

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH WELLS STAPLETON,

Defendant-Appellant.

UNPUBLISHED

May 20, 2008

No. 264175

Oakland Circuit Court

LC No. 04-197438-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,¹ 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 impermissible extrinsic evidence affected the jury's verdict and whether the trial court impermissibly considered facts not proven beyond a reasonable doubt when scoring the sentencing guidelines. We affirm.

I. FACTS

On November 20, 2002, defendant and co-defendant Lance Allen Schmitt² 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 Schmitt moved behind Richard while the other man hit Richard in the face. Richard fell to the ground, and defendant and Schmitt 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 disk removal

¹ *People v Stapleton*, unpublished opinion per curiam of the Court of Appeals, issued July 31, 2007 (Docket No. 264175).

² Defendant and co-defendant Schmitt were tried together. Although not consolidated for appellate consideration, the appeal in this case and that of co-defendant Schmitt were submitted together for consideration by this panel.

on January 27, 2004. On March 4, 2004, Richard died of a pulmonary embolism—a blood clot that blocked the lungs. The medical examiner discovered a blood clot in Richard’s left 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 clot occurred as a result of the healing process from Richard’s back injury and determined that Richard’s death was a homicide.

After Richard died, defendant was charged with second-degree murder.³ The trial focused on causation. Physicians testified that disc damage could occur contemporaneously or later if a bone was broken during a beating. Richard’s neurosurgeon opined that the assault was the source of the blood clot in Richard’s leg, but he acknowledged that he had no proof of that assertion. The medical examiner opined that Richard’s herniated disc resulted from both the assault and preexisting degeneration in Richard’s spine.

The jury deliberated for several days before returning a verdict of guilty. Before sentencing, the trial court received a letter from the person who served as Juror 9 on defendant’s jury.⁴ The letter stated in part:

Our lengthy deliberating began off of the subject because some were trying to convince the others that there was Reasonable Doubt that the Defendant was Guilty. We wasted most of two days going back and forth on that. You also might be interested to know that two of the jury members were living with spinal disc problems, one had had a torn rotator cuff and had surgery, another one had suffered for four years from a 35 ft fall and had finally elected to have spinal surgery, and one person’s mother and sister died from blood clots following back surgery and one juror’s doctor said that pushing wasn’t stressing on a bad spine, but pulling was.

Our decision-making breakthrough came when we took a copy of your **Instructions to the Jury**, and copied some relevant items to the flip chart we found in your Jury Room. We put one pertinent charge on each page. We ended up with three large, handwritten pages.

* * *

As we spent most of the day on that project [copying instructions onto the flip chart], some formerly Not Guilty people began to see that the charges really left little room for any decision but Guilty.

³ On February 5, 2003, defendant pleaded guilty to assault with intent to do great bodily harm less than murder, MCL 750.84, and on March 5, 2003, was sentenced to serve a term of three years’ probation. Defendant’s assault conviction was vacated at the time of sentencing in this case.

⁴ Defendant and co-defendant Schmitt had separate juries.

Nothing in the record indicates that defendant sought relief from the trial court based on this letter.

At sentencing, defendant objected to the trial court's scoring of several offense variables, but did not object on the ground that the trial court's scoring was based on facts not found by the jury beyond a reasonable doubt. The trial court sentenced defendant to 20 to 40 years in prison.

II. INFLUENCE ON JURY VERDICT

Defendant first contends that the extrinsic evidence described in the letter Juror No. 9 sent to the trial court improperly influenced the jury. We disagree.

A. Standard of Review

Defendant failed to raise this issue before the trial court; therefore, it has not been properly preserved for appellate review, *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994), and will be reviewed for plain error affecting substantial rights, *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, defendant must establish that: (1) an error occurred; (2) the error was plain; (3) and the plain error affected defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003), citing *Carines*, *supra* at 763.

B. Analysis

A defendant in a jury trial has a right to a fair and impartial jury. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). During deliberations, jurors may only consider evidence presented to them in open court. *Id.* Traditionally, juror testimony is not admissible to impeach a verdict. *Id.* at 91; *People v Fletcher*, 260 Mich App 531, 539; 679 NW2d 127 (2004). An extraneous influence on the verdict is the only exception to this rule. *Fletcher*, *supra* at 539. When the jury considers extraneous facts that were not introduced in evidence, the defendant is denied his Sixth Amendment rights of confrontation, cross-examination, and assistance of counsel. *Budzyn*, *supra* at 88.

In order to establish that the extraneous influence constitutes error requiring reversal, defendant must prove that the jury was exposed to an extraneous influence and that this extraneous influence created a real and substantial possibility that it could have affected the jury's verdict. *Budzyn*, *supra* at 88-89; *Fletcher*, *supra* at 540. Extraneous influences are usually external influences or inherent juror misconduct. *Id.* at 541. One juror's personal experience with a doctor and the experience of another juror's family members regarding blood clots after surgery are part of one's everyday experience and do not constitute extraneous influences. The *Budzyn* Court considered the following jury incidents: rumors that the city of Detroit was preparing for a riot if the defendants were acquitted, the jurors' act of viewing the film *Malcom X* during a recess, and information not introduced at trial that the defendants had been members of a task force purported to abuse young African-American men. *Budzyn*, *supra* at 92-93. Considering all three factors, the Court held that there was a real and substantial possibility that the influences affected the verdicts. *Id.* at 100. Unlike the events in *Budzyn*, the

jurors in the instant case did not consider anything outside their normal everyday experience. Therefore, we conclude that there was no extraneous influence in this case.

But even if we were to conclude otherwise, defendant's argument still fails because he has not demonstrated "a real and substantial possibility," *Budzyn, supra* at 89, that the extrinsic evidence, while related to a material aspect of the case, prejudiced the verdict. In determining whether such prejudice occurred, a court may consider: (1) whether the jury actually received the evidence, and if so how; (2) the length of time the evidence was available to the jury; (3) the extent to which the jury discussed and considered the evidence; (4) whether the evidence was introduced before the jury reached a verdict, and if so, at what point in the deliberations; and (5) any other matter that would be relevant to the issue. *Id.* at 89 n 11, quoting *Marino v Vasquez*, 812 F2d 449, 506 (CA, 9 1987). The letter from Juror 9 indicates that the jury received the extrinsic evidence via a statement from a juror and seems to indicate that the evidence was introduced before the jury reached a verdict. However, the letter contains no information regarding the length of time the evidence was available to the jury, or the extent to which the jury discussed and considered the evidence, if at all. Defendant's assertion that the jury relied on the physician's statement to conclude that the beating Richard received resulted in the injury that necessitated the surgery, and to reject defendant's assertion that Richard injured his back by pushing his wife's car, is based on speculation. Moreover, defendant's assertion is implausible in light of the undisputed evidence that Richard's surgery had been scheduled at the time he pushed his wife's car. Defendant has failed to carry his burden of establishing that the extrinsic evidence created a real and substantial possibility that it affected the verdict. *Id.* at 89.

III. SENTENCING

Defendant also argues that the trial court violated his due process rights when it imposed his sentence in violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Again, we disagree.

A. Standard of Review

Defendant failed to object at sentencing; therefore, this issue is unpreserved, *People v Sexton*, 250 Mich App 211, 227; 646 NW2d 875 (2002), and will be reviewed for plain error, *Carines, supra* at 762-763. We review de novo questions of constitutional law, including this Sixth Amendment challenge. *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006).

B. Analysis

Blakely provides that any fact, other than that of a prior conviction, that increases a criminal sentence beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Blakely, supra* at 301, applying *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000). The Michigan Supreme Court recently reaffirmed that *Blakely* does not apply to Michigan's indeterminate sentencing system. *Drohan, supra* at 163-164; *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004). The maximum sentence in Michigan is set by statute—not determined by the trial court. Therefore, Michigan's sentencing guidelines create a range within which the trial court must impose a minimum sentence, and the trial court's sentence will always fall within the range that the jury's

verdict authorizes. *Drohan, supra* at 161. Accordingly, defendant's argument is misplaced, and resentencing is not required.

Affirmed.

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