

No. SC90125

*In the
Missouri Supreme Court*

STATE OF MISSOURI,

Respondent,

v.

MICHAEL MOORE,

Appellant.

**Appeal from Montgomery County Circuit Court
Twelfth Judicial Circuit, Division One
The Honorable Kelly Broniec, Judge**

RESPONDENT'S SUBSTITUTE BRIEF

**CHRIS KOSTER
Attorney General**

**DORA A. FICHTER
Assistant Attorney General
Missouri Bar No. 51756**

**P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
dora.fichter@ago.mo.gov**

**ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI**

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JURISDICTIONAL STATEMENT

This is an appeal from a conviction for the Class D felony of failure to return to confinement, § 575.220, RSMo 2000, obtained in the Circuit Court of Montgomery County, for which appellant was sentenced, as a prior and persistent offender, to four years in the Missouri Department of Corrections. After an opinion by the Missouri Court of Appeals, Eastern District, this Court granted transfer pursuant to Supreme Court Rule 83.04. Therefore, jurisdiction lies in this Court. Article V, § 10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Michael Moore, was charged in the Circuit Court of Warren County with the Class D felony of failure to return to confinement (L.F. 10). The information alleged that appellant was a prior and persistent offender (L.F. 10). On January 11, 2008, appellant was tried before a jury on a change of venue to Montgomery County, the Honorable Kelly Broniek presiding (Tr. 2-154). Appellant challenges the sufficiency of the evidence. Viewed in the light most favorable to the verdict, the following evidence was adduced at trial:

On December 7, 2006, appellant appeared before the Honorable Keith Sutherland for a probation revocation hearing on a felony driving while intoxicated conviction (Tr. 79, 95). Judge Sutherland revoked appellant's probation and ordered appellant to serve his previously imposed prison sentences of four and seven years (Tr. 82).¹ Appellant was ordered to complete a 120-day treatment program and he had a bed date for February of 2007 (Tr. 79). It was too early to send appellant to the penitentiary on December 7, 2006, because prisoners were normally sent to the Department of Corrections 30 or 35 days before the date of treatment (Tr. 79). Appellant requested a stay of his sentence, but instead of a stay, Judge Sutherland granted him a "furlough" (Tr. 79). A "furlough" meant that appellant would be first booked and processed at the Warren County Sheriff's Department, and then released

¹ The seven year sentence was for the driving while intoxicated and the second sentence was in an unrelated case (Tr. 95).

with an order to return on a certain date to complete his sentence (Tr. 80). The “furlough” meant that appellant had to be booked in custody before he was temporarily released and that he could be prosecuted if he did not return as ordered (Tr. 83).

Judge Sutherland granted appellant a “furlough” until noon on December 27, 2006, and told appellant that the prosecutor could charge him with failure to return to custody if he did not appear on December 27 (Tr. 84-85).

Appellant was processed at the Warren County Sheriff’s Department on December 7, 2006, and was released with orders to return on December 27, 2006 (Tr. 97-98). Appellant did not return on December 27, 2006 (Tr. 99). He did not return to the Sheriff’s Department until January 2, 2007 (Tr. 99). Appellant was delivered to the Department of Corrections on January 3, 2007 (Tr. 99). He received one full day of credit for the time served at the Warren County Jail (Tr. 99).

Appellant called one witness in his defense (Tr. 111). Steward Epps, a warden at the Fulton Reception and Diagnostic Center (FRDC), testified that the FRDC received all prisoners for the Central Region (Tr. 115). Steward Epps stated that an inmate begins to serve his sentence in the Department of Corrections when he is received and accepted by the Department of Corrections and when the Department of Corrections has physical custody of him (Tr. 116).

On cross-examination Mr. Epps testified that when an inmate received jail time credit for time served in a county jail, the Department of Corrections “backdate[d]” his starting date for serving his sentence (Tr. 120). Mr. Epps explained that if an inmate was received on

January 1, but had been given a credit for time served in jail since December 1 of the previous year, the records of the Department of Corrections would indicate that the starting date for serving the sentence was December 1, and that the receiving date was January 1 (Tr. 119-1120). Mr. Epps testified that in appellant's case the record of the Department of Corrections showed that the starting date of appellant's sentence was sometime in March of 2006 and that appellant was received in the Department of Corrections on January 4, 2007 (Tr. 120).

At the close of all the evidence, the jury found appellant guilty of the Class D felony of failing to return to confinement (L.F. 56). On March 17, 2009, the Court of Appeals, Eastern District, issued an opinion reversing appellant's conviction and sentence. State v. Moore, ED No. 91056 (March 17, 2009). Thereafter, respondent sought, and this Court granted, transfer.

ARGUMENT

I.

The trial court did not err in overruling appellant's motion for judgment of acquittal at the close of the evidence because the evidence and the reasonable inferences therefrom were sufficient to permit a reasonable juror to find that appellant failed to return to confinement in that the evidence showed that appellant was serving a sentence to the Missouri Department of Corrections, that he was temporarily permitted to go at large without guard, and that he purposely failed to return to confinement at the Warren County Jail.

In his first point, appellant claims that the evidence was insufficient to support his conviction for the Class D felony of failure to return to confinement because the evidence did not establish that he was serving a sentence when he failed to return to the Warren County Jail (App. Br. 13-22). Appellant maintains that he did not begin serving his sentence until he was physically delivered to the Department of Corrections (as opposed to the county sheriff) and that he cannot be criminally liable for a felony failure to return to confinement at the Warren County Jail when he was sentenced to serve time in the Missouri Department of Corrections (App. Br. 13-22).

Appellate review is limited to a determination of whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt. State v. Crawford, 68 S.W.3d 406, 408 (Mo. banc 2002). In applying this standard, the Court accepts as true all of the evidence favorable to the state, including all favorable

inferences drawn from the evidence, and disregards all evidence to the contrary. Id. Reasonable inferences may be drawn from both direct and circumstantial evidence. State v. Salmon, 89 S.W.3d 540, 546 (Mo. App., W.D. 2002).

Facts

Viewed in the light most favorable to the verdict, the evidence showed the following:

Appellant's probation for a felony driving while intoxicated was revoked on December 7, 2006, and Judge Sutherland ordered appellant to serve his previously imposed prison sentences (Tr. 79, 82, 95). Judge Sutherland granted appellant a "furlough," which meant that appellant would be first booked and processed at the Warren County Sheriff's Department and then released with an order to return on a certain date to complete his sentence (Tr. 80). Unlike a stay, the "furlough" meant that appellant was in custody when he was temporarily released and that he could be prosecuted if he did not return as ordered (Tr. 83).

Judge Sutherland granted appellant a "furlough" until noon on December 27, 2006, and told appellant that the prosecutor could charge him with failure to return to custody if he did not appear on December 27 (Tr. 84-85). Appellant was processed at the Warren County Sheriff's Department and released with orders to return on December 27, 2006 (Tr. 97-98). Appellant did not return on December 27 (Tr. 99). He returned to the Sheriff's Department on January 2, 2007, and was delivered to the Department of Corrections on January 3, 2007 (Tr. 99). Appellant received one full day of credit for the time served at the Warren County Jail (Tr. 99).

Judge Sutherland testified at trial that in his opinion, appellant was serving a sentence on December 27, 2006, and that Warren County was simply holding appellant on behalf of the Department of Corrections (Tr. 85). Judge Sutherland stated that because appellant began to serve his prison sentence, he was entitled to jail time credit for the time spent at the Warren County Jail (Tr. 85).

On cross-examination, Judge Sutherland testified that a literal reading of Section 558.031 RSMo. provided that a person starts serving a sentence in the Department of Corrections when he is delivered to the Department of Corrections (Tr. 90).

On re-direct examination, the state admitted, over appellant's objection, a copy of Section 575.220, RSMo, failure to return to confinement, and read the applicable provisions of the statute to the jury (Tr. 92-93). Judge Sutherland stated that the statute does not specify where appellant had to be present physically in order to be convicted of failure to return to confinement (Tr. 94).

Appellant called Steward Epps, a warden at the Fulton Reception and Diagnostic Center (FRDC), who testified that an inmate begins to serve his sentence in the Department of Corrections when he is received and accepted by the Department of Corrections (Tr. 116). On cross-examination Mr. Epps testified that when an inmate receives jail time credit for time served in a county jail, the Department of Corrections "backdates" his starting date for serving his sentence (Tr. 120). For example, if an inmate was received on January 1 of any given year, but had been given credit for time served in jail since December 1 of the previous year, the records of the Department of Corrections would indicate that the starting date for

-serving a sentence was December 1 and that the receiving date was January 1 (Tr. 119-1120). Mr. Epps stated that in appellant's case the record of the Department of Corrections showed that the starting date of appellant's sentence was in March, 2006, but that he was received in the Department of Corrections on January 4, 2007 (Tr. 120).

The jury was instructed to find appellant guilty of the Class D felony of failing to return to confinement if the jury found the following:

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First, that on December 27, 2007, in the County of Warren, State of Missouri, the Defendant was serving a sentence to the Missouri Department of Corrections for driving while intoxicated where he was temporarily permitted to go at large without a guard, and

Second, the defendant was at large without a guard, and

Third, that defendant was required to return to confinement at the Warren County jail by 12:00 p.m. on December 27, 2006, and

Fourth, that defendant purposefully failed to return to confinement at the Warren County jail by 12:00 p.m. on December 27, 2006,

Then you will find the defendant guilty on Count I.

(L.F. 47).

This instruction followed the substantive law, which was in conflict with MAI CR3d 329.76, the verdict director for failure to return to confinement (Tr. 127-129). The first paragraph of MAI CR3d 329.76 required a finding that the defendant is serving a sentence **in**

the Department of Corrections, instead of **to** the Department of Corrections as provided for in Section 575.220, RSMo 2000 (Tr. 127-129). The trial court modified the instruction to conform to the statutory language (Tr. 127-129).

Appellant objected to the instruction (L.F. 47, Tr. 127). The court overruled appellant's objection and refused appellant's unmodified instruction, which would have required the jury to find that appellant was serving a sentence "in" the Missouri Department of Corrections when he failed to return to custody at the Warren County Jail (Tr. 127-129). The court instructed the jury on the lesser included offense of the Class C misdemeanor of failure to return to confinement under §575.220.3(2), RSMo 2000, which required the jury to find that appellant was serving a sentence for driving while intoxicated when he failed to return to the Warren County Sheriff's Department, but did not require a finding that the sentence was to the Department of Corrections (L.F. 49).

The jury found appellant guilty of the Class D felony of failure to return to confinement (L.F. 56, Tr. 154).

Analysis

The evidence supported a finding that appellant committed the Class D felony of failure to return to confinement. Appellant was charged and convicted under Section 575.220, RSMo. 2000, which provides in pertinent part:

1. A person commits the crime of failure to return to confinement if, while serving a sentence for any crime under a work-release program, or while under sentence of any crime to serve a term of confinement which is not continuous, or *while serving any other type of sentence for any crime wherein he is temporarily permitted to go at large without guard, he purposely fails to return to confinement when he is required to do so.*

3. Failure to return to confinement is a class C misdemeanor unless:

(1) *The sentence being served is to the Missouri department of corrections and human resources, in which case failure to return to confinement is a class D felony; or*

(2) The sentence being served is one of confinement in a county jail on conviction of a felony, in which case failure to return to confinement is a class A misdemeanor.

§575.220, RSMo 2000 (emphasis added).

Place of confinement is defined as “any building or facility and the grounds thereof wherein a court is legally authorized to order that a person charged with or convicted of a crime be held.” §556.061(21).

Here, the evidence was sufficient to establish that appellant was serving a sentence for a crime, that he was temporarily permitted to go at large without guard, and that he purposely failed to return to confinement at the Warren County Jail. As the record shows, the court sentenced appellant to the Department of Corrections to serve a term of imprisonment, and

the court placed him in confinement at the Warren County Jail pursuant to this sentence (Tr. 80, 85). Appellant was booked in the county jail and temporarily released from confinement with an order to return to the county jail (Tr. 84-85). Appellant knew that his sentence was executed and that he was released temporarily from confinement with an order to return for delivery to the Department of Corrections (Tr. 83). Appellant purposefully failed to return to the place of confinement and violated the statute.

The Court of Appeals, Southern District, addressed a similar claim in State v. Mobley, 267 S.W.3d 776 (Mo. App., S.D. 2008). In State v. Mobley, the defendant was sentenced to imprisonment in the Department of Corrections, and after sentencing, he was remanded to the county sheriff for transfer to the Department of Corrections. Id. at 778. At his hearing, the defendant requested a “furlough” so he could take his grandsons fishing. Id. The court granted a six-day “furlough,” and instructed the defendant to return to the county sheriff at a specific time. Id. The defendant failed to return, and was charged and convicted of failure to return to confinement. Id.

On appeal, Mobley argued that the state failed to prove that he had ever been confined for the applicable offenses, and therefore he could not be convicted of failing to return to confinement. Id. at 779. In rejecting this claim, the Southern District Court of Appeals held as follows:

Defendant’s sentences to imprisonment in the department of corrections were imposed on June 14, 2005, and he was remanded to the custody of the sheriff of Lawrence County for the purpose of serving those sentences. The sheriff’s obligation was to maintain custody over defendant and to transport

him to the reception center of the department of corrections. Defendant was placed in confinement for purposes of serving the sentences imposed on him at that time. Following imposition of sentences in the drug cases and placement of defendant in the physical custody of the sheriff, the trial court temporarily permitted defendant to go at large without a guard for a period of six days at the end of which defendant was to return to confinement. By failing to return to the specified location, the Lawrence County Jail, defendant violated § 575.220.1.

Id. at 779.

Like the defendant in Mobley, appellant's sentences were executed and at that point appellant was confined for the purpose of serving the sentences (Tr. 83-85, 97-98). Appellant was in the physical custody of the county sheriff and was held there pursuant to his prison sentence (Tr. 83-85, 97-98). The furlough appellant received was nothing more than temporary permission to go at large without a guard (Tr. 80-83). When appellant did not return to confinement at the Warren County Jail, he violated Section 575.220.1.

Appellant argues that he was not serving a sentence because his sentence did not commence until he was physically delivered to the Department of Corrections (App. Br. 16-17). Appellant relies on Section 558.031.1, which provides as follows:

1. A sentence of imprisonment shall commence when a person convicted of a crime in this state is received into the custody of the department of corrections or other place of confinement where the offender is sentenced. Such person shall receive credit toward the service of a sentence of

imprisonment for all time in prison, jail or custody after the offense occurred and before the commencement of the sentence, when the time in custody was related to that offense...

Section 558.031, RSMo 2000.

But Section 558.031 is not controlling. This section from Chapter 558 (“Imprisonment”) is intended to regulate the calculation of prison time, not to define when a defendant is serving a sentence for purposes of Section 575.220, RSMo 2000. The crime of failure to return to confinement is in Chapter 575, which regulates offenses against administration of justice. *See* § 575.220, RSMo 2000. What the legislature intended to punish was the failure to return to confinement. Appellant was held in confinement at the county jail for the purposes of being transported to the Department of Corrections, and at that time, appellant was serving a sentence to the Missouri Department of Corrections. Appellant received credit for the time served at the Warren County Jail, and the Department of Corrections considered the starting date for appellant’s sentence to be sometime in March of 2006 (Tr. 120). This is all that is required under Section 575.220 -- appellant had to be “serving any other type of sentence for any crime wherein he is temporarily permitted to go at large without guard.” The statute elevated the crime to a Class D felony because appellant’s sentence served was to the department of corrections, but it did not require that appellant be physically delivered to the Department of Corrections as a prerequisite to a conviction. While appellant was not “received” until January 4, 2007, this is irrelevant for the purposes of §575.220. Evidence was presented that appellant was serving a sentence to the Missouri Department of Corrections on December 26, 2006. Steward Epps testified that

the records of the Department of Corrections showed that the starting date of appellant's sentence was in March, 2006 (Tr. 120). Thus, the evidence showed that appellant was serving a sentence on December 27, 2006, when he failed to return to confinement.

The narrow interpretation of the statute appellant suggests would lead to the absurd result that appellant could not be convicted of any crime just because he absconded after sentencing but before being physically delivered to the Department of Corrections. Appellant was held in jail on his prison sentence, not on a sentence that he was required to serve in jail. Appellant could not have committed a misdemeanor of failing to return to confinement because he was not sentenced to a term in the county jail. Appellant was sentenced to the Department of Corrections but he had not yet been delivered there. If the definition of when a sentence "commences" for purposes of jail time credit is imported into §575.220, the legitimate purpose of preventing or deterring the failure to return to confinement will be undermined.

The crime of failure to return to confinement is in the chapter which regulates offenses against administration of justice. *See* §575.220, RSMo 2000. In the same chapter, the legislature penalized the crime of escape from confinement. *See* §575.210, RSMo 2000. In the comments to Section 575.210, the legislature stated the following:

Note that under § 556.061(3), confinement does not include persons on bond, recognizance, probation or parole. It does not apply where a prisoner is mistakenly released by jail authorities. It does apply to all actual confinement in a place of confinement, and *once an individual is in confinement, he remains in confinement while in transit from one location to another, while*

outside the place of confinement for court appearances, work details, etc., or while on an emergency “leave” for humanitarian purposes because of death or illness in the family. However, where the prisoner is serving a sentence which is not continuous (e.g. he is confined on weekends only), or is participating in a work-release program (the “Huber Plan”) whereby he is free without guard to work during the day and returns to his cell at night, he is “in confinement” only during the periods of actual confinement. It is believed that this approach captures the sense of § 557.351 RSMo but clarifies some of the ambiguities.

Section 575.210, VAMS.

The intent of the legislature was to punish individuals who attempt to evade the justice system regardless of whether they have been physically delivered to the Department of Corrections or are awaiting transportation. Appellant was confined in the Warren County jail solely as a result of his prison sentence. He was held there for the purpose of being transported to the Department of Corrections. Thus, for the purposes of §575.220, appellant should be deemed to have begun serving his sentence when he was placed in confinement and held there pursuant to his prison sentence. Appellant’s transportation to the Department of Corrections was only delayed because the court granted appellant the benefit of temporary release and appellant failed to return on time to be delivered to the Department of Corrections.

Appellant relies on Johnson v. Haynes, 504 S.W.2d 308 (Mo. App., K.C.D. 1973), to argue that he was not serving a sentence because he was given credit towards serving his

sentence for the time held at the Warren County Jail (App. Br. 17-18). But the fact that appellant received credit towards his prison sentence only supports the conclusion that he was serving a sentence when he was confined to the Warren County Jail. The time appellant spent in the county jail was counted toward appellant's sentence in the Department of Corrections because appellant's confinement at the Warren County Jail was pursuant to appellant's prison sentence. He was not held in the county jail for any other reason.

Appellant further relies on Section 546.610 to argue that the legislature intended to apply Section 575.220 only to an offender who is physically in the custody of the Department of Corrections (App. Br. 21). Appellant contends that Section 546.610 requires the sheriff to deliver all prisoners to the Department of Corrections without a delay and that he cannot be charged with failure to return to confinement when he had not been delivered to the Department of Corrections (App. Br. 21).

Section 546.610 is inapplicable. Section 546.610 ("Copy of commitment to sheriff--prisoner, how and where delivered") requires the clerk of the court in which the sentence was imposed to deliver a certified copy of the sentence to the sheriff, who must deliver a prisoner without delay to a place designated by the director of the department of corrections. *See* § 546.610, RSMo 2000. This section is clearly intended only to regulate the procedure for transporting prisoners and the duties of the designated officials in administering the transportation of inmates. The statute does not purport to speak as to when the time of servicing a sentence begins for the purposes of Section 557.220; rather, the requirement that the sheriff must deliver the prisoners "without delay" is simply intended to ensure a prompt delivery of inmates to the designated facility when all other requirements are met.

Moreover, there is nothing in this section that requires the circuit court to transport appellant immediately after sentencing, especially where, as here, he could not be received by the Department of Corrections. The evidence in this case showed that appellant could not begin the treatment program to which he had been sentenced until February of 2007, and the circuit court properly placed appellant in confinement while awaiting transportation to the Department of Corrections (Tr. 79). Section 546.610 does not prohibit appellant's confinement in the county jail until delivery to the Department of Corrections, and it does not make Section 575.220 applicable only to cases where the defendant is physically present within the Department of Corrections.

In addition, any delay in delivery in this case was caused by appellant's failure to return to confinement when ordered, not by the failure of the sheriff to transport appellant immediately to the Department of Corrections. The sheriff promptly delivered appellant to the Department of Corrections when appellant finally returned to the Warren County Jail to be transported. Thus, Section 546.610 is inapplicable and appellant should not be allowed to benefit from any delay that he caused by his unlawful behavior.

Appellant next argues that Judge Sutherland had no authority to release appellant on "furlough" because under section 217.425 only the Department of Corrections can grant furlough and that Judge Sutherland's attempt to grant a furlough had no legal effect (App. Br. 18-19). But Judge Sutherland had the authority to release appellant temporarily. While not called a "furlough" as in Section 217.425, Section 544.455.1 grants the circuit judge the authority to release a person charged with a bailable offense "pending trial, appeal, or other stage of the proceedings against him on his personal recognizance" and allows the court to

set conditions for release that would reasonably assure the appearance of the accused. § 544.455.1, RSMo 2000. The provisions of this section have been interpreted to apply to granting a defendant a temporary release post-sentencing. *See State v. Wilson*, 202 S.W.3d 665, 667-669 (Mo. App., W.D. 2006)(finding that a bail bond company’s obligation under bond agreement did not terminate after the defendant appeared in court for sentencing and that the bond company was liable when the defendant failed to turn himself in following a thirty-day stay of the execution of his sentence).

Here, Judge Sutherland granted appellant a temporary release during the post-sentencing stage of the proceedings against appellant. The circuit judge had the authority to release appellant temporarily with an order to return to confinement on a specific date and the fact that Judge Sutherland called the temporarily release a “furlough” did not make the release unlawful.

Additionally, the fact that the release may not have been authorized by statute is irrelevant under Section 575.220. Section 575.220 only requires that the defendant “is temporarily permitted to go at large without guard.” §575.220. It does not require that the release be in conformity with a specific provision of the law. It is not a defense that the circuit judge may have had no authority to release appellant temporarily.

As the Southern District Court of Appeals observed in *State v. Mobley*:

Here, defendant was sentenced to confinement and remanded to the custody of the sheriff. He thereafter was permitted to be on what the trial court described as “furlough” without guard, from which he did not return. The

evidence was sufficient for the trial court to find that defendant failed to return to confinement; that he violated § 575.220.1.

267 S.W.3d at 779.

In sum, the legislature intended to penalize the failure to return to confinement regardless whether the defendant is confined in the place where he is ordered to serve his sentence or held in confinement awaiting transportation. Here, appellant was serving a sentence to the Department of Correction at the time he failed to return to the Warren County Jail, and appellant's claim should be denied.

II.

The trial court did not plainly err in allowing Judge Sutherland to testify that in his opinion appellant was serving a sentence when he was released from confinement because Judge Sutherland was qualified as an expert on the issue of whether appellant was serving a sentence on December 27, 2006, and the jury that consisted of lay people did not have the experience or knowledge required to draw a conclusion from the facts on the issue of when appellant began serving a sentence.

In his second point, appellant claims that the trial court plainly erred in allowing Judge Sutherland to testify that in his opinion, appellant was serving a sentence to the Department of Corrections when he failed to return to the Warren County Jail (App. Br. 23-29). Appellant argues that there was no proper foundation laid for Judge Sutherland's testimony and that it was improper opinion testimony on the ultimate issue that the jury must decide (App. Br. 23-29).

Appellant did not raise this claim in his brief before the Court of Appeals. Supreme Court Rule 83.08(b) provides that:

(b) ... The substitute brief shall conform with Rule 84.04, shall include all claims the party desires this Court to review, shall not alter the basis of any claim that was raised in the court of appeals brief, and shall not incorporate by reference any material from the court of appeals brief. Any material included in the court of appeals brief that is not included in the substitute brief is abandoned.

Supreme Court Rule 83.08.

Because appellant did not include this claim in his brief before the Court of Appeals, this Court should decline to review appellant's claim. *See Dupree v. Zenith Goldline Pharmaceuticals, Inc.*, 63 S.W.3d 220, 222 (Mo. banc 2002).

Furthermore, appellant did not object at trial on the basis that Judge Sutherland's testimony was improper opinion testimony, and appellant did not include this claim in his motion for new trial. Consequently, his claim should be reviewed, if at all, for plain error only. Supreme Court Rule 30.20.

Plain error review requires the reviewing court to find that manifest injustice or a miscarriage of justice has resulted from the trial court error. *State v. Baumruk*, 280 S.W.3d 600, 607-608 (Mo. banc 2009). This Court applies a two-step analysis. *Id.* First, it determines whether the claim of error "facially establishes substantial grounds for believing that 'manifest injustice or miscarriage of justice has resulted.'" *Id.*, quoting *State v. Brown*, 902 S.W.2d 278, 284 (Mo. banc 1995). The second part of the analysis is whether the claimed error resulted in manifest injustice or a miscarriage of justice. *State v. Baumruk*, 280 S.W.3d at 607-608. Not all prejudicial errors are not plain error. *Id.* "[P]lain errors are those which are evident, obvious, and clear." *Id.* (internal citations omitted).

Appellant in the present case cannot show plain error from Judge Sutherland's testimony. The state called Judge Sutherland in its case in chief (Tr. 78). Judge Sutherland testified that he had been a circuit judge for the twelfth judicial circuit for eight years (Tr. 78). He testified that he revoked appellant's probation and executed the previously imposed sentences of seven and four years in the Department of Corrections (Tr. 79, 82). Judge Sutherland testified that he granted appellant a "furlough" until December 27, 2006, and told

him that the prosecutor could charge him with failure to return to custody if he did not return to Warren County Jail on December 27 (Tr. 84-85).

The state asked Judge Sutherland whether in his opinion appellant was serving a sentence on December 27, 2006, when he did not return to jail (Tr. 85). Appellant objected that Judge Sutherland was not an expert and the court overruled the objection (Tr. 85). Judge Sutherland testified as follows:

Witness: The -- as far as I'm concerned, he was [serving a sentence] because he was entitled to credit for all the jail time he spent towards his sentence and once he was booked in at the jail and then furloughed he was entitled to credit for that time.

(Tr. 85).

“Because expert testimony is always fraught with questions of relevancy and competency, the decision to admit expert conclusions is a matter of trial court discretion that will not be overturned on appeal absent an abuse of discretion.” State v. Knese, 985 S.W.2d 759, 768 (Mo. banc 1999). Missouri law permits an expert “to testify as to his or her opinion on an ultimate issue in a criminal case as long as the opinion does not state that the defendant is guilty of the crimes.” State v. Moyers, 266 S.W.3d 272, 285 (Mo. App., W.D. 2008) (finding no plain error when a forensic pathologist testified that the victim was “intentionally suffocated”).

Generally, expert testimony is admissible if it is clear that the subject of such testimony is one upon which the jurors, for want of experience or knowledge, would otherwise be incapable of drawing a proper conclusion

from the facts in evidence. “The theory upon which expert testimony is excepted from the opinion evidence rule is that such testimony serves to inform the court [and jury] about affairs not within the full understanding of the average man.” Therefore, proffered expert testimony should be excluded if it does not assist the jury, or if it unnecessarily diverts the jury’s attention from the relevant issues.

State v. Lawhorn, 762 S.W.2d 820, 822-823 (Mo. banc 1988) (internal citations omitted).

In the present case, Judge Sutherland was qualified as an expert on the issue of whether appellant was serving a sentence on December 27, 2006. He was a circuit court judge for eight years and had sufficient expertise in the area of law. By virtue of his role as a judge, Judge Sutherland is presumed to know the law. *See* State v. Carlock, 242 S.W.3d 461, 465 (Mo. App., S.D. 2007); State v. Feltrop, 803 S.W.2d 1, 15 (Mo. banc 1991)(“Trial judges are presumed to know the law and to apply it in making their decisions”); *see also* State ex rel. Taylor v. Moore, 136 S.W.3d 799, 802 (Mo. banc 2004)(the petitioner’s counsel and the plea judge were “the legal experts” to advise the petitioner of his eligibility for a sentence under the long term drug program).

Further, the jury consisting of lay people did not have experience or knowledge required to draw a conclusion from the facts on the issue of when appellant began serving a sentence. It is apparent that appellant himself believed that this was not an issue that the jury could decide based on its everyday common knowledge because he presented Steward Epps’s testimony to aid the jury on the issue of whether appellant was serving a sentence on December 27, 2006. Steward Epps was the warden at the Fulton Reception and Diagnostic

Center and he testified on direct examination that an inmate begins to serve his sentence in the Department of Corrections when he is received and accepted by the Department of Corrections and when the Department of Corrections has physical custody of him (Tr. 115-116). Because the jury lacked knowledge and experience on the issue of when an offender serves a sentence as required in Section 575.220, the trial court did not plainly err in allowing Judge Sutherland's testimony on this subject. Appellant's claim should be denied.

CONCLUSION

In light of the foregoing, respondent submits that appellant's conviction and sentence should be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

DORA A. FICHTER
Assistant Attorney General
Missouri Bar No. 51756

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
dora.fichter@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 6,296 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 5th day of August, 2009, to:

Nancy McKerrow
Woodrail Centre, Bldg. 7, Ste. 100
1000 West Nifong
Columbia, Missouri 65203
Attorney for Appellant

DORA A. FICHTER
Assistant Attorney General
Missouri Bar No. 51756
P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Fax (573) 751-5391

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

APPENDIX

Section 544.455 A1

Section 546.610 A3

Section 556.061 A4

Section 558.031 A8

Section 575.220 A10