asserted has had a full and fair opportunity to litigate the issue." *Id*. at 156-157. Moreover, an issue is "necessarily determined" in a previous proceeding "only if it is 'essential' to the judgment." *Id*. at 158, quoting 1 Restatement Judgments, 2d, § 27, p 250, comment h, p 258. "The inability of a court to determine upon what basis an acquitting jury reached its verdict, is, by itself, enough to preclude the defense of collateral estoppel." *Id*.

Here, defendant argues in particular that the collateral estoppel should have operated to preclude the prosecution from presenting evidence at the second trial that he administered a drug without consent to the victim for the reason that he was acquitted of the charge of delivery of a controlled substance with the intent to commit criminal sexual conduct, MCL 333.7401, at his first trial. But after reviewing the record, we conclude that the jury could have based its acquittal

decision on an issue other than that which the defendant seeks to preclude from consideration. *Ashe, supra* at 444. In fact, our review of the record reveals that the jury could have reasonably based its acquittal on more than one basis, not simply on the general factual conclusion that defendant did not administer a drug without consent to the victim. *Gates, supra* at 158.

To prove defendant guilty of delivery of a controlled substance with the intent to commit criminal sexual conduct, MCL 333.7401a, the prosecutor must prove that defendant (1) delivered or caused to be delivered a controlled substance to the victim, (2) without the victim's consent, (3) to commit or attempt to commit criminal sexual conduct. See MCL 333.7401a. Regarding the first element, the jury could have believed, based on the proofs, that the substance defendant injected the victim with was not Valium and therefore was not a controlled substance as required by the statute. The jury could have believed that defendant injected the victim with Phenergan as prescribed by Dr. Holbert and that Valium was found in the victim's blood because she had ingested Valium in pill form of her own volition. Regarding the second element, a rational jury could have believed that the victim actually "consented" to the injection when she permitted defendant to inject her with medication after Dr. Holbert prescribed her Phenergan to settle her nausea. Finally, regarding the third element, under the circumstances of this case the jury could reasonably have concluded that at the time defendant injected the victim arguably with Valium, he did not actually intend to commit first-degree criminal sexual conduct. Instead, the jury could have concluded that defendant did not intend to commit any crime at the moment of injection and only later decided to commit a crime after the victim was rendered unconscious. Or, the jury could have concluded that at the time defendant injected the victim he intended to commit a crime, but a crime less than first-degree criminal sexual conduct, e.g. something less than penetration such as only removing the victim's underwear. Again, "[t]he inability of a court to determine upon what basis an acquitting jury reached its verdict, is, by itself, enough to preclude the defense of collateral estoppel." *Gates, supra* at 158. Thus, the doctrine of collateral estoppel did not bar evidence of defendant's delivery of Valium to the victim in defendant's second trial.[3]

V. Juror Communications

[3] As an alternative basis for affirmance, the prosecution argues that defendant's retrial in this matter based on the same felony information is not a "subsequent, different cause of action" within the meaning of collateral estoppel and thus collateral estoppel should not apply in this context. In support of its argument, the prosecutor cites *People v Thompson*, 424 Mich 118, 127; 379 NW2d 49 (1985), for the proposition that hung jury mistrials have consistently been considered as nullities and subsequent retrials have been determined to be nothing more than a continuation of the same case. While we find this argument interesting in that it involves the most basic tenet of the doctrine of collateral estoppel, we decline to address it in light of our resolution of the issue. Though were we to address it, it would ultimately fail because the United States Supreme Court has specifically found that collateral estoppel applies in the criminal context because it is "embodied in the Fifth Amendment guarantee against double jeopardy." *Ashe, supra* at 445.

A. Juror 19

Defendant asserts that the trial court violated the MCR 6.414(B) and denied him a fair trial by engaging in an ex parte communication with Juror 19. "A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct." *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). "A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial." *Id*. We review the record as a whole and place the court's comments in context to determine if defendant was denied a fair trial. *Id*. Further, a trial judge's general conduct of a trial is reviewed on appeal for an abuse of discretion. See *People v Cole*, 349 Mich 175, 200; 84 NW2d 711 (1957); *In re King*, 186 Mich App 458, 466; 465 NW2d 1 (1990). A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). MCR 6.414(B) governs the trial court's responsibilities when conducting a jury trial. It provides as follows:

> The trial court must control the proceedings during trial, limit the evidence and arguments to relevant and proper matters, and take appropriate steps to ensure that the jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence presented in court. 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. [MCR 6.414(B).]

The record reveals that at the end of the second day of the jury's deliberations, the trial court excused all of the jurors for the day except for Juror 19. The trial court stated that it had received a message from the bailiff communicating that Juror 19 wanted to talk to the court and attorneys. The trial court warned Juror 19 not to disclose anything about deliberations. Juror 19 indicated that she did not want to "do this in front of everybody." Juror 19 also indicated that she did not want to speak in front of counsel. Apparently the trial court then talked with defense counsel and the prosecutor outside of Juror 19's presence and off the record. The trial court then spoke to Juror 19 in open court on the record stating:

> THE COURT: Okay. Juror 19, I've talked with the attorneys. I have one of two choices for you. One, clear everybody out of the courtroom and we would be on the record, but it will just be us here. Or, alternatively, that we step aside – you and I step aside and you can just, without getting into any detail, just give me the nature of the issue.
>
> JUROR NUMBER 19: I'd prefer that.
>
> THE COURT: Okay.
>
> (At 4:56 p.m., off record)
>
> (At 5:01 p.m., on record)
>
> THE COURT: You can just come right back up here, if you would?

***

> THE COURT: Okay. I have had a brief discussion with Juror Number 19, and I'm going to give her an instruction, part of the instructions, and I'm not going to remove her from the jury. She'll remain on the jury, and she'll continue deliberations.

The record reflects that the trial court did not remove the juror and instead reinstructed her by rereading a portion of CJI2d 3.11, Deliberations and Verdict. The trial court then excused Juror 19 for the day.

After Juror 19 left the courtroom, the trial court gave the parties an opportunity to make a record. The prosecutor had nothing for the record. Defense counsel then stated:

> DEFENSE COUNSEL: Just briefly, your Honor, and I 100 percent appreciate the court's – the delicate position that the court is in with a request like that, but I owe it to my client to simply point out that according to MCR 6.414(A), [sic] under the subheading court's responsibility, and really, I guess, the last two or three full sentences, is what the pertinent part is for our discussion here.

Defense counsel then read the relevant portion of MCR 6.414(B) into the record. The following exchange then took place.

> THE COURT: Well, Mr. Samouris, didn't we just agree that we would – that I would follow the procedure that I just did?
>
> DEFENSE COUNSEL: Actually, your Honor, what I thought was happening when I asked if the court was going to make a record, and my interpretation was the court was – determined it was not going to make a record of it. I guess –
>
> THE COURT: Well, Mr. Samouris, I want to be clear here.
>
> DEFENSE COUNSEL. Okay.
>
> THE COURT: We stepped out in the – into the corridor and we discussed this. I believe I did exactly what we discussed.
>
> DEFENSE COUNSEL: I believe you did do exactly what we discussed, but I guess what I'm –
>
> THE COURT: And I thought that you agreed to that?
>
> DEFENSE COUNSEL: I guess my interpretation was you were telling us what you were going to do, and okay, that's – and I'm not going to quarrel with the court. And then after reading this court rule, even if we did agree to that, can we agree to something that can't be done?

THE COURT: Well, Mr. Samouris, let me – let me understand this. Are you saying that I did something different than we agreed to?

DEFENSE COUNSEL: What I'm saying is, your Honor, my interpretation of the discussion was more along the lines of this is how we're going to handle it. And you were right, I did not voice any strenuous objection. And then I consulted the court rule while we were doing this –

THE COURT: Did you get – before I – before I met with the jury, [sic] did you state that you disagreed with that?

DEFENSE COUNSEL: My exact wording, your Honor, was I specifically remember asking if a record was going to be made. And I think in all fairness there was discussion, but I think we need to know what this juror says after the fact. And it's almost like a subject matter of jurisdiction argument.

THE COURT: Well, Mr. Samouris, I will tell you, I'm exceedingly disappointed in you. I gave you an opportunity, we came in here, I explained to Juror Number 19 the two options we discussed, she chose one, so far as I can tell, you never braced an objection to that at all.

Now after it's done, you come in and you try to say that – I don't know what – I don't even know what you're saying here.

DEFENSE COUNSEL: What I'm –

THE COURT: Apparently you're not saying that you disagreed with it.

DEFENSE COUNSEL: What I'm saying is, your Honor, I think we need to know what was said, that's all, between you and the juror.

And even if – for the sake of the argument, say, that my lack of objection could be construed as some sort of complied [sic] consent, so be it. But I cannot imply the consent –

THE COURT: Well, certainly I wouldn't have done it if I didn't think I had your consent.

DEFENSE COUNSEL: And, your Honor, it's not like I walk around with MCR 6.44 [sic] and memorize it off the top of my head. As we were sitting here, there was a few minutes lag, I consulted with the court rule, and I think – said to myself, well, gee, I guess I owe it to my client to place this on the record.

And I appreciate the court's position. It's a very delicate position with a request like that. And I – and I personally have no problem with the way the court handled it. I'll even state that for the record.

But if the court rules says there's got to either be a record of it, or we've got to be present, then do I bury my head in the sand and not address that?

I think I owe it to my client to at least put that on the record. Fine, maybe I should have objected. Maybe that's my mistake. Maybe that's something.

I guess the only thing I can say is, short of that, I think the court handled it fine, and I think we – since a record wasn't made, I think a record could be made now of just the nature of the discussion this Honorable Court and Juror Number 19.

THE COURT: I have absolutely no problem at all doing that.

DEFENSE COUNSEL: Thank you.

THE COURT: But the idea that what I did was not what we had discussed, and what I understood that we'd agreed on, and that you raised that after the fact, is very disappointing to me, because I think I did exactly what we agreed upon. And you were certainly here with [sic] Juror Number 19 asked to speak privately. I understood that was part of the agreement, and that's what we did. And after the fact that you come in and try to say, well, now you want to object afterwards, I think, as I said, is very disappointing to me.

DEFENSE COUNSEL: Again, your Honor, for the record, I'm not necessarily objecting, or even quarrelling with the court the way it handled it. I'm just simply rereading the court rule, and I would just respectfully request that we just know the nature of the discussion. That's all.

THE COURT: I'll be happy to tell you. She said that there was – basically that there are issues among the jurors. She did not get into detail with me. I refused to let her get into any detail with me. In fact, she did not try to get into any detail with me. But she asked to be excused. I told her that I was not going to excuse her as a juror. And she is going to have to come back. It was not a basis for being excused, and she was going to have to come back and deliberate.

DEFENSE COUNSEL: Thank you, your Honor.

At the outset of the next day, the trial court stated that it wanted to revisit the issue of Juror 19 by offering a summary of what had occurred and also allowing counsel another opportunity to speak on the record.

THE COURT: And I would just simply start by going through that process as I saw it.

The jurors were in the courtroom at the end of the day, to give them the following instructions not to discuss this with anyone, and tell them what time to be here this morning. And [the bailiff] gave me a note, which he had drafted, saying that Juror Number 19 wanted to talk with me. When the jurors left, I asked Juror Number 19 to stay, and I showed the note to Mr. Sanford and Mr. Samouris.

I considered this to be an administrative matter, to try to figure out what Juror 19 wanted to talk about.

Juror 19 seemed to be – seemed not to be willing to talk in the courtroom in the way with everyone here. That created a practical problem as to how to proceed. I decided I did not want to have Juror 19 removed from the courtroom at that point, thought that might further isolate her, so I asked counsel to join me in – outside the courtroom in the hallway. Of course, that was not on the record. For that, any criticism of that, of course, should be directed to me, because that was my decision.

Following our discussion, we returned to the courtroom. I posed two alternatives to Juror 19, one, I could remove everyone from the courtroom other than counsel and she could give me – say to me what she wanted, or, alternatively, I told her that she and I could go into – I could go off into – meet in private, I forget exactly how I phrased it. She chose the second alternative.

Again, I considered this an administrative matter to try to understand what the issue was, and the jury – Juror Number 19 had.

We did discuss of [sic] the record. [The bailiff], our court officer, found a vacant jury deliberation room, and we sat in there for a few minutes to – so I could understand what the issue was.

I mentioned, when we came back, she apparently had some difficulty with a juror, or I'm not sure who all it was, we didn't get into anything beyond that, and she asked to be removed.

Came back in the courtroom, I gave her instructions that – the standard jury instruction 3.11, which I'd previously given to them, and I also – and which was also in the written instructions, which they have and took into the courtroom with them.

And I told her that I would not remove her and that she was to begin deliberations.

With that, as I mentioned, I considered this an administrative matter.

***

DEFENSE COUNSEL: I have nothing to ad your Honor, just, again, I truly thought when we talked off the record the court was simply advising what the court was going to do, and that as a courtesy was telling us ahead of time, and perhaps was even offering our input. And that's how I interpreted that. And I just felt I had no choice to bring up what I brought up. That's all.

THE COURT: Okay.

We have scrutinized the lengthy and complicated exchanges between the trial court and defense counsel regarding the handling of the Juror 19 issue. It appears that defense counsel initially approved the procedure agreed on by the trial court and the parties off the record, then later apparently withdrew his approval after reading MCR 6.414(B) though not actually placing an objection on the record, then after further discussion, again provided express approval to the procedure stating he had "no problem with the way the court handled it." Under these circumstances it is impossible to determine whether defense counsel acquiesced to the procedure used by the trial court by expressly approving it or forfeited any error by never placing a clear and definite objection to the procedure on the record.

If we consider defense counsel's behavior as acquiescence, then defendant has waived appellate review of this issue. A party may not acquiesce to the trial court's handling of an issue only to challenge the ruling on appeal as error. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). Waiver is the "intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (citations omitted). Where a defendant's counsel affirmatively acquiesces to the court's handling of a jury's request, the defendant waives appellate review of any error. *Id*. at 216; *Fetterley, supra* at 519-520. Waiver precludes appellate review because any error has been extinguished. *Carter, supra* at 216.

If we consider defense counsel's behavior as forfeiture, forfeited issues do not extinguish error and are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). To ensure fairness, we will review the issue for plain error affecting defendant's substantial rights. But, in doing so, we are cognizant that a party cannot claim error requiring reversal based on a ruling to which he contributed by plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003).

A trial court may not communicate with a deliberating jury without notifying the parties and permitting them to be present. MCR 6.414(B). "The court must ensure that all communications pertaining to the case between the court and jury or any juror are made part of the record." MCR 6.414(B). Here, before communicating with Juror 19, the trial court notified the parties and offered alternative methods of dealing with the issue. One of the options included allowing counsel to be present and have any interaction with Juror 19 recorded in the court record. Thus, by offering that alternative and later twice making a detailed record of its communication with Juror 19, arguably, the trial court was in compliance with MCR 6.414(B) and defendant has not shown error affecting his substantial rights.

Even if we consider the trial court not in compliance with MCR 6.414(B), a violation of this rule does not require automatic reversal. *People v France*, 436 Mich 138, 142-143; 461 NW2d 621 (1990). In *France*, our Supreme Court defined three types of communication:

> Substantive communication encompasses supplemental instructions on the law given by the trial court to a deliberating jury. A substantive communication carries a presumption of prejudice in favor of the aggrieved party regardless of whether an objection was raised. The presumption may only be rebutted by a firm and definite showing of an absence of prejudice.
>
> Administrative communications include instructions regarding availability of certain pieces of evidence and instructions that encourage a jury to continue its

> deliberations. An administrative communication carries no presumption. The failure to object when made aware of the communication will be taken as evidence that the administrative instruction was not prejudicial.
>
> ***
>
> Housekeeping communications are those which occur between a jury and court officer regarding meal orders, rest room facilities, or other matters consistent with general "housekeeping" needs that are unrelated in any way to the case being decided. A housekeeping communication carries a presumption of no prejudice. [*Id*. at 142-144.]

After reviewing the record, we conclude that the trial court's communication with Juror 19 falls within the classification of administrative communications and does not require automatic reversal. *France*, *supra* at 142-144. The record reveals that the communication was brief, the trial court and Juror 19 did not discuss anything related to deliberations or that would prejudice defendant, and the trial court thoroughly described the communication on the record. Juror 19 simply communicated that there were issues among the jurors and that she was having difficulty with an unidentified juror. For this reason Juror 19 requested to be removed, but the trial court denied her request finding that the situation was not a basis for excusing her from the jury. The trial court then reinstructed her and encouraged her to return to deliberations the following day. We conclude that the brief and non-substantive communication was administrative in nature, and defendant has not shown plain error affecting his substantial rights. *Id*.

B. Juror 48

Defendant argues that the trial court abused its discretion when it denied his motion for mistrial based on jury misconduct. We review the denial of a motion for mistrial based on juror misconduct for an abuse of discretion. *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997). Again, a trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes. *Babcock*, *supra* at 269.

On the third day of jury deliberations, the trial court received a note from Juror 48. The trial court showed the note to counsel and read the note into the record:

> I need to speak to the judge urgently. I feel un-useful as a juror, and feel it is – it is best served if I'm replaced – by an alternate, somebody who can be better served by an outcome of this case, period. Thank you. Number 48[.]

The trial court and parties discussed the note, and with the parties' agreement, Juror 48 was brought into the courtroom. The trial court advised the juror not to say anything related to the status of deliberations, and then asked her of there was anything she wanted to say. Juror 48 stated, "[t]hey told me they're going to send me to the psych ward." The trial court again cautioned Juror 48 not to say anything about jury deliberations. Juror 48 responded and the following exchange took place on the record:

JUROR NUMBER 48: No, that's – it's not that. I'm impossible, I guess, to the others.

THE COURT: Okay. Let me stop you for a minute. The –

JUROR NUMBER 48: Not to do with where we're at. It's totally different.

THE COURT: You mean totally unrelated to the deliberations?

JUROR NUMBER 48: Yes. Thank you.

THE COURT: So it is strictly a personality kind of issue? Would that be fair?

JUROR NUMBER 48: Yeah.

THE COURT: Okay.

JUROR NUMBER 48: And I think they're right. I hated to have wasted anyone's time, but I think they're right.

THE COURT: Are you saying that in good conscience that you cannot deliberate with the others? Or what are you saying?

JUROR NUMBER 48: They had me read the note to everyone before it could be sent, and that caused an outburst, yes. Knowing how they feel about me, even as a person, I don't think I'm best served to be open minded.

I knew my personality clashed with the majority. I am by far younger, you know, I have a different perspective on things. But it didn't make a difference to me, because I am an open-minded person, which is what I thought was needed.

THE COURT: So it does have something to do with your views about this case. And, again, I want to tell you, do not, in any way, tell me what those views are.

JUROR NUMBER 48: I can't answer that with a yes or no.

The trial court then asked if counsel had any questions for Juror 48. Defense counsel then questioned the juror as follows:

DEFENSE COUNSEL: Do you feel you're being intimidated?

JUROR NUMBER 48: Yes.

DEFENSE COUNSEL: And do you feel that the criticisms are personal in nature as opposed to any objective, constructive, well, look, why don't you try to see it our way? I mean, is it just nasty in there, or what?

JUROR NUMBER 48: I guess (indistinct) statement for this to explain it, but since I am the most outspoken, I am the one that people come to me and say, why don't you say this, why don't you say that, because they don't. And because I am the only one that says all of it. I'm the target now.

***

I feel I am being very juvenile right now, and that's not my goal. I'm just an emotional person.

***

And I'm under attack by complete strangers in places they shouldn't be to do with this case, that's personal.

Juror 48 left the courtroom and defense counsel immediately stated that Juror 48 had just described jury misconduct. Defense counsel said it would not be appropriate to bring an alternate in because of jury misconduct and made a motion for a mistrial based on jury misconduct. The prosecutor stated that he was not opposed to having Juror 48 excused. Counsel and the trial court continued to discuss the merits of replacing Juror 48. Ultimately, the trial court concluded:

THE COURT: I have to say I'm very reluctant to replace her.

Well unless one of you, or both of you, tell me that you ask her to be replaced, and so far I've not heard that from either one of you, I'm going to bring her back in and ask her to continue to try. If she convinces me that she cannot continue to try, then I'll again consider replacing her. But otherwise, that would be my inclination.

I do not know what it's like in that jury room. She does. It sounds like it is not an inviting place for her. But by the same token, we've got 12 different people, and these things are difficult.

So, my inclination at this point will be to bring her back in, give her my thoughts, and ask her to continue. If she simply – if I find that she simply cannot do that then we will – I'll talk to you again.

The prosecutor stated that it was a "reasonable course." Defense counsel stated, "[t]hat's fine, your Honor. I mean, for the record, we moved for a mistrial, and that's been noted for the record. But I have no objection to how, you know, short of that, how the court wishes to proceed, and that's probably the most prudent course."

The trial court brought Juror 48 brought back into the courtroom the following discussion took place:

THE COURT: Welcome back, Juror 48. I've given thought to this issue. I will tell you that I've [sic] very, very reluctant to remove you at this time. And I want to ask you, if I do not remove you, can you at least try to continue to participate as a juror?

* * *

JUROR NUMBER 48: It's hard to be a juror when I'm told not to speak. Can you understand that?

THE COURT: I can understand that.

JUROR NUMBER 48: Okay.

THE COURT: But what I need to know from you is – I guess the most important thing is that you understand that you have your own vote as a juror. And the critical question is whether you will vote your vote based on your own decision?

JUROR NUMBER 48: Yes.

THE COURT: Okay. Having said that, I'm going to ask you to continue to serve. I know it's not easy.

JUROR NUMBER 48: I didn't think it would be.

THE COURT: But I'm going to ask that you continue to serve, and I'm going to read to you an instruction, which I gave before. It's part of the jury instructions you have.

JUROR NUMBER 48: Can I just ask something? And if it's inappropriate, just cut me off, because I don't know. But if there are jurors who have that handbook you're going to read, and they're deliberately going against it, then what do you do?

THE COURT: Well, okay. I will – what I'll do is I will not read this to you.

JUROR NUMBER 48: Okay.

THE COURT: I'll read it when everybody comes in so everybody hears it.

JUROR NUMBER 48: Okay

THE COURT: Okay? With that, do you think you can continue? I'm not asking you if it's easy, I just asking if you can?

JUROR NUMBER 48: I'm going to give it my 110.

THE COURT: Okay. Fair enough.

After Juror 48 left the courtroom, the trial court indicated that it would read CJ2d 3.11 to the entire jury. Neither party objected. Defense counsel then made another motion for mistrial stating:

DEFENSE COUNSEL: Just for the record, and I'll be brief.

In light of what Juror Number 48 just said, with specific reference to jurors who have, in her words, who have taken that handbook and are purposely acting contrary to that handbook, again, that's jury misconduct. I owe it to my client to make a motion for a mistrial.

THE COURT: Okay. She did say that she would vote as a juror in accordance with what she believed the verdict should be that's what I understood her to say.

DEFENSE COUNSEL: I agree, your Honor. It sounds like she – it sounds like she was describing a problem with at least some of the other 11.

***

My motion is noted for the record.

The trial judge read CJI2d 3.11 to the jury. Later that afternoon, the jury sent a message to the court stating, "Judge, we are not able to reach a unanimous verdict." In response, the prosecutor suggested reading the hung jury instruction to the jury. Defense counsel agreed that reading the hung jury instruction was a reasonable request but stated that it would rather the trial court declare a hung jury and a mistrial. The trial court decided to give CJI2d 3.12, finding that a possibility existed that more deliberations would be worthwhile. After giving the instruction, the trial court excused the jury for the day. The next day, the jury returned with a verdict of guilty of first-degree criminal sexual conduct. The trial court polled the jurors and when asked, "[I]s this and was this your verdict?," all of the jurors including both Juror 19 and Juror 48 responded affirmatively.

On appeal, defendant argues that in light of the fact that Juror 48 indicated that the other jurors were intimidating her and not following instructions, the trial court erroneously failed to make any further inquiry and erred when it denied defendant's motion for mistrial. A denial of a mistrial based on juror misconduct is an abuse of discretion only if the misconduct was such that it affirmatively affected the impartiality of the jury or disqualified its members from exercising the powers of reason and judgment. *Messenger*, *supra* at 175. A new trial will be denied if no substantial harm was done to the defendant, even if the misconduct merits a rebuke from the trial court if brought to its notice. *Fetterley*, *supra* at 545. Prejudice must be shown, or facts clearly establishing the inference that it occurred from what was said or done. *Id.*

After receiving the note from Juror 48, the trial court promptly investigated the matter by questioning the juror on the record and allowing counsel to question the juror. Juror 48 revealed that she was "emotional" and felt intimidated, but very clearly told the trial court that issues with

the other jurors concerned personality clashes "totally unrelated to the deliberations." The trial court specifically asked Juror 48 a critical searching question: "will you vote your vote based on your own decision?" Juror 48 answered in the affirmative. The trial court also questioned Juror 48 regarding whether she felt she could continue deliberating with the rest of the jury and again, she responded affirmatively. At this point, the trial court determined that Juror 48 could render a fair and impartial verdict based on her own decision. After reviewing the record, we conclude that defendant has not displayed that the circumstances surrounding Juror 48 affected the impartiality of the jury or disqualified her from exercising her own powers of reason and judgment. *Messenger*, *supra* at 175. Further supporting our conclusion was the fact that, post verdict, Juror 48 represented during jury polling that the jury verdict "is" and "was" her own verdict. For these reasons, the trial court's decision not to grant a mistrial based on Juror 48's situation was not an abuse of discretion.

Juror 48 also revealed that another unidentified juror might have been deliberately acting in contravention to the jury instructions during deliberations. The trial court took the information seriously, discussed it with counsel, and then decided to immediately reinstruct the entire jury. The trial court's instruction reinforced that all jurors were required to follow the court's instructions and consider the opinions of the other jurors during deliberations. After the trial court reinstructed the jury by reading from CJI2d 3.11, there was never any expression of dissension or intimidation raised by Juror 48, Juror 19, or any other juror during the remainder of the deliberation period. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The record displays that the trial court carefully and reasonably handled the problem. Under the circumstances, the trial court did not abuse its discretion when, after conducting an inquiry into the situation, it elected to instruct the jury consistent with CJI2d 3.11 in lieu of granting a mistrial. Defendant has not shown substantial harm as a result of the situation, thus a mistrial was not warranted. *Fetterley*, *supra* at 545.

VI. Conclusion

The trial court properly ruled that double jeopardy principles did not prohibit the prosecution from retrying defendant on the charge of first-degree criminal sexual conduct under the theory of mental or physical incapacitation, MCL 750.520b(1)(g). The doctrine of collateral estoppel did not bar evidence of defendant's delivery of Valium to the victim in defendant's second trial. The trial court's brief and non-substantive administrative communication with Juror 19 did not result in plain error affecting defendant's substantial rights. Finally, defendant has not displayed that the trial court's handling of the situation involving Juror 48 or her report of the unidentified juror not following jury instructions, resulted in substantial harm to defendant and thus a mistrial was not warranted.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ William B. Murphy