

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

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LANCE ALLEN SCHMITT,

Defendant-Appellant.

---

UNPUBLISHED

May 20, 2008

No. 264176

Oakland Circuit Court

LC No. 04-197437-FC

ON REMAND

Before: Zahra, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

This case returns to this Court on remand from our Supreme Court. In lieu of granting leave to appeal, our Supreme Court reversed this Court's earlier opinion,<sup>1</sup> which granted defendant a new trial on the basis of ineffective assistance of counsel, for the reasons stated in the dissent and ordered this Court to consider defendant's remaining issues on appeal, i.e., whether the trial court denied defendant due process by failing to give the correct jury instructions on the issue of causation; whether counsel rendered ineffective assistance by failing to request such instructions; whether defendant's conviction of second-degree murder violated the prohibition against double jeopardy; and whether a causal connection or proximate cause link existed between the assault and Richard's death. We affirm.

**I. FACTS**

On November 20, 2002, defendant and co-defendant Joseph Wells Stapleton were involved in an argument with Peter Richard in the parking lot of the Clarkston McDonald's restaurant. The argument turned into a physical altercation, and either defendant or Stapleton moved behind Richard while the other man hit Richard in the face. Richard fell to the ground, and defendant and Stapleton hit and kicked him numerous times in the face and back.

Richard experienced severe and continuing back pain following the assault, and eventually was diagnosed with a herniated disc. He underwent a laminectomy and disc removal on January 27, 2004. On March 4, 2004, Richard died of a pulmonary embolism—a blood clot

---

<sup>1</sup> *People v Schmitt*, unpublished opinion per curiam of the Court of Appeals, issued July 31, 2007 (Docket No. 264176).

that blocked the lungs. The medical examiner discovered a blood clot in Richard's leg, identified it as the source of the embolism, and concluded that the clot occurred 24 to 48 hours before Richard's death. The medical examiner opined that the blood clot occurred as a result of the healing process from Richard's back injury, and determined that Richard's death was a homicide.

Defendant pleaded nolo contendere to assault with intent to do great bodily harm less than murder, MCL 750.84. On March 26, 2003, defendant was sentenced to three years' probation, with the first 11 months in jail. After Richard died, defendant was charged with second-degree murder.

The trial focused on causation. Physicians testified that disc damage could occur contemporaneously or later if a vertebra was broken during a beating. The witnesses acknowledged that a fall could aggravate a preexisting back injury. Richard's neurosurgeon opined that the assault was the source of the blood clot in Richard's leg, but acknowledged that he had no proof of that assertion. The medical examiner opined that Richard's herniated disc resulted from both the assault and the preexisting degeneration in Richard's spine.

The trial court instructed the jury on the elements of second-degree murder and causation as follows:

The defendant is charged with the crime of Second Degree Murder. To prove this charge the prosecutor [must] prove each of the following elements beyond a reasonable doubt:

First, that the defendant caused the death of Peter Richard; that is, that Peter Richard died as a result of a blood clot brought on after surgery necessary to relieve back pain from an assault that occurred on November 20<sup>th</sup>, 2002.

Second, that the defendant had one of these three states of mind: He intended to kill, or he intended to do great bodily harm to Peter Richard, or he knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of his actions.

Third, that the killing was not justified, excused, or done under circumstances that reduced it to a lesser crime.

There may be more than one cause of death. It is not enough that defendant's acts made it possible for this death to occur. In order to find that the death of Peter Richard was caused by the defendant, you must find beyond a reasonable doubt that the death was the natural or necessary result of this defendant's act.

If the defendant unlawfully injured Peter Richard and started a series of events that naturally or necessarily resulted in Peter Richard's death, it is no defense that:

The injury was not the only cause of death; and/or Peter Richard was already weak or ill and this contributed to his death; and/or

The immediate cause of death was medical treatment. It is a defense, however if the medical treatment was grossly erroneous or grossly unskillful and the injury might not have caused death if Peter Richard had not received such treatment.

The jury deliberated for several days before convicting defendant as charged. At sentencing on June 30, 2005, the trial court vacated defendant's previous conviction for assault with intent to do great bodily harm less than murder, and sentenced defendant as a second habitual offender, MCL 769.10, to 20 to 40 years in prison for second-degree murder, with credit for 729 days.<sup>2</sup>

## II. JURY INSTRUCTIONS

Defendant first argues that the trial court denied him due process by failing to give the correct jury instructions on the issue of causation and that his counsel was ineffective in failing to request proper jury instructions on causation. We disagree.

### A. Standard of Review

Generally, we review a claim of instructional error de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). However, defendant failed to object to the instructions as given by the trial court; therefore, our review is for plain error. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Further, a claim of ineffective assistance of counsel is a mixed question of fact and law, with the findings of fact reviewed for clear error and the questions of law reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

### B. Analysis

We review jury instructions in their entirety to determine whether the trial court committed error requiring reversal. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). "Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *Id.* Instructions that are somewhat imperfect do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. *Id.* Further, "[e]rror does not result from the omission of an instruction if the charge as a whole covered the substance of the omitted instruction." *Id.*

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional

---

<sup>2</sup> Defendant received credit for time served on the assault conviction.

norms. Counsel must have made errors so serious that he was not performing as the “counsel” guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884, reh den 464 Mich 1212 (2001). Counsel’s deficient performance must have resulted in prejudice. “To demonstrate the existence of prejudice, the defendant must show a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different[.]” *id.* at 600, and that the result that did occur was fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

In a criminal case, the causation element of an offense is comprised of factual causation and proximate causation. *People v Schaefer*, 473 Mich 418, 435; 703 NW2d 774 (2005), overruled in part on other grounds in *People v Derror*, 475 Mich 316, 334; 715 NW2d 822 (2006). Whether the defendant’s conduct was a factual cause of the result depends on whether the result would have occurred absent the defendant’s conduct. *Id.* Thus, if the result would not have occurred but for the defendant’s conduct, factual causation exists. *Id.* at 435-436. Whether the defendant’s conduct was a proximate cause of the result depends on whether the result was a direct and natural consequence of the defendant’s conduct such that the law will recognize the causation. *Id.* at 436. Thus, proximate causation is factual causation that is not so remote or unnatural that the law will not recognize it. *Id.*

An intervening, superseding cause will negate proximate causation. *Id.* at 436-437. The standard by which it is determined whether an intervening cause superseded, and thus severed the causal link, is reasonable foreseeability. *Id.* at 437. If the intervening cause was reasonably foreseeable, then the defendant’s conduct is still considered a proximate cause of the result. *Id.* If the intervening act was not reasonably foreseeable, i.e., if the victim engaged in intentional misconduct or received grossly negligent medical care, then the causal link is severed, and the defendant’s conduct is not considered a proximate cause of the result. *Id.* at 437-438.

Defendant argues that the trial court denied him due process by failing to properly instruct the jury that it was required to find both factual and proximate causation, and by failing to instruct the jury that any intentional misconduct by Richard, such as pushing his wife’s car, playing golf, or lifting weights, severed the causal link. Further, defendant asserts that trial counsel rendered ineffective assistance by failing to request such instructions. We disagree.

The trial court read CJI2d 16.15, which informed the jury that it was “not enough” that defendant’s actions made it possible for Richard’s death to occur. The jury was also required to find beyond a reasonable doubt that Richard’s death was the “natural or necessary result” of defendant’s actions. Thus, the trial court instructed the jury that it was required to find both that Richard’s death would not have occurred “but for” defendant’s actions, and that Richard’s death was a direct and natural consequence of defendant’s actions. This instruction informed the jury that it was required to find that defendant’s actions were both a factual and a proximate cause of Richard’s death. The instruction correctly stated that law as set out in *Schaefer*.

Defendant correctly notes that the trial court did not instruct the jury that Richard’s acts of pushing his wife’s car, playing golf, or lifting weights could have broken the causal connection. However, the undisputed evidence showed that Richard pushed his wife’s car after

his surgery had been scheduled. Thus, that act could not have resulted in a herniated disc. Moreover, while it is possible that Richard's acts of playing golf on one occasion or lifting weights on one occasion could have resulted in a herniated disc, we conclude that those acts did not constitute the type of intentional misconduct on Richard's part necessary to break the causal connection. Rather, those acts were attempts on Richard's part to go about the normal activities in which he engaged before the attack by defendant and Stapleton.

The instructions as given adequately explained the concepts of factual and proximate causation and what the jury was required to decide in order to determine if the prosecution had proven its case beyond a reasonable doubt. The instructions sufficiently protected defendant's rights. *Canales, supra* at 574. Further, defendant has not shown that trial counsel rendered ineffective assistance in that defendant has not demonstrated that but for counsel's failure to request further instructions, it is reasonably probable that he would have been acquitted, *Carbin, supra* at 600, and that the result that did occur was fundamentally unfair or unreliable. *Odom, supra* at 415.

### III. DOUBLE JEOPARDY

Defendant contends that he is serving sentences for both his assault and murder convictions, in violation of the Double Jeopardy Clause, US Const, Am V. We disagree.

#### A. Standard of Review

A double jeopardy claim is reviewed de novo on appeal. *People v Smith*, 478 Mich 292, 298; 733 NW2d 351 (2007). Defendant failed to raise the issue below; therefore, in order to be entitled to relief, defendant must show that plain error occurred. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005).

#### B. Analysis

Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15. The double jeopardy clauses protect a defendant against both multiple prosecutions for the same offense and multiple punishments for the same offense. *Smith, supra* at 299.

Defendant argues that his right to be free of double jeopardy has been violated because he is serving a sentence for both assault with intent to do great bodily harm less than murder, the offense to which he plead nolo contendere several months after the assault occurred, and second-degree murder, the charge that was instituted and of which he was convicted after Richard died. Defendant asserts that no authority suggests that the Legislature intended to impose punishments for both crimes.

Defendant's argument is without merit. At sentencing for defendant's conviction of second-degree murder, the prosecutor moved to vacate defendant's conviction of assault with intent to do great bodily harm less than murder. The trial court indicated that the conviction was vacated. Moreover, the trial court granted defendant credit for 729 days served; a portion of the credit defendant received was for time served in jail for the conviction of assault with intent to do great bodily harm less than murder. Defendant received credit for all time served on the

previous conviction; thus, no double jeopardy violation occurred. See *People v Whiteside*, 437 Mich 188; 468 NW2d 504 (1991).

#### IV. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence of causation to sustain his conviction. We disagree.

##### A. Standard of Review

In reviewing a sufficiency of the evidence issue, this Court views the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the offense were proven beyond a reasonable doubt. *People v Bulls*, 262 Mich App 618, 623; 687 NW2d 159 (2004). We do not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). A trier of fact may make reasonable inferences from direct or circumstantial evidence in the record. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990).

##### B. Analysis

The elements of second-degree murder are: (1) a death; (2) caused by the defendant; (3) with malice; and (4) without excuse or justification. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Causation includes both factual causation and proximate causation. *Schaefer*, *supra* at 435-436.

Defendant argues that the prosecution produced insufficient evidence of causation to sustain his conviction. Defendant notes that the orthopedic surgeon with whom Richard treated from November 2002 through March 2003 did not detect evidence of a herniated disc based on Richard's symptoms. This physician removed Richard's restrictions against lifting in February 2003 because Richard's fracture had healed. Defendant asserts that Richard's herniated disc must have occurred after this point, and must have resulted from Richard's own actions, including pushing his wife's car, playing golf, and lifting weights. Again, we disagree.

The undisputed evidence established that x-rays taken in the emergency room immediately after the assault showed a fractured vertebra. A herniated disc is not revealed by an x-ray. Richard complained of constant back pain after the attack; his physical therapist and his family physician suspected that a disc problem could be the source of the pain. An MRI, taken in August 2003, revealed the herniated disc. The surgeon with whom Richard treated from November 2002 through March 2003 did not order an MRI. Three physicians, one of whom was the neurosurgeon who operated on Richard in January 2004, testified that disc damage could occur if a beating was so severe as to break a vertebra. Richard's neurosurgeon opined that the assault could have been the source of the blood clot in Richard's leg. The medical examiner opined that the blood clot was the source of the embolism that killed Richard and that the clot occurred as a result of the healing process from Richard's back injury. This evidence, if accepted by the jury, was sufficient to establish beyond a reasonable doubt that absent defendant's conduct, Richard's injury would not have occurred. Thus, the evidence produced by

the prosecution was sufficient to establish that defendant's conduct was the factual cause of Richard's death. *Schaefer, supra* at 435-436.

Defendant's assertion that Richard's acts of pushing his wife's car, playing golf, and lifting weights must have resulted in the herniated disc, and therefore constituted an intervening, superseding cause that negated proximate causation, is not supported by a rational view of the evidence. The undisputed evidence showed that Richard had already scheduled surgery to treat his herniated disc when he pushed his wife's car. The evidence showed that Richard played nine holes of golf on one occasion during the 2003 season; however, no physician testified that this activity might have resulted in the herniated disc. The evidence showed that Richard lifted weights on one occasion on an unspecified date, and Richard's neurosurgeon acknowledged that such an activity could cause a disc to rupture. However, lifting weights is a foreseeable activity that would not sever the causal link. See *id.* at 437-438. The evidence was sufficient to allow the jury to conclude beyond a reasonable doubt that defendant's acts were a proximate cause of Richard's death. See *People v Bailey*, 451 Mich 657, 676-677; 549 NW2d 325, amended 453 Mich 1204 (1996). The evidence was sufficient to sustain defendant's conviction of second-degree murder.

Affirmed.

/s/ Brian K. Zahra  
/s/ Mark J. Cavanagh  
/s/ Bill Schuette