

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 9, 2012

v

MUQARIBU AUNDUNAE MILES,

Defendant-Appellant.

No. 302497
Jackson Circuit Court
LC No. 09-006113-FH

Before: BORRELLO, P.J., and O'CONNELL and TALBOT, JJ.

O'CONNELL, J. (*concurring in part and dissenting in part*).

I concur with my colleagues' analyses of the ineffective assistance of counsel issue and of the sentencing issue. I disagree, however, with their analysis of the constitutional error that occurred when the jury in this case received extraneous evidence. Because the record demonstrates a real and substantial possibility that the accidental disclosure to the jury of defendant's prior criminal record could have affected the jury's verdict, I would reverse the trial court's decision and remand for a new trial.

I. RELEVANT FACTS

Defendant was charged as an habitual offender, fourth offense, MCL 769.12, with first-degree home invasion, MCL 750.110a(2), felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b.

On the first day of trial, the prosecutor informed the trial court that she had certified copies of defendant's prior felony convictions and that the copies were marked as "People's Exhibit 1." However, the prosecutor indicated that she and defense counsel agreed to stipulate that defendant had a prior felony conviction for the felon in possession charge so that defendant's extensive criminal record would not be placed before the jury. At no time during the course of trial was "People's Exhibit 1" received by the trial court as an exhibit in the case.

During jury deliberations, the jury requested to see the exhibits. Unfortunately, defendant's criminal history was accidentally submitted to the jury. All parties to this litigation agree that it was error to submit proposed "People's Exhibit 1" to the jury.

II. ISSUE

The central question before this panel concerns whether this jury could render a fair and impartial verdict after reviewing defendant's extensive criminal history. Stated another way, is the error in submitting "People's Exhibit 1" to the jury harmless beyond a reasonable doubt. For the reasons stated below, I have a reasonable doubt that this jury could render a fair and impartial verdict after reviewing defendant's criminal history.

III. ANALYSIS

The trial court based its denial of defendant's motion for a new trial on its determination that the jurors' exposure to defendant's criminal record did not affect their deliberations. According to the trial court, two factors demonstrated that the jurors were unaffected by the criminal record: first, the jurors' testimonies indicated they did not consider the prior record in their verdict, and second, if the jurors had considered the prior record, they would have found defendant guilty on the firearms counts. The trial court's conclusion is inconsistent with the controlling case law. Under *People v Budzyn*, 456 Mich 77; 566 NW2d 229 (1997), a jury's exposure to extraneous facts is a constitutional error. *Id.* at 89.

The trial court relied on the jurors' assertions that their exposure to defendant's criminal record had not affected their verdict. Like the trial court, my colleagues accept the jurors' belated individual assessments of whether they considered the erroneously submitted criminal record. However, the jurors made those assessments nearly a year after the trial, following publication of a local newspaper article that trumpeted defendant's "long list of previous felony and misdemeanor convictions," and reported the prosecutor's view that defendant's criminal history "did not bias [the jury's] finding." Given the unique facts of this case, I find it improper to place such heavy reliance on the jurors' subjective assessments of the effect of the criminal record on their deliberations.

In my view, defendant established a real and substantial possibility that his criminal record *could have* affected the jury's verdict. See *Budzyn*, 456 Mich at 88 ("defendant must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict"). Defendant met this burden by demonstrating that the criminal record was substantially related to a material element of the home invasion charge and by demonstrating that there was a direct connection between the criminal record and the adverse verdict. One of the material elements of the home invasion charge was whether defendant committed (or intended to commit) an assault. See MCL 750.110a(2). Defendant's prior criminal record indicated that defendant had been convicted of at least eight prior felonies, including some offenses involving malicious behavior. At least two jurors testified that they found defendant's prior criminal record to be fairly extensive; other jurors testified that they heard discussions of the prior record. In particular, at least one juror thought the prior record included a felonious assault conviction and possibly a firearm offense. This information could have affected the jurors' consideration of whether defendant committed an assault during the home invasion.

Although several of the jurors testified that the jury had reached an initial verdict on the home invasion count before discussing defendant's prior criminal record, several also testified that they understood they were free to reconsider their decision at any time before delivering the verdict in open court. To hold that the jury's preliminary decision on the home invasion count

was unaffected by their later exposure to defendant's prior criminal record would be to ignore the jury's prerogative to reconsider their initial votes on the home invasion charge during their discussions on the other charges.

In *Budzyn*, our Supreme Court reversed a conviction on the ground that the jurors' exposure to extraneous influences may have undermined their ability to be impartial. 456 Mich at 96, 97, 98. The *Budzyn* Court determined that when the extraneous facts at issue have a direct and rational connection to the adverse verdict, reversal is warranted. *Id.* at 99. In this case, as in *Budzyn*, the jury's exposure to defendant's prior criminal record may have affected the jurors' inclination to remain impartial about the home invasion charge and their inclination to reconsider their initial votes. Accordingly, the record presents a reasonable, objective possibility that the jury's exposure to defendant's prior record affected their ultimate verdict on the home invasion count.

Once defendant fulfilled his initial burden of establishing a real and substantial possibility that the prior record could have affected the jury's verdict, the burden should have shifted to the prosecution to demonstrate that the exposure to the prior record was harmless beyond a reasonable doubt. *Budzyn*, 456 Mich at 89. The trial court did not expressly engage in this step of the analysis, having apparently found as a matter of law that no constitutional error occurred. If the trial court had engaged in the burden-shifting analysis, the prosecution would have had to establish either that the prior record was duplicative of evidence admitted at trial, or that there was overwhelming evidence of defendant's guilt on the home invasion count. *Id.* at 89-90.

On appeal, the prosecution does not address duplicative evidence or evidence of defendant's guilt. Instead, the prosecution argues that the error was harmless on the ground that the jurors testified they were unaffected by the criminal record. This testimony does not render the constitutional error harmless. First, the testimony indicates only that the jurors were unaffected by the criminal record when they took their preliminary vote on the home invasion count. Assuming that the jurors received the criminal record after the preliminary vote, the jurors may have decided that the criminal record substantiated their preliminary decision. As the jury continued deliberation to impasse on the other counts, the criminal record may have caused one or more jurors to suppress reasonable doubt that otherwise may have altered their preliminary vote on the home invasion count. I believe that when the constitutional right to an impartial jury is at stake, reversal is required if there is reasonable likelihood that exposure to the criminal record interfered with even one juror's ability to remain impartial during the entire deliberations. See US Const, Am VI; Const 1963, art 1; Cf. *Budzyn*, 456 Mich 88 (defendant has a right to a fair and impartial jury); *Groppi v Wisconsin*, 400 US 505, 509; 91 S Ct 490; 27 L Ed 2d 571 (1971) (Due Process Clause guarantees a right to an impartial jury).

My colleagues disagree with me. They conclude that the fact the jury knew defendant was a convicted felon neutralizes the danger that his criminal record would affect the jurors' decision-making process. This conclusion disregards the longstanding rule that a trial court must accept a stipulation to a defendant's prior felony conviction. *Old Chief v United States*, 519 US 172, 191-192; 117 S Ct 644; 136 L Ed 2d 574 (1997); *People v Swint*, 225 Mich App 353, 377-

379; 572 n2 666 (1997). The rule precludes disclosure to the jury of the nature of the underlying conviction. *Old Chief*, 519 US at 191-192.¹ This rule would be meaningless if the subsequent disclosure of a defendant's entire criminal record is deemed a harmless error.

Moreover, the transcripts in this case demonstrate that the evidence of defendant's prior criminal record was not duplicative of evidence received at trial. The trial evidence established only that defendant had a prior felony conviction and misdemeanor convictions. Nothing in the evidence indicated the number or nature of his prior convictions. In contrast, defendant's prior criminal record gave the jury specific information about both the number and nature of his convictions, i.e., that he had at least eight prior convictions, that some of the convictions were for aggressive or resistant behavior, and that some involved firearms. At the post-trial evidentiary hearing, at least two jurors remarked that defendant's prior record was lengthy. This specific information about defendant's convictions was not duplicative of the general information the jury had received at trial.

I fail to comprehend the foundation for my colleagues' assertion that the sole consequence of the disclosure of defendant's criminal record was the effect, if any, on the deliberations of the weapons offenses. In my view, the jury's inability to reach a verdict on the weapons offenses suggests that at least one juror found defendant's testimony credible when he denied having a gun. If the jurors had not seen defendant's criminal record of malicious behavior, at least one juror may have found defendant's description of the home invasion more credible. Defendant denied that he purposefully entered the screened-in porch and denied that he assaulted or intended to assault anyone on the night in question. The jury's exposure to defendant's prior criminal record could have affected their determination of the likelihood that he committed home invasion.

According to *Budzyn*, the analysis in this appeal should focus on whether there is "a direct connection between the extrinsic evidence and the *adverse* verdict." 456 Mich at 88 (emphasis added). In this case, the critical inquiry is whether defendant's prior record could have affected the jury's home invasion verdict, regardless of whether it could have affected their inability to reach verdicts on the weapons counts. The inquiry compels the conclusion that a constitutional error occurred, that the error was not harmless, and that the trial court abused its discretion in denying defendant's motion for a new trial.

I would reverse the conviction and remand for a new trial.

/s/ Peter D. O'Connell

¹ The United States Supreme Court explained,

there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant. That risk will vary from case to case . . . but will be substantial whenever the official record offered by the Government would be arresting enough to lure a juror into a sequence of bad character reasoning. [*Old Chief*, 519 US at 185.]