S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 31, 2006
v	No. 253609 Oakland Circuit Court
ROBERT V. TUSCANO, Defendant-Appellant.	LC No. 03-189148-FH

Before: P.J. Talbot, and White and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of involuntary manslaughter, MCL 750.321. Defendant was sentenced to concurrent sentences of seven to fifteen years' imprisonment. We affirm.

I

The basic facts are not in dispute. In the early morning hours of November 12, 2002, a motor vehicle crash involving four vehicles occurred on I-75 resulting in the deaths of Adolph Jones, Jr. and Sacha Gomez. Witnesses testified that immediately before the accident occurred, a Saturn was proceeding in the center lane on southbound I-75 with the flow of traffic until its front hood flew open obscuring the view of the driver. When the Saturn slowed down, the neighboring vehicles also slowed down, including the vehicle to its immediate right, which signaled that it would allow the Saturn to cross-over to the shoulder of the road. Jones and Gomez were observed riding alongside the Saturn in a Bonneville and talking to the driver to assist. Meanwhile, a small group of cars, including defendant's vehicle, were approaching from behind. Defendant was observed weaving from lane to lane and tailgating before his vehicle suddenly increased in speed as it proceeded up a hill. When defendant descended, he approached the group of cars near the Saturn and struck the rear of the Bonneville in which Jones and Gomez were riding. The impact significantly crushed the Bonneville and caused the Bonneville to strike two other vehicles; additionally, the fuel tank of the Bonneville ruptured and the vehicle become completely engulfed in flames.

Witnesses testified that defendant appeared intoxicated at the scene. When the investigating police officer approached defendant, he detected a strong odor of alcohol and described defendant as dazed with glassy red eyes who also slurred his speech. After defendant was unable to satisfactorily perform the field-sobriety tests, the police officer arrested defendant

for drunk driving. Defendant refused to take a breathalyzer test at the scene, preferring to have a blood test performed at the hospital. 2-1/2 hours after the accident, defendant's blood-alcohol content measured 0.23.

After the prosecution's case-in-chief, the trial court denied defendant's motion for a directed verdict. The trial court also denied defendant's motion to preclude the prosecution from commenting on the defense expert's volunteered testimony referencing police estimates of defendant's driving speed during closing argument.[1] Thereafter, the jury, after deliberating for a little less than 2 days total, sent a note to the trial court indicating it was deadlocked. The parties agreed that the trial court should instruct the jury to continue its deliberations, and the trial court read CJI2d 3.12. The jury resumed its deliberations and when the jury was excused for the day, it had not reached a verdict. The next afternoon, the jury again sent a note to the trial court indicating it remained deadlocked:

> We are still deadlocked further than yesterday. We believe that we have one juror that will not take the evidence into account. We have been working with the one juror since late Monday. We spent time working with him as well as letting him try to convince us. We believe that he discounts the evidence in favor of 'possible doubt.' When we point this out to him, he disagrees.
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> Some of the jurors have already completely given up the cause. We have spent all our time since late Monday with this one juror. We are going nowhere. We are very, very frustrated and see no end insight [sic].

The trial court denied defendant's motion for a mistrial and over defendant's objection, the trial court instructed the jury to continue its deliberations. The jury deliberated for the remainder of the day from 3:30 p.m. to 5:00 p.m. The next day the jury resumed its deliberations and, in the midmorning, the jury reached a verdict, convicting defendant of two counts of involuntary manslaughter. Following defendant's sentencing, the trial court denied defendant's motion for resentencing. Defendant now appeals.

II

Generally, this Court reviews the trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Bulmer*, 256 Mich App 33, 34; 662 NW 117 (2003). However, whether a defendant's constitutional right to confrontation is violated presents a question of law that this Court reviews de novo. *People v Smith*, 243 Mich App 657, 682; 625 NW2d 46 (2000). Similarly, this Court reviews claims of prosecutorial misconduct de novo to determine whether the defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). This Court will not find error requiring reversal unless the prejudicial effect of the prosecutor's comments could not have been cured by a timely instruction. *People v Callon,* 256 Mich App 312, 329; 662 NW2d 501 (2003); *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

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[1] No police expert testified to defendant's estimated driving speeds.

However, claims of coerced verdicts are reviewed on a case-by-case basis. All facts and circumstances, as well as the language used by the court, must be considered in making the determination. *People v Malone*, 180 Mich App 347, 352; 447 NW2d 157 (1989).

The denial of a motion for mistrial is reviewed for an abuse of discretion, *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). The decision to shackle a defendant is also within the sound discretion of the trial court, and this Court reviews the decision for an abuse of discretion under the totality of the circumstances. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996).

This Court also reviews the sources and types of information a trial court considers when imposing a sentence for an abuse of discretion. *People v Albert*, 207 Mich App 73, 74; 523 NW2d 825 (1994). However, the construction or application of statutory sentencing guidelines presents a question of law which is reviewed de novo. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). This Court reviews a trial court's factual findings at sentencing for clear error. MCR 2.613(C); *Mack, supra* at 125, and the scoring of a sentencing guidelines variable is reviewed to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supported a particular score. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). We also review the trial court's response to a claim of inaccuracies in the PSIR for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003).

III

Defendant argues that the prosecutor's rebuttal argument was error because the prosecutor improperly referenced testimonial hearsay when it commented on the defense expert's volunteered testimony, and thus denied him his right of confrontation and to a fair trial. We disagree.

A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence in the case. *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992). "[T]estimonial hearsay is not admissible against a criminal defendant unless the declarant is unavailable to testify at trial and the defendant had the opportunity to cross-examine the declarant." *People v Lonsby*, 268 Mich App 375, 377; __ NW2d __ (2005), citing *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Assuming, but not deciding, that by referring to the defense expert's testimony which noted that police estimated defendant was driving at speeds between 80 m.p.h. and 82 m.p.h., the prosecution relied on impermissible hearsay in asserting that defendant was grossly negligent, any error was harmless.

The difference between involuntary manslaughter and negligent homicide is the degree of culpability, or the difference in mens rea. *People v McKee*, 15 Mich App 382, 385; 166 NW2d 688 (1968). Negligent homicide, MCL 750.324, involves ordinary negligence and involuntary manslaughter requires grossly negligent conduct. See *People v Schaefer*, 473 Mich 418, 438; 703 NW2d 774 (2005); *People v Herron*, 464 Mich 593, 604; 628 NW2d 528 (2001).

Here, the jury heard ample evidence, and not just the comments about the defense expert's volunteered testimony, that defendant's conduct constituted gross negligence. John Holmes testified that, immediately before he approached the group of cars surrounding the Bonneville, defendant's driving speed was 85 m.p.h. or 90 m.p.h. Defendant was also observed tailgating another vehicle. In addition, Anthony Butterfield testified he observed defendant drive past him between 90 m.p.h. and 100 m.p.h. Butterfield also had to swerve to avoid being hit by defendant's vehicle. Lester Zimmerman testified he observed defendant swerve from lane to lane without using his turn signals. Given that eyewitness testimony actually reported defendant's driving speed higher than the police estimations and also established defendant's erratic driving immediately before the accident, any error in referencing the defendant's expert's testimony was not outcome determinative. Thus, we reject defendant's argument that, but for the prosecution's argument, the jury may have considered the lesser offense of negligent homicide. Defendant has not established he was denied a fair trial on the basis of prosecutorial misconduct.

Next, defendant contends the trial court improperly instructed the jury to continue deliberating after announcing it was deadlocked. We disagree.

A verdict in a criminal case must be unanimous. MCR 6.410(B); *People v Booker*, 208 Mich App 163, 169; 527 NW2d 42 (1994). Under MCR 6.420(B) and (C), the trial court "may" declare a mistrial when a jury is unable to agree unanimously on the verdict. Because trial courts should consider reasonable alternatives before declaring a mistrial, *People v Hicks*, 447 Mich 819, 841; 528 NW2d 136 (1994), the giving of an instruction such as CJI2d 3.12 is an appropriate response to a jury's indication that it is deadlocked. See, e.g., *People v Sullivan*, 392 Mich 324, 335, 341; 220 NW2d 441 (1974); *People v Larry*, 162 Mich App 142, 149; 412 NW2d 674 (1987). The trial court may choose to issue supplemental instructions to the jury and require it to deliberate further so long as the trial court's instructions or actions would not cause "a juror to abandon his conscientious dissent and defer to the majority solely for the sake of reaching agreement." *People v Hardin*, 421 Mich 296, 314; 365 NW2d 101 (1984).

We find no abuse of discretion on the record before us. When the jury initially expressed its inability to reach a verdict, the jury had deliberated less than two full days. After deliberating 1-1/2 days more, the trial court appropriately read CJI2d 3.12 to the jury, clearly stating that while the jurors were to discuss the matter frankly and openly, no juror was to abandon his or her honest beliefs simply for the sake of reaching a verdict. The fact that the foreperson informed the trial court it was divided 11 to 1 is not dispositive. Any concern of a coerced verdict or a lack of neutrality was eliminated when the trial judge expressly informed the jury that his instructions were not "an endorsement of any particular position that was placed in [the jury foreperson's] note." Further, defendant has presented no evidence demonstrating that the trial court's rationale for denying the motion was unreasonable. As stated by the trial court, it was just as plausible that the 11 jurors, and not the one, misapprehended the meaning of "reasonable doubt." To ensure that each juror understood the meaning of the term, the trial court reread its previous instructions in their entirety, as well as CJI2d 3.12. The trial spanned over three weeks with nine days of testimony including twenty-six witnesses, eighty exhibits and five possible charges against defendant. The jury instructions covered over forty transcript pages, and the jury spent less than four days deliberating, in total. The jurors, who were polled after rendering the verdict in open court, each indicated that they had found defendant guilty of involuntary

manslaughter. The trial court did not abuse its discretion by denying defendant's motion for mistrial.

Next, defendant argues that the trial court deprived him of his right to counsel during a critical stage of the proceedings when defendant was shackled to the jury box during sentencing. Again, we disagree.

The Sixth Amendment safeguards the right to counsel at all critical stages of the criminal process for an accused who faces incarceration. *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004). Sentencing is a critical stage of a criminal proceeding. *People v Evans*, 156 Mich App 68, 70; 401 NW2d 312 (1986). The complete denial of counsel at a critical stage of a criminal proceeding is structural error rendering the result unreliable and requiring automatic reversal. See *Gideon v Wainwright*, 372 US 335, 344-345; 83 S Ct 792; 9 L Ed 2d 799 (1963); *People v Duncan*, 462 Mich 47, 51-52; 610 NW2d 551 (2000).

Defendant has not established a deprivation of counsel. Defendant does not dispute the trial court's findings that he was neither bound nor gagged; that he was the only person in the jury box; that he was in the same room with counsel, or that counsel had the ability to "lean over and talk to defendant at any time in each other's ears just as if they were sitting at the defense table." Further, defendant has not alleged specific harm. Defendant's complaints that the use of restraints *may* interfere with his Sixth Amendment right to counsel are too general and abstract to establish a constitutional violation. Because defendant has not specified the exact information he may have wished to disclose to counsel, defendant cannot establish a deprivation. *Council of Orgs & Others for Educ About Parochiaid v Governor*, 455 Mich 557, 568; 566 NW2d 208 (1997) ("Constitutional questions are not to be dealt with in the abstract.") The trial court's finding that there was no physical separation between defense counsel and defendant was not clearly erroneous.

Defendant next argues that the cumulative effect of sentencing errors denied him the right to a fair proceeding, entitling him to resentencing. We find no error.

Defendant first asserts the prosecution improperly advanced arguments at sentencing to penalize defendant for pursuing his right to a jury trial. We disagree. While a defendant has the constitutional right to a trial and should not be penalized for exercising that right, *People v Mosko*, 190 Mich App 204, 211; 475 NW2d 866 (1991), we find no merit to defendant's claim. As discussed below, defendant's OV variables were properly scored, and his sentences are within the guidelines. Further, to the extent that defendant asserts that the prosecution made baseless arguments that could not be impeached or were not proven beyond a reasonable doubt at trial, Michigan's sentencing scheme recognizes that the evidentiary rules governing trial procedure and sentencing are different. *Fisher, supra* at 577. More specifically, under proper circumstances, a sentencing court may consider facts not found or considered by the jury in imposing a defendant's minimum sentence. See *People v Claypool*, 470 Mich 715, 730; 684 NW2d 278 (2004), citing *Blakely v Washington,* 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Finally, given that the trial court expressly stated on the record that it was not punishing defendant for pursuing his right to a jury trial, defendant's claim fails.

Next, defendant challenges the trial court's practice of preventing supportive character witnesses from testifying at sentencing. We find no abuse of discretion. Defendant cites no

authority requiring a sentencing judge to allow testimony from character witnesses. Further, the proposed character witnesses testified extensively regarding defendant's character at trial. The trial court was in receipt of numerous letters from defendant's supporters, including one from a proposed character witness. Finally, defendant fails to specify how the witnesses' statements would have affected his sentence. Given that defendant's sentences are within the guidelines, his claim is without merit.

In a related argument, defendant also argues the trial court erred by permitting persons who did not qualify as "victims" under the crime victim's rights act, MCL 780.751 *et seq.*, to speak on behalf of the deceased. We disagree. A trial court may consider, for purposes of sentencing, the statements of persons who do not meet the definition of a victim under MCL 780.752. *Albert, supra* at 74. "[A] sentencing court is afforded broad discretion in the sources and types of information to be considered when imposing a sentence." *Id.* Nor has defendant established bias or prejudice on the basis of the additional statements. As this Court stated previously, "[w]e are confident that trial judges of this state are able to separate the evidence at trial from the subjective requests of victims or their family members as stated in letters submitted to the court." *People v McAllister*, 241 Mich App 466, 476; 616 NW2d 203 (2000) (footnote omitted).

Next, defendant, citing *Blakely, supra,* argues he is entitled to resentencing because the jury did not find beyond a reasonable doubt the factors underlying OV's 5, 9 and 17 at ten points each, i.e., that there was serious psychological injury to a member of a victim's family requiring professional treatment, that there was more than one person placed in danger of injury or loss of life as a victim, that defendant showed a wanton or reckless disregard for the life or property of another person. We disagree.

In *Claypool, supra* at 730 n 14, the Michigan Supreme Court noted that *Blakely* is inapplicable to Michigan's sentencing system. In *People v Drohan*, 264 Mich App 77, 89 n 4, 689 NW2d 750 (2004), this Court rejected the argument raised here again by defendant that *Claypool* is mere dicta and not binding on this Court. Under MCR 7.215(C)(2), *Drohan* is binding precedent, irrespective of the Supreme Court's recent decision to grant leave in *Drohan*,[2] to consider the sole issue whether *Blakely* and *United States v Booker*, 543 US 220, 125 S Ct 738; 160 L Ed 2d 621 (2005) apply to Michigan's sentencing scheme. See *Straman v Lewis*, 220 Mich App 448; 559 NW2d 405 (1996) (a Michigan Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals).

We also find that the record evidence adequately supported the trial court's scoring decisions. The trial court did not err in assessing ten points under OV 5 because "serious psychological injury requiring professional treatment occurred to a victim's family [member] . . . ." MCL 777.35(1)(a). The evidence supporting this score originated from Adolph Jones, Sr. who stated he was receiving professional treatment to cope with the loss of his son. The trial court correctly scored OV 5 at ten points.

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[2] See *People v Drohan*, 472 Mich 881; 693 NW2d 823 (2005).

Nor did the trial court err in assessing ten points under OV 9. Under MCL 777.39, a trial court must score OV 9 at ten points if it determines that two to nine victims were "placed in danger of injury or loss of life as a victim." Victims include bystanders who render aid. See *Knowles*, *supra* at 62. Here, nearby drivers at the scene were in danger of injury immediately before the accident as a result of defendant's erratic driving and speeding. Two or more victims were in danger after the accident on account of (1) the Bonneville striking two other vehicles before it came to a stop, and (2) the dangerous situation created from a burning vehicle on the highway. The trial court correctly scored OV 9 at ten points.

Finally, the evidence supported the assessment of ten points for OV 17 because the offense involved the operation of a vehicle, MCL 777.22(1), and the evidence demonstrated a wanton or reckless disregard for the life or property of another person. MCL 777.47.

Next, defendant raises several claims of error concerning alleged inaccuracies within the PSIR. Defendant concedes that the trial court may not have been misled by the inaccurate information as it presided over defendant's trial. However, defendant nonetheless asserts that he will be prejudiced if the Michigan Department of Correction (MDOC) relies on the inaccurate information in administering defendant's sentence.

Before a person convicted of a felony is sentenced, the probation officer must prepare a written PSIR for the court's use. MCL 771.14(1); MCR 6.425(1); *People v Johnson*, 203 Mich App 579, 587; 513 NW2d 824 (1994). A presentence report is presumed to be accurate and may be relied upon by the trial court unless effectively challenged by the defendant. See *People v Callon, supra* at 332. "It is incumbent on a defendant . . . to invoke his right to a hearing on a contested fact at sentencing and, thus, [request] the need for an evidentiary hearing with a finding by the trial court based upon the preponderance of evidence." *Id.* at 333-334, citing *People v Ewing* (*After Remand*), 435 Mich 443, 472, 458 NW2d 880 (1990) (Boyle, J.); *People v Walker*, 428 Mich 261, 268; 407 NW2d 367 (1987). If the trial court finds that challenged information in the PSIR is inaccurate or irrelevant, that finding must be made part of the record and the information must be corrected or stricken from the report. MCL 771.14(6); MCR 6.425(D)(3)(a); *People v Hoyt,* 185 Mich App 531, 534; 462 NW2d 793 (1990).

We find defendant's challenges to certain biographical information contained within the PSIR to be without merit. Contrary to defendant's assertion, a PSIR need not contain exhaustive information under the court rules. MCR 6.425(A) requires that the report be "succinct." Here, the challenged information was either supported by the record evidence or fully outlined in the body of the report. Accordingly, the fact that the PSIR does not include the underlying circumstances of defendant's substance abuse history or driving record is not violative of MCR 6.425(A).

Finally, defendant challenges several statements in the "Agent's Description of the Offense," arguing that the "report's abbreviated 'version' of the offense leads and directs any reader to reach conclusions unsupported by the record," contrary to MCR 6.425(A)(2).

Defendant accurately states that MCR 6.425(A)(2) requires a complete description of the offense and the circumstances surrounding it. However, it is well established that a PSIR "may include information about a defendant that was not admissible nor admitted at defendant's trial or plea including hearsay, character evidence, prior convictions or alleged criminal activity for

which defendant was not charged or convicted, and the victims' version of the offense." *People v Fleming*, 428 Mich 408, 418; 410 NW2d 266 (1987).

Here, given our review of the alleged inaccuracies, we conclude defendant has not shown that the agent's description is inaccurate. The evidence supported the agent's description and because defendant only seeks to add explanatory information better suited to the section entitled "Defendant's Description of the Offense," the agent's description is not violative of MCR 6.425(A). The trial court did not abuse its discretion in denying defendant's motions for resentencing and correction of the PSIR.

Affirmed.

/s/ Michael J. Talbot
/s/ Helene N. White
/s/ Kurtis T. Wilder