

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WALTER SANDERS, a/k/a WALTER JOHNSON

Defendant-Appellant.

UNPUBLISHED

December 10, 1999

No. 215215

Kent Circuit Court

LC No. 96010758 FC

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to thirty to forty years' imprisonment for the assault with intent to murder conviction as a four-time felony offender, MCL 769.12; MSA 28.1084, and two years for the felony-firearm conviction. We affirm, but remand for resentencing.

Defendant first raises three claims of prosecutorial misconduct. Defendant failed to object to any of the alleged instances of misconduct at trial. Therefore, appellate review is precluded unless a curative instruction could not have eliminated the prejudicial effect or where failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Each claim of misconduct concerned a remark made by the prosecutor during trial. When viewed in context and in light of defendant's arguments at trial, we find that any prejudicial effect of the prosecutor's remarks could have been eliminated by a curative instruction and that failure to review this issue would not result in a miscarriage of justice. *Id.* Accordingly, we decline to review this issue.

Defendant next argues the trial court erred in denying his motion for a new trial. Defendant contends he was denied a fair and impartial trial as a result of contact between a juror and a woman the juror assumed was a friend or family member of defendant. We disagree. We review the decision whether to grant or deny a new trial for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 27; 592 NW2d 75 (1998).

An evidentiary hearing was held on this matter below. Wanda Vitale testified that during trial she was approached by a woman outside the courtroom near the elevators as she was leaving for the day. Vitale recognized the woman from the courtroom and assumed she was either a friend or family member of defendant. The woman stated to Vitale “You’re Frank’s wife, aren’t you?” Vitale responded that she was, and that was the extent of the conversation. Vitale testified that other jurors were in the area, that she asked one of the male jurors what she should do, and he responded that she should talk to the judge. Vitale was concerned because the woman knew who she was and knew her husband, and Vitale did not want to continue as a juror in the case. She contacted the judge through his clerk and the decision was made with both attorneys present that an alternate would replace Vitale at the end of the trial. Vitale was not informed about the decision to replace her, but she did not return to jury duty.

Vitale testified that she spoke to two male jurors about the contact with the woman. Roger Burley testified that he discussed the contact with Vitale and that she was concerned for her husband and children, seemed nervous and scared, and wanted to get off the jury. Burley said Vitale told him one of the women in the courtroom had approached her, but he did not recall whether Vitale said the woman was a member of defendant’s family. Burley did not tell the judge that he was aware of Vitale’s experience. Burley also testified that Vitale’s experience did not in any way affect his deliberations and that he did not mention the incident to any other juror until after the verdict had been reached. Howard Ross testified that Vitale told him that a member of defendant’s family had spoken to her, but that she did not go into any details and he was not aware that she was concerned about the situation. Ross testified that he did not know anything further about the situation until Burley discussed it after the verdict was reached. Ross also testified that the issue did not come up at all during deliberations. A third juror, Suzanne Breniser, who was not aware of Vitale’s experience during the trial, confirmed that the issue did not come up during deliberations.

The testimony was inconsistent as to exactly when the jurors discussed Vitale’s experience and who said what about the incident. Ross and Breniser indicated that the subject came up after the verdict was read in court when the jurors were getting ready to leave. Burley testified that the discussion took place before the verdict was read in court but after the jury had reached its verdict. It appears that the seemingly nebulous comment regarding the female juror’s husband was embellished into threats made upon the female juror’s husband and children, but the testimony was inconsistent as to who made these statements.

The Michigan Supreme Court has recently addressed the issue of extraneous influences on juries. In *People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997), reversed on other grounds, *Nevers v Killinger*, 169 F3d 352 (CA 6, 1999),¹ the Court stated:

As the Court of Appeals has previously noted, once a jury has been polled and discharged, its members may not challenge mistakes or misconduct inherent in the verdict. Rather, oral testimony or affidavits may only be received on extraneous or outside errors, such as undue influence by outside parties.

The Court held that the following analysis was to be used to determine whether the outside influence required reversal:

In order to establish that the extrinsic influence was error requiring reversal, the defendant must initially prove two points. First, the defendant must prove that the jury was exposed to extraneous influences. Second, the defendant must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict. Generally, in proving this second point, the defendant will demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict. If the defendant establishes this initial burden, the burden shifts to the people to demonstrate that the error was harmless beyond a reasonable doubt. We examine the error to determine if it is harmless beyond a reasonable doubt because the error is constitutional in nature. The people may do so by proving that either the extraneous influence was duplicative of evidence produced at trial or the evidence of guilt was overwhelming. [*Id.*, 88-90. Citations omitted.]

Defendant has failed to meet his burden under *Budzyn*. Defendant has not proved that the jury was exposed to extraneous influences because although Vitale was exposed to an extraneous influence, she was not a part of the panel that ultimately rendered the verdict. The two remaining jurors with knowledge of the contact were, at best, only exposed to an indirect extraneous influence. Defendant has also failed to demonstrate that the extraneous influence was substantially related to a material aspect of the case and that there was a direct connection between the extrinsic material and the adverse verdict. *Id.* Instead, the evidentiary hearing revealed that the extraneous information did not have any affect on the jury's verdict. In any event, even if defendant had met his burden under *Budzyn*, we would find that the error was harmless beyond a reasonable doubt because the evidence of defendant's guilt was overwhelming. *Id.* at 89-90. Accordingly, the trial court did not err in denying defendant's motion for a new trial.

Next, defendant argues that he must be resentenced because the trial court sentenced him in violation of *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972). We agree. Defendant was sentenced to thirty to forty years' imprisonment for his conviction of assault with intent to murder, MCL 750.83; MSA 28.278, as a four-time habitual offender, MCL 769.12; MSA 28.1084. A sentence imposed upon an habitual offender with too short an interval between the minimum and maximum terms frustrates the intent of the indeterminate sentence act; any sentence which has a minimum which exceeds two-thirds of the maximum is improper. *People v Thomas*, 447 Mich 390, 392; 523 NW2d 215 (1994); *Tanner*, *supra* at 690. Therefore, we vacate the sentence on this charge and remand for resentencing consistent with our Supreme Court's holding in *Tanner*.

Affirmed, but remanded for resentencing. We do not retain jurisdiction.

/s/ Gary R. McDonald

/s/ Janet T. Neff

/s/ Michael R. Smolenski

¹ In *Nevers*, *supra* at 372-373, the Sixth Circuit held that the Michigan Supreme Court's application of the harmless error test in *Budzyn* was unreasonable because of the specific facts and circumstances of that case, including the evidence presented and the nature of the extraneous information received by the jury. The Sixth Circuit also criticized the fact that no evidentiary hearing had been held to determine the actual effect of the extraneous information on the jury. *Id.* at 373.