STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED September 11, 2008
v	No. 247391 Jackson Circuit Court
KATHERINE SUE DENDEL, a/k/a KATHERINE SUE BURLEY, Defendant-Appellant/Cross-Appellee.	LC No. 02-002915-FC ON REMAND

Before: Borrello, P.J., Saad, C.J. and Wilder, J.

PER CURIAM.

In *People v Dendel*, unpublished opinion per curiam of the Court of Appeals, issued July 18, 2006 (Docket No. 247391), we reversed defendant's conviction and remanded for a new trial because we held that defendant was prejudiced by defense counsel's failure to consult with and present the testimony of an appropriate medical expert about the cause of death of the victim, Paul Michael Burley. Slip op, p 3. Our Supreme Court reversed and remanded this case for us to consider the remaining issues raised on appeal and cross appeal. *People v Dendel*, 481 Mich 114; 748 NW2d 859, amended 481 Mich 1201 (2008).

I. Second-Degree Murder Conviction

Defendant contends that this Court must vacate her second-degree murder conviction. We hold that defendant has waived review of this issue because her assertion that no rational view of the evidence could support a second-degree murder conviction is contrary to the position she took throughout her trial. Indeed, defense counsel specifically asked the trial court to consider the lesser offense of second-degree murder. Error requiring reversal must be that of the trial court, and not error to which the aggrieved party contributed by plan or negligence. *People v Jordan*, 275 Mich App 659, 666; 739 NW2d 706 (2007). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Defense counsel's request that the court consider the lesser offense of second-degree murder waives this issue on appeal and we decline to consider it further. *Id*.

II. Testimony of Dr. Michael Evans

Defendant contends that the trial court abused its discretion by admitting Dr. Michael Evans's testimony about toxicology results because he did not perform the tests.[1] Defendant maintains that Dr. Evans's testimony lacked proper foundation and that it violated her rights under the Confrontation Clause of the Sixth Amendment.

Dr. Evans is a toxicologist at AIT Laboratories, and president and CEO of the company. He manages the corporation and directs laboratory operations. AIT Laboratories provides services to the clinical community and hospitals throughout the county, as well as the pharmaceutical industry by performing research to aid in new drug development. The laboratory also performs forensic toxicology testing in autopsy cases. Dr. Evans described the logistics and procedures for autopsy testing at the request of medical examiners' offices.

Here, the laboratory performed a pane 1 autopsy test on a sample of Burley's blood, urine, and vitreous fluids at the request of Dr. John Mayno from the Jackson County Medical Examiner's office. Dr. Evans explained that in such cases, the technicians "proceed as if we have no information" and "proceed without any preconceived notion about what we're going to look for in starting our testing process." He testified at length about the procedures utilized in the lab, and the many substances that the autopsy tests identify.

Dr. Evans testified generally about the relationship between insulin and glucose levels, and the body's response to insulin. He explained the difficulty of testing for the presence of insulin during an autopsy. Dr. Evans then testified that the toxicology results showed that the level of glucose in Burley's system was zero. He opined that the zero glucose level was consistent with Burley having been injected with insulin. Defense counsel objected to the admission of Dr. Evans' testimony about the toxicology results as lacking proper foundation because Dr. Evans did not perform the autopsy test himself. Dr. Evans stated that about fifteen people from his lab were involved in the testing. The trial court ruled that an adequate foundation had been laid for the admission of Dr. Evans' testimony, and that the toxicology results came within the exception to the hearsay rule for business records.

We reject defendant's foundational challenge. The trial court did not admit the toxicology report into evidence, only Dr. Evans's testimony about the toxicology results. At the time of trial, MRE 703 did not preclude expert testimony based on underlying facts or data not in evidence[2]:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived or made known to the expert at or before the hearing. The court may require that underlying facts or data essential to an opinion or inference be in evidence.

[1] A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

[2] Effective September 1, 2003, MRE 703 was amended to provide that "the facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence."

"It is well-settled that an expert witness may rely on hearsay evidence when the witness formulates an opinion." *People v Lonsby*, 268 Mich App 375, 282-283; 707 NW2d 610 (2005); *People v Caulley*, 197 Mich App 177, 194; 494 NW2d 853 (1992). The trial court did not abuse its discretion in admitting Dr. Evans's testimony based on the toxicology results.

Defendant did not raise a Confrontation Clause challenge to Dr. Evans's testimony and, therefore, the issue is not preserved. *People v Bauder*, 269 Mich App 174, 178-179; 712 NW2d 506 (2005). Accordingly, we review defendant's argument for plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The United States and Michigan constitutions guarantee a criminal defendant the right to confront witnesses against him. US Const, Am VI; Const 1963, art 1, § 20. To preserve this right, testimonial hearsay is inadmissible against a criminal defendant unless the declarant was unavailable at trial and the defendant had a prior opportunity to cross-examine the declarant. *Crawford v Washington*, 541 US 36; 124 S C t 1354; 158 L Ed 2d 177 (2004); *Lonsby, supra* at 377. The Confrontation Clause bars the admission of such testimonial statements of a witness regardless of their admissibility under the rules of evidence. *Crawford, supra*, 541 US at 50-51. If the hearsay at issue is nontestimonial, the Confrontation Clause does not restrict state law from determining admissibility. *Id*. at 68.

Statements are testimonial if the "primary purpose" of the statements or the questioning that elicits them "is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v Washington*, 547 US 813, 814; 126 S Court 2266, 2274; 165 L Ed 2d 244 (2006). Business records and public records are not testimonial. *Crawford, supra* at 76; *People v Jambor*, 273 Mich App 477, 487 n 4; 729 NW2d 569 (2007); *Lonsby, supra*, 268 Mich App at 391 n 9.

Defendant relies on *Lonsby, supra*, a sexual assault case in which this Court ruled that the notes and laboratory report of a nontestifying serologist were testimonial in nature, and were admitted in violation of the defendant's Sixth Amendment right to confront witnesses against him. However, in *Lonsby*, this Court clarified:

> The critical point . . . is the distinction between an expert who forms an opinion based in part on the work of others and an expert who merely summarizes the work of others. In short, one expert cannot act as a mere conduit for the opinion of another. [*Lonsby, supra* at 393 n 12, quoting *State v Williams*, 253 Wis 2d 99, 113; 644 NW2d 919 (2002).]

This "critical point" makes *Lonsby* distinguishable from the present case. Here, unlike in *Lonsby*, the witness did not testify to subjective observations from the toxicologists who performed the autopsy test. Dr. Evans did not speculate about any reasoning or judgment exercised by the nontestifying toxicologists. *Id*. at 392. The zero-level of glucose in Burley's system was an objective result, and Dr. Evans formed his own expert opinion on the basis of that finding. And unlike the police crime lab serologist in *Lonsby*, Dr. Evans was not employed by law enforcement. He testified that the lab testing is performed without any preconceived notions about what might be found, and without any case background.

Additionally, autopsy reports are not testimonial because they are public records prepared pursuant to a duty imposed by law as part of the statutorily defined duties of a medical examiner. See MCL 52.202(1)(a) (mandating a medical examiner to conduct an autopsy when the deceased's death was unexpected), MCL 52.207 (mandating a medical examiner to conduct an autopsy upon the order of a prosecuting attorney). Therefore, the autopsy and toxicology reports qualify as public records under MRE 803(8). Thus, the toxicology results were not testimonial in nature, and Dr. Evans' testimony based on the results did not violate defendant's rights under the Confrontation Clause.

III. Sentence

The prosecutor argues that the trial court did not impose a long enough sentence for defendant's conviction. As originally scored, the sentencing guidelines dictated a minimum sentence of 162 to 405 months in prison. This range was based in part on a scoring of 10 points for prior record variable 6 (PRV 6) because defendant was on probation when she committed this offense. Defendant was placed on probation in 1982 for a felony conviction in Washtenaw County. She absconded, and failed to report to her probation officer. A bench warrant was issued and remained outstanding. At sentencing in this case, defense counsel ultimately conceded that PRV 6 should be scored ten points, and that the guidelines range was 162 to 405 months. The trial court disagreed with the scoring of 10 points for PRV 6, and changed the score to zero, yielding a minimum range of 90 to 225 months. The trial court sentenced defendant to 90 to 180 months, within the recalculated guidelines.

PRV 6 is properly scored 10 points if "[t]he offender is on parole, probation, or delayed sentence status or on bond awaiting adjudication or sentencing for a felony . . . " MCL 777.56(1)(c). PRV 6 should be scored zero if "[t]he offender has no relationship to the criminal justice system." MCL 777.56(1)(e). Defendant was never discharged from the 1982 probation. In *People v Ritter*, 186 Mich App 701, 711; 464 NW2d 919 (1991), this Court held that "a defendant's period of probation is tolled when he absconds from probationary supervision" because "[a]n absconding defendant should not be allowed to benefit from his wrongful noncompliance with the terms of his probation order." Accordingly, defendant was still on probation at the time of the instant offense, and therefore the trial court erred in scoring zero points for PRV 6.

The trial court imposed a sentence that was outside the correct guideline range of 162 to 405 months. But resentencing is not necessary on this basis, because the court clearly indicated that it would have imposed the same sentence regardless of an error in scoring. *People v Mutchie*, 468 Mich 50, 51; 658 NW2d 154 (2003).

The court acknowledged the possibility that its scoring of the guidelines was erroneous, and stated that even if the correct guidelines range was 162 to 405 months, it would depart downward and impose the same sentence. The court articulated reasons for departing from the guidelines, in the event that its sentence constituted a departure. The court cited the following reasons to justify the departure: (1) defendant provided extraordinary care to Burley, (2) defendant sought help for Burley but did not receive it, (3) defendant was overwhelmed by the responsibility of caring for Burley, and (4) defendant's age (fifty-one). The trial judge opined:

> [T]here's no question that Mr. Burley, Mike, had significant health problems. I don't know that I would say that I deviate from the guidelines because the person who died had health problems. They don't just say there isn't one sentence for murder if it's a healthy person and another, you know, sentence for murder if they're unhealthy. He certainly had some significant health problems, and I think it affected – unquestionably affected the quality of his life, although it was the only life he had. You know, he has a right to enjoy it. I think what makes me want to – that would cause me to deviate from the guidelines if they were 162 months are that there's no question that he had some extraordinary health problems and I – there's no doubt in my mind that you were providing extraordinary care to him for many months before this. I understand you were being paid for some of that, but I think caring for someone with those significant problems, going to the doctor and the hospital, and the medications, and the daily living, I think that far exceeded what you were being paid to do and so I think you did a lot for him, and I think that is one reason to try – I think I should deviate, and I think there's absolutely no question from the proofs in this case that you were overwhelmed by this, and that you were seeking some help, and you weren't getting it. You tried different places; FIA, the Department on Aging, Hospice, some nursing home, you even called the City Police to see if he can be committed, and I think all of these – everybody said, well, he doesn't qualify for this or he doesn't fall under that, and you weren't getting any help, so you made some other attempts. I think you got to – as I said at the trial, I think you got to the end of your rope and you gave him the insulin, but this wasn't your first choice. I think you were trying to do something else and you weren't getting any assistance in that, so because of the extraordinary care and the fact that you were trying to get some assistance, taking into account your age, also, I would not sentence you – if the guidelines were 162 months to 405 months, I would not sentence you within those guidelines; I would deviate from the guidelines, and I really think they should be scored at 90 to 225, and I'm going to sentence you within those guidelines, but for the reason that I've said here today, I'm going to sentence you at the low end of those guideline [sic]. It's the sentence of this Court that you serve a term, in the Michigan Department of Corrections, a minimum term of 90 months and a maximum term of 180 months, with credit for 302 days. You're to pay a $60.00 victim's rights and a $60.00 DNA sample.

In reviewing a trial court's decision to depart from the sentencing guidelines, this Court reviews for clear error a trial court's finding that a particular factor in support of departure exists. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). Whether the factor is objective and verifiable is a question of law that this Court reviews de novo. *Id*. This Court reviews for an abuse of discretion the trial court's determination that the objective and verifiable factors in a particular case constitute a substantial and compelling reason to depart from the sentencing guidelines. *Id.* An abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. *Id*. at 269.

The factors on which the trial court relied were objective and verifiable. In addition to defendant's age, the court relied on evidence adduced at trial that Burley was difficult to care for,

defendant was his primary and often sole caretaker, and she unsuccessfully sought assistance in caring for him. The prosecution cites testimony that defendant refused certain offers of help, but in light of the conflicting testimony on this point, the trial court's finding was not clearly erroneous. Here, the extent of the departure was significant, but considering the circumstances surrounding the offense and the offender, the sentence imposed was proportionate. *Babcock, supra* at 269-270.

Affirmed.

/s/ Stephen L. Borrello
/s/ Henry William Saad
/s/ Kurtis T. Wilder