

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

Stephen L. Borello, P.J., and Mark J. Cavanagh and Donald S. Owens, JJ.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

Supreme Court
No. 142234

-vs-

Court of Appeals
No. 293285

MAURICE ANTHONY RICHARDS,
Defendant-Appellant,

Macomb Circuit
No. 09-0434-FC

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

ERIC J. SMITH P46186
PROSECUTING ATTORNEY
MACOMB COUNTY, MICHIGAN

JOSHUA D. ABBOTT P53528
CHIEF APPELLATE LAWYER
BY:

RICHARD GOODMAN P34395
ASSISTANT PROSECUTING ATTORNEY
MACOMB COUNTY ADMINISTRATION
1 SOUTH MAIN, 3RD FLOOR
MT. CLEMENS, MICHIGAN 48043
(586) 469-5350

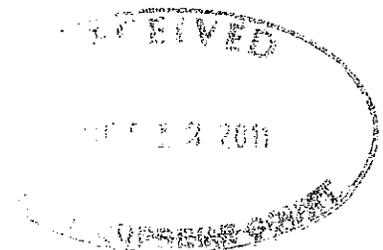


TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
INDEX OF AUTHORITIES	ii
ISSUE PRESENTED	iii
COUNTERSTATEMENT OF FACTS	1
ISSUE.....	2
THE TRIAL COURT’S INSTRUCTION, PURSUANT TO PROPOSED RULE MCR 2.513(K), ADVISING THE JURORS THAT THEY COULD ENGAGE IN PRE-DELIBERATION DISCUSSIONS DID NOT VIOLATE THE DEFENDANT’S SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY. THE SIXTH AMENDMENT DOES NOT PROHIBIT PRE-DELIBERATION DISCUSSIONS BY JURORS IN CRIMINAL CASES. THE THEORY THAT THE SIXTH AMENDMENT BARS PRE-DELIBERATION DISCUSSIONS BY JURORS IS BASED ON THE RATIONALE THAT ONCE A JUROR EXPRESSES HIS POINT OF VIEW TO HIS FELLOW JURORS HE WILL CONTINUE TO ADHERE TO THAT OPINION REGARDLESS OF THE EVIDENCE OR THE OPINIONS OF HIS FELLOW JURORS. THAT THEORY IS UNPROVEN AND LACKS ANY RATIONAL BASIS. GIVEN THE FACT THAT THE ONLY RATIONALE FOR PROHIBITING PRE-DELIBERATION DISCUSSIONS BY JURORS IN CRIMINAL CASES IS BASED UPON SUCH A QUESTIONABLE THEORY, THE COURT SHOULD NOT RELY UPON SUCH FAULTY REASONING TO REVERSE THE DEFENDANT’S CONVICTION.....	2
RELIEF REQUESTED	18

INDEX OF AUTHORITIES

Cases

McCormick v Carrier, 487 Mich 180; 795 NW2d 517 (2010)..... 15

McDougall v Schanz, 461 Mich 15; 597 NW2d 148 (1999)..... 16

Payne v Tennessee, 501 US 808 (1991) 15

People v Blondia, 69 Mich 554; 245 NW2d 130 (1976) 8

People v Feldman, 87 Mich App 157; 274 NW2d 1 (1978)..... 8

People v Hawthorne, 265 Mich App 47; 692 NW2d 879 (2005)..... 2

People v Hunter, 370 Mich 262; 121 NW2d 442 (1963) 7

People v Monroe, 85 Mich App 110; 270 NW2d 655 (1978)..... 8

People v Schaefer, 473 Mich 418; 703 NW2d 774 (2005)..... 16

US v Judlowe, 628 F3d1 (1st Cir. 2010) 7

US v Klee, 494 F2d 394 (9th Cir. 1974) 14

US v Resko, 3 F3d 684 (3rd Cir. 1993)..... 9

Weatherspoon v State, 912 NE2d 437 (2009) 14

Wilson v State, 4 Md App 192; 242 A2d 194 (1968) 13

Winebrenner v US, 147 F2d 322 (8th Cir 1945); cert den'd 325 US 863
(1945)..... passim

Statutes

MCL § 769.26..... 16

Rules

MCR 2.513(K)..... passim

ISSUE PRESENTED

ISSUE

DID THE TRIAL COURT'S INSTRUCTION ADVISING THE JURORS THAT THEY COULD ENGAGE IN PRE-DELIBERATION DISCUSSIONS VIOLATE THE DEFENDANT'S RIGHT TO AN IMPARTIAL JURY UNDER THE SIXTH AMENDMENT, WHEN THE REASON FOR PROHIBITING PRE-DELIBERATION DISCUSSIONS BY JURORS IN CRIMINAL CASES IS BASED ON THE UNPROVEN AND IRRATIONAL THEORY THAT ONCE A JUROR EXPRESSES HIS OPINION TO HIS FELLOW JURORS HE WILL CONTINUE TO ADHERE TO THAT OPINION REGARDLESS OF THE EVIDENCE OR THE OPINIONS OF HIS FELLOW JURORS?

**The Plaintiff-Appellee answers "No."
The Defendant-Appellant answers "Yes."
The Court of Appeals answered "No."**

COUNTERSTATEMENT OF FACTS

The Plaintiff-Appellee accepts all nonargumentative portions of the Defendant-Appellant's Statement of Facts.

ISSUE

THE TRIAL COURT'S INSTRUCTION, PURSUANT TO PROPOSED RULE MCR 2.513(K), ADVISING THE JURORS THAT THEY COULD ENGAGE IN PRE-DELIBERATION DISCUSSIONS DID NOT VIOLATE THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY. THE SIXTH AMENDMENT DOES NOT PROHIBIT PRE-DELIBERATION DISCUSSIONS BY JURORS IN CRIMINAL CASES. THE THEORY THAT THE SIXTH AMENDMENT BARS PRE-DELIBERATION DISCUSSIONS BY JURORS IS BASED ON THE RATIONALE THAT ONCE A JUROR EXPRESSES HIS POINT OF VIEW TO HIS FELLOW JURORS HE WILL CONTINUE TO ADHERE TO THAT OPINION REGARDLESS OF THE EVIDENCE OR THE OPINIONS OF HIS FELLOW JURORS. THAT THEORY IS UNPROVEN AND LACKS ANY RATIONAL BASIS. GIVEN THE FACT THAT THE ONLY RATIONALE FOR PROHIBITING PRE-DELIBERATION DISCUSSIONS BY JURORS IN CRIMINAL CASES IS BASED UPON SUCH A QUESTIONABLE THEORY, THE COURT SHOULD NOT RELY UPON SUCH FAULTY REASONING TO REVERSE THE DEFENDANT'S CONVICTION.

STANDARD OF REVIEW

Claims of instructional error are reviewed de novo. *People v Hawthorne*, 265 Mich App 47; 692 NW2d 879 (2005).

ARGUMENT

The Defendant was convicted by jury trial of Carjacking¹ and Felony Firearm.² At the time of the Defendant's trial the trial court, the Macomb County Circuit Court, Judge David F. Viviano presiding, was participating in a pilot project involving jury reform under Supreme Court Administrative Order 2008-2. Part of that pilot project involved allowing the jurors to discuss the case during the course of the trial before final deliberations. Under proposed rule *MCR 2.513(K)* jurors were allowed to discuss the evidence among themselves in the jury room during trial recesses. After the jury was sworn in the trial court instructed the jury regarding possible discussions. The trial court stated:

"The, contrary to past practice, you will be permitted to discuss the evidence among yourselves in the jury room during trial recesses when all of the jurors are present. Under the current rules, jurors were not permitted to discuss the case until the end. Now you will be permitted to discuss the case during the trial, but it's extremely important that you remember and clearly understand that any discussions you have are tentative until you've heard all the evidence, the instructions the court will give, and the argument by the attorneys. And I will of course remind you of that from time to time during the trial." (11a).³

"You must not discuss this case with anyone, including your family or friends. You must keep an open mind and not decide any issue in the case until you've heard all the evidence, all the instructions on the law, all the arguments of counsel, and until the court directs you to begin your deliberations. However, you may discuss the case among yourselves in the jury room during trial recesses when all of the jurors are present. Although you can discuss the evidence with your fellow jurors you must clearly understand that any such discussions are tentative pending final

¹ *MCL* § 750.529a.

² *MCL* § 750.227b.

³ All references to the record are made to the Defendant-Appellant's Appendix.

presentation of all evidence, instructions, and argument. I cannot stress enough how important it is for you to keep an open mind and to avoid forming opinions about the outcome of the case until I direct you to begin your deliberations.” (17a).

The Defendant objected to the procedure that would allow the jurors to discuss the evidence prior to deliberations. (22a-23a).

The Defendant appealed his conviction, claiming in part that allowing the jurors to discuss the evidence prior to deliberations violated his due process right to an impartial jury. The Court of Appeals rejected the Defendant’s claim, holding that, viewed as a whole the instruction given by the trial court sufficiently protected the Defendant’s right to have his case decided by a fair and impartial jury. (133a). The Court granted the Defendant’s application for leave on the issue of whether the trial court’s instruction permitting jurors to discuss the evidence among themselves in the jury room during trial recesses violated the Defendant’s right to an impartial jury and a fair trial. (136a).

The Defendant claims that allowing the jurors to discuss the evidence prior to deliberations violated his right to an impartial jury. The basic thrust of the Defendant’s argument is that the Sixth Amendment prohibits the jury from discussing the evidence until deliberations. According to the Defendant, the instruction resulted in constitutional error requiring reversal of his conviction. In response, the People submit that the Defendant’s Sixth Amendment right to an impartial jury did not

prohibit the jurors from discussing the evidence prior to deliberations. Therefore, the trial court's instruction does not require reversal.

A. The Sixth Amendment does not prohibit pre-deliberation discussions by jurors in criminal cases.

The Defendant argues that the Sixth Amendment of the U.S. Constitution requires all juries in criminal cases to be instructed that they cannot discuss the evidence in any way prior to deliberations. The People acknowledge that the long established practice of American jurisprudence is to instruct the jury in a criminal case that they should not discuss the evidence in any way prior to deliberations. The People do not agree however, with the Defendant's claim that the Sixth Amendment bars all pre-deliberation discussions by jurors in criminal cases.

(1) The traditional rule prohibiting pre-deliberation discusses is based upon faulty reasoning.

The Defendant's argument focuses on those cases that have held that the Sixth Amendment prohibits any discussion prior to deliberations. Justification for the prohibition against pre-deliberation discussions in criminal cases was first addressed in *Winebrenner v US*, 147 F2d 322 (8th Cir 1945); cert den'd 325 US 863 (1945), cited throughout the Defendant's argument. In *Winebrenner* the defendants were charged with conspiracy to defraud the United States Army in the procurement of aircraft equipment. During trial the trial court first instructed the jurors that while they should not discuss the case with others they might discuss it among themselves. 147 F2d 326. The Eighth

Circuit Court of Appeals reversed the defendants' convictions because it found the trial court's instruction to be improper. The Court opined:

"The jury should not discuss the case among themselves because, first, they have not heard all of the evidence; second, they have not heard the instructions of the court as to how this evidence is to be considered by them, and neither have they heard the arguments of counsel." 147 F2d 328.

The Court concluded that allowing the jurors to discuss the evidence before deliberations in effect shifted the burden of proof to the defendant to change an opinion formed by such discussion. 147 F2d 328.

The majority in *Winebrenner* based its conclusion on its belief that, once a juror expressed his or her opinion as to a defendant's guilt or innocence that juror would be unable to change his or her mind. The Court explained:

"A juror having in discussion not only formed but expressed his view as to the guilt or innocence of the defendant, his inclination thereafter would be to give special attention to such testimony as to his mind strengthened, confirmed or vindicated the views which, he had already expressed to his fellow jurors, whereas, had there been no discussion and no expression of tentative opinion, he would not be confronted with embarrassment before his fellow jurors should he change the tentative opinion which he might entertain from hearing evidence." 147 F2d 328.

Thus, the Court concluded that a defendant's right to an impartial jury under the Sixth Amendment prohibited any discussion of the evidence prior to deliberations because once a juror announced his opinion he would be too embarrassed to change it.

Numerous cases both state and federal have cited *Winebrenner* in support of the rule barring jurors in criminal cases from discussing the evidence prior to deliberations. Those decisions appear to rest on the conclusion reached in *Winebrenner*, that once a juror expresses an opinion on the evidence to his fellow jurors, that juror will refuse to change his position regardless of what evidence may follow or regardless of the opinions expressed by his fellow jurors. For example, in *US v Judlowe*, 628 F3d1 (1st Cir. 2010), the First Circuit Court of Appeals held that the trial court's instruction permitting jurors to discuss the evidence prior to deliberations was improper.⁴ 628 F3d 15. In so holding the Court agreed with the *Winebrenner* rationale that once a juror expresses his point of view to his fellow jurors he will continue to adhere to that opinion regardless of the evidence or the opinions of his fellow jurors. 628 F3d 17-18. The *Winebrenner* rationale has been cited positively in subsequent cases, both state and federal, to prohibit all discussion of the evidence by the jury prior to deliberations in criminal cases.⁵

Similarly, the appellate courts of Michigan have expressed agreement with the reasoning of *Winebrenner*. In *People v Hunter*, 370 Mich 262; 121 NW2d 442 (1963), the Court opined that it was improper for the trial court to instruct the jurors that they could discuss the

⁴ The court ultimately held that the error was harmless. 628 F3d 22.

⁵ See, *State v McLeskey*, 138 Idaho 691, 694; 69 P3d 111(2003)(Idaho Supreme Court agreed with the *Winebrenner* rationale.); *Comm v Kerpan*, 508 Pa 418, 422; 498 A2d 829 (1985)(Pennsylvania Supreme Court agreed with the *Winebrenner* rationale.); *State v Washington*, 182 Conn 419, 426-427; 438 A2d 1144 (1980)(Connecticut Supreme Court

testimony among themselves. The Court, quoting *Winebrenner*, agreed that once a juror expresses his opinion to his fellow jurors he will stand by that opinion regardless of the evidence or the opinions of his fellow jurors. 370 Mich 269-273. Subsequent panels of the Court of Appeals have likewise held it improper for the trial court to allow the jurors to discuss the evidence prior to deliberations. In *People v Monroe*, 85 Mich App 110; 270 NW2d 655 (1978), the trial court instructed the jurors that: "Throughout the case do not discuss it with anybody except one another." 85 Mich App 112. In reversing the defendant's conviction, the Court of Appeals found the dictum of *Hunter* and the *Winebrenner* rationale to be controlling. 85 Mich App 112-113. In *People v Feldman*, 87 Mich App 157; 274 NW2d 1 (1978), the Court of Appeals, relying on *Hunter* and the *Winebrenner* rationale, reversed the defendant's conviction where the trial court's instruction left the jury with the impression that they could discuss the case among themselves. 87 Mich App 160. Thus, the rationale for prohibiting Michigan jurors from discussing the evidence prior to deliberations is based upon the theory set for in *Winebrenner*, that once a juror expresses his opinion to his fellow jurors he will stand by that opinion regardless of the evidence or the opinions of his fellow jurors. See also, *People v Blondia*, 69 Mich 554; 245 NW2d 130 (1976). (A different panel of the Court of Appeals reached

agreed with the *Winebrenner* rationale.); *State v McGuire*, 272 SC 547, 552; 253 SE2d 103 (1979)(South Carolina Supreme Court agreed with the *Winebrenner* rationale.).

the same result but without reference to *Hunter* or the reasoning of *Winebrenner*.)

The People submit that the traditional authority barring jurors from discussing the evidence prior to deliberations should not be followed to reverse the Defendant's conviction in the case at bar. While the Defendant's argument is perfectly willing to perpetuate this unnecessary rule, the People submit that there are two significant flaws in the Defendant's argument.

(2) The prohibition against pre-deliberation discussions is not constitutionally required.

The first significant problem with the Defendant's argument is that the Defendant never answers the question of whether the prohibition against pre-deliberation discuss is constitutionally required. The Defendant relies on the *Winebrenner* rationale that the prohibition against pre-deliberation discussions is necessary in order to protect a criminal defendant's Sixth Amendment right to an impartial jury. The Defendant's argument however, fails to address the fact that the courts that have held that pre-deliberation discussions violate a defendant's Sixth Amendment right to an impartial jury have not done so because the Sixth Amendment requires it but because the *Winebrenner* theory requires it. For example, in *US v Resko*, 3 F3d 684 (3rd Cir. 1993), the court, citing *Winebrenner*, found that the prohibition against pre-deliberation discussion was the preferred practice because once a juror

expresses an opinion on the evidence to his fellow jurors, that juror will refuse to change his position regardless of what evidence may follow or regardless of the opinions expressed by his fellow jurors. 3 F3d 689. Likewise in *US v Jadowe, supra*, the court, citing *Winebrenner*, found that the prohibition against pre-deliberation discussion was the preferred practice because once a juror expresses an opinion on the evidence to his fellow jurors, that juror will refuse to change his position regardless of what evidence may follow or regardless of the opinions expressed by his fellow jurors. 628 F3d 17. Numerous other courts have likewise ruled out pre-deliberation discussions not because it is directly prohibited by the Sixth Amendment but because the *Winebrenner* theory, that once a juror expresses an opinion on the evidence to his fellow jurors that juror will refuse to change his position regardless of what evidence may follow or regardless of the opinions expressed by his fellow jurors, requires it.⁶ Thus, the prohibition against pre-deliberation discussions has been maintained because the appellate courts have accepted the *Winebrenner* theory.

(3) There is no rational basis for the *Winebrenner* theory.

The second significant problem with the Defendant's argument is that it fails to address the fact that there is no rational basis for the *Winebrenner* theory. While it is true that the Sixth Amendment guarantees a criminal defendant the right to an impartial jury, the Sixth

⁶ See footnote 5, *supra*.

Amendment does not specify that the right requires jurors not to discuss the evidence prior to deliberations. The Defendant admits that “The precise origin of this rule is unclear.”⁷ It appears that the Defendant’s argument for the rule’s continued sanctity is grounded in the belief expressed in *Winebrenner* that once a juror expresses his point of view to his fellow jurors he will continue to adhere to that opinion regardless of the evidence or the opinions of his fellow jurors. The Defendant’s argument however, fails to address the fact that the *Winebrenner* theory has never been proven to be true.

In *Let Jurors Talk: Authorizing Pre-Deliberation Discussion of the Evidence During Trial*, 174 Mil L Rev 92 (2002), the Honorable David A. Anderson (JAG Retired), discusses several studies that have taken place in several jurisdictions that tend to cast doubt on the *Winebrenner* theory that once a juror expresses his point of view to his fellow jurors he will continue to adhere to that opinion regardless of the evidence or the opinions of his fellow jurors. Judge Anderson noted the following:

1. After a year and a half study the Arizona Jury Reform Project, established by the Arizona Supreme Court, concluded that the “limitation of all discussions among trial jurors and the accompanying assumptions that jurors can and do suspend all judgments about the case are unnatural, unrealistic, mistaken and unwise.” 174 Mil L Rev 105.

⁷ Appellant’s brief, p. 8.

2. The California Jury Reform Project opined that "It is ironic that the one thing which jurors have in common-they are all sitting together watching a case develop-is precisely the one thing they are not permitted to talk about." 174 Mil L Rev 107.
3. The District of Columbia Jury Project "commented that based on both social science research and anecdotal reports from jurors, the traditional prohibition against these discussions "runs contrary to human nature and is a source of frustration for jurors, especially in long or complicated trials." 174 Mil L Rev 109.
4. The Colorado Jury Reform Project found that "Ninety-three percent of the jurors found that informal, pre-deliberations discussions helped them better understand the evidence and resolve confusion about the evidence during trial." 174 Mil L Rev 111.
5. The Lakamp Survey of 208 Arizona state court judges found that "[of the 38 judges responding] the vast majority felt that based upon their experiences, the pre-deliberation discussion reform was a positive development that should be continued in civil trials." 174 Mil L Rev 113.
6. The National Center for State Courts Field Experiment found that "Contrary to fears that trial discussions might solidify early opinion, jurors assigned to the Trial Discussions group reported that they changed their minds just as often as those assigned to the No Discussions group." The researchers concluded that pre-

deliberation discussions among jurors did not appear to lead to premature judgments about the evidence and the verdict. 174 Mil L Rev 115.

7. The Pima County Field Experiment found that "Discuss jurors were no more likely to favor the testimony presented at the beginning of trial (the "primacy effect"), than they were to favor what they heard immediately at the end of the trial before deliberations (the "recency effect")." *Id.*, pp. 117-118.

Thus, the empirical evidence appears to directly refute the *Winebrenner* theory that once a juror expresses his point of view to his fellow jurors he will continue to adhere to that opinion regardless of the evidence or the opinions of his fellow jurors. See also, "*Learning Lessons*" and "*Speaking Rights*": *Creating Educated and Democratic Juries*, 68 Ind L J 1229 (1993).

Other authorities have similarly expressed doubts as to the validity of *Winebrenner's* theory that once a juror expresses his point of view to his fellow jurors he will continue to adhere to that opinion regardless of the evidence or the opinions of his fellow jurors. In *Wilson v State*, 4 Md App 192; 242 A2d 194 (1968), the trial court admonished the jury that they could talk about the case as long as they were alone among themselves or in the jury room. On appeal, the defendant relied upon *Winebrenner* in support of his claim that the trial court's instruction was

improper. The Maryland Court of Special Appeals, rejecting the defendant's claim, opined:

"We find no denial of the appellant's constitutional right to a fair trial and are not persuaded by *Winebrenner* that the right to due process of law is properly extended to embrace the matter." 4 Md App 200.

Further, the dissent in *Winebrenner* questioned the Court's reasoning. In dissent Judge Woodrough stated:

"No normal honest Americans ever worked together in a common inquiry for any length of time with their mouths sealed up like automatons or oysters." 147 F2d 330.

In *US v Klee*, 494 F2d 394 (9th Cir. 1974), the court agreed with Judge Woodrough, stating:

"We think that there is a good deal in what he says. The important thing is not that jurors keep silent with each other about the case but that each juror keep an open mind until the case has been submitted to the jury. Be that as it may, we need not reach the problem of the propriety of the admonition here." 494 F2d 396.

Lastly, the state courts of Indiana now allow pre-deliberation discussions by jurors in criminal cases. See, *Weatherspoon v State*, 912 NE2d 437 (2009).

Given the fact that the only rationale for prohibiting pre-deliberation discussions by jurors in criminal cases is the questionable theory of *Winebrenner*, that once a juror expresses his point of view to his fellow jurors he will continue to adhere to that opinion regardless of the

evidence or the opinions of his fellow jurors, the People submit that the Court should not rely upon such faulty reasoning to reverse the Defendant's conviction.

B. The doctrine of stare decisis does not prohibit the Michigan Supreme Court from changing the rules governing how jury trials are conducted.

The Defendant also argues that the doctrine of stare decisis requires that the Court reverse his conviction by adhering to the traditional rule prohibiting pre-deliberation discussions in criminal cases. In response, the People submit that the doctrine of stare decisis does not apply in this case. The doctrine of stare decisis provides that courts should not depart from the legal precedents established by their prior decisions. The doctrine of stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *McCormick v Carrier*, 487 Mich 180, 210; 795 NW2d 517 (2010). [Citing *Payne v Tennessee*, 501 US 808 (1991).] In other words, the doctrine applies to courts following the prior decisions of previous courts. Thus, the doctrine does not apply to a superior court changing the procedural rules for a court of inferior jurisdiction.

In this case, the Supreme Court of the State of Michigan decided it would change a rule by which jury trials are conducted by circuit courts in the state. While the People acknowledge that the procedure set forth in

proposed rule *MCR 2.513(K)* was contrary to prior practice, the People submit that this was not a situation where the Court was overruling prior precedent. The rule merely altered the procedure by which jury trials are conducted. The Michigan Supreme Court has the expressed and inherent authority to promulgate rules of practice and procedure for all courts of the state. See, *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999). Thus, it was within the Supreme Court's authority to change the existing rule to allow the jurors to discuss the case before deliberations. Therefore, the trial court did not err in instructing the jury that it could discuss the evidence prior to deliberations.

C. If any error did result from the trial court's instruction it was harmless.

Lastly, the People disagree with the Defendant's argument that any error resulting from the trial court's instruction is not subject to a harmless error analysis. As the People have contended throughout, the prohibition against pre-deliberation discussions by jurors in criminal cases is not constitutionally required. Under *MCL § 769.26*, instructional error is not grounds for reversal unless it affirmatively appears that the error resulted in a miscarriage of justice. *People v Schaefer*, 473 Mich 418, 442; 703 NW2d 774 (2005). In this case, the trial court's instruction allowing pre-deliberation discussions by the jury could not have resulted in a miscarriage of justice. The testimony in this case took up just an afternoon. The first witness was sworn in at 1:11 p. m. and the People rested at 5:08 p.m. (29a, 111a). The Defendant did not present any

witnesses. Thus, there is little chance that the jurors engaged in any pre-deliberation discussions and no chance that any pre-deliberation discussions could have affected the verdict. Thus, the instruction could not have resulted in a miscarriage of justice.

Conclusion

In sum, the trial court's instruction, pursuant to proposed rule *MCR* 2.513(K), advising the jurors that they could engage in pre-deliberation discussions did not violate the Defendant's Sixth Amendment right to an impartial jury. The Sixth Amendment does not prohibit pre-deliberation discussions by jurors in criminal cases. The conclusion that the Sixth Amendment bars pre-deliberation discussions by jurors is based on the theory that once a juror expresses his point of view to his fellow jurors he will continue to adhere to that opinion regardless of the evidence or the opinions of his fellow jurors. That theory is unproven and lacks any rational basis. Given the fact that the only rationale for prohibiting pre-deliberation discussions by jurors in criminal cases is based upon such a questionable theory, the Court should not rely upon such faulty reasoning to reverse the Defendant's conviction.

RELIEF REQUESTED

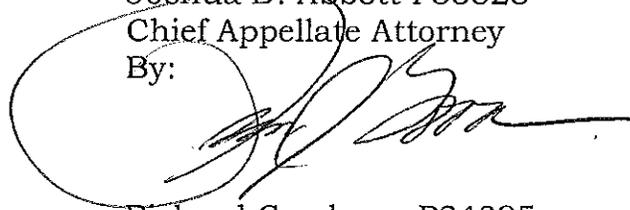
The Plaintiff-Appellee requests that this Honorable Court **DENY** the Defendant-Appellant's Brief On Appeal because of the lack of merit in the issue presented and further the People respectfully pray that this Honorable Court will **AFFIRM** the judgment of conviction.

Respectfully submitted,

Eric J. Smith P46186
Prosecuting Attorney
Macomb County, Michigan

Joshua D. Abbott P53528
Chief Appellate Attorney

By:

A handwritten signature in black ink, appearing to read "Richard Goodman", is written over a circular stamp. The signature is fluid and cursive.

Richard Goodman P34395
Assistant Prosecuting Attorney

DATED: October 11, 2011.