

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN CONDRON,

Defendant-Appellant.

UNPUBLISHED

January 26, 2001

No. 217760

Oakland Circuit Court

LC No. 97-155548 FH

Before: Sawyer, P.J., and Jansen and Gage, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of operating a water vessel under the influence of liquor and causing incapacitating injury, MCL 324.80176(5); MSA 13A.80176(5). The trial court sentenced defendant to forty to sixty months' imprisonment. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court erred in failing to grant his motion for a directed verdict at the close of the prosecutor's proofs. In reviewing a decision on a motion for directed verdict, this Court reviews the record de novo and considers the evidence presented by the prosecutor in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999).

Defendant claims that the prosecutor failed to present sufficient evidence, including the testimony of a medical expert, that the victim suffered a "long-term incapacitating injury". MCL 324.80176(5); MSA 13A.80176(5). "Long-term incapacitating injury" is defined as "an injury that causes serious impairment of a body function." MCL 324.80102(f); MSA 13A.80102(f).

Due to scheduling conflicts, the victim's doctor could not testify concerning the extent of the victim's injuries. Without foundational testimony from the victim's doctor, the trial court refused to admit the doctor's report describing the victim's injuries. According to MRE 701, however, the victim himself properly testified regarding the existence of several injuries he suffered after the accident. *Howard v Feld*, 100 Mich App 271, 273; 298 NW2d 722 (1980) (observing that "[a] lay witness generally may testify to something he knows and that does not require expert testimony to establish, such as the existence of a physical injury"). The victim testified, "I guess I was in a coma for like four or five days, I'm not for sure. I think it was five."

The victim stated that he underwent several surgeries at Pontiac Osteopathic Hospital, and that he broke his neck and for more than three months had to wear a halo to immobilize his head and neck. Doctors informed him that he suffered an incomplete spinal injury and that they were unsure of his prognosis. At trial, the victim utilized a wheelchair, but stated that he could “get around a little bit with a quad cane.” The victim asserted that he had difficulty moving his right arm because some nerves were torn from his spinal cord, but could “grip some things”. The victim additionally recounted that he lost feeling in at least one leg and could not detect bleeding or temperature changes in parts of his body. From September 1, 1997 through February 13, 1998 the victim was admitted to St. Joseph’s Hospital. At the time of trial, approximately sixteen months after the accident, the victim still had to catheterize himself to release bodily waste.

We reject defendant’s suggestion that as a matter of law the existence of a long-term incapacitating injury could not be established absent expert medical testimony. This Court previously declined to accept a defendant’s argument that expert testimony was necessary to establish a “serious or aggravated injury” constituting an element of an aggravated assault charge:

The defendant also argues that expert testimony is required on the question of whether a serious or aggravated injury has been inflicted. We know of no such requirement, and decline to imply one. Expert testimony is important if it can aid the trier of fact in resolving complex issues beyond the experience of a person not trained in a specific field. See MRE 702. We believe, however, that a jury is normally capable of applying the statutory language involved in the instant case without the need of expert testimony. [*People v Brown*, 97 Mich App 606, 611-612; 296 NW2d 121 (1980).]

While some of the victim’s testimony constituted repetition of diagnoses of his conditions, we similarly find that in this case the remainder of the victim’s appropriate testimony concerning his many and continuing injuries and their effects on him,¹ when considered in the light most favorable to the prosecution, supported the jury’s determination beyond a reasonable doubt that the victim suffered from a long-term incapacitating injury.² We therefore conclude that the trial court properly denied defendant’s motion for directed verdict. *Mayhew, supra*.³

¹ We note that the jury also had the opportunity to observe the victim’s physical appearance, condition and demeanor and determine whether the victim’s testimony regarding his injuries was credible.

² Defendant in his brief on appeal mentions other statutory requirements that a certain level of injury exist. We do not here declare that the meaning of the phrase “serious impairment of a body function” found in MCL 324.80102(f); MSA 13A.80102(f) should be interpreted in light of similar phrases found in MCL 500.3135(7); MSA 24.13135(7) and MCL 257.625(5); MSA 9.2325(5), but note our finding that the victim’s testimony alone provided sufficient evidence from which the jury could have found either definition of injury satisfied beyond a reasonable doubt.

³ With respect to defendant’s further assertions in his brief on appeal that “several other factors combined to prejudice [defendant] and require reversal of his conviction,” including that (a)
(continued...)

Defendant next argues that the police department and prosecutor violated his due process rights by failing to thoroughly investigate the accident. Defendant specifically argues that despite the fact that the boat driver's identity was at issue the police failed to examine the boat's steering wheel for fingerprints, and that the police failed to interview a key witness who arrived on the scene shortly after the accident and administered first aid to defendant. Although defendant failed to properly preserve this issue for appeal, *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994), we will briefly consider his arguments. Whether defendant's right to due process was violated is a question of law that we review de novo. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999).

With respect to fingerprinting the boat's steering wheel, the sheriff's deputy who investigated the accident scene, a boat accident reconstruction expert, acknowledged that he did not attempt to lift fingerprints from the wheel. He explained his inaction due to the facts that (1) in his experience it is virtually impossible to fingerprint vessels involved in water-related accidents, (2) it was unlikely that the wheel would have yielded usable fingerprints because it was damaged after the boat landed on the ground upside down, and (3) even if fingerprints were lifted they would not have dispositively established the identity of the driver at the time of the accident because boats often are utilized by many people.⁴ Regarding the alleged failure to interview an important witness who arrived on the scene shortly after the accident, defendant himself called this witness to testify at trial, and we detect no significant exculpatory testimony recounted by this witness that was not otherwise presented at trial.⁵ Because we find no indication of any bad faith actions by the prosecutor or police or that any novel and significant exculpatory evidence was lost or suppressed, we reject defendant's allegations of a due process violation. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992).

Lastly, defendant asserts that several remarks made by the prosecutor during his closing argument constituted prosecutorial misconduct. Because defendant did not object at trial to the prosecutor's comments, this Court will review defendant's claim only for plain error. *People v*

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“[t]he prosecutor promised the jury evidence of a life-long incapacitating injury,” then failed to produce such evidence; (b) “the prosecutor assured the court and defense counsel that Dr. Fergotas’ testimony was forthcoming despite his inability to locate the doctor,” but ultimately failed to secure the doctor’s presence; and (c) the trial court’s instructions did not explain to the jury the meaning of an incapacitating injury, we decline to consider these questions because defendant failed to raise any of these in his statement of questions presented. *Greathouse v Rhodes*, 242 Mich App 221, 240; 618 NW2d 106 (2000). Furthermore, at trial defendant voiced no objection to the trial court’s jury instructions.

⁴ Defendant notes in his brief on appeal that “the presence of other prints would not be dispositive on its own,” but suggests that other prints on the wheel “would be important in conjunction with other facts” to “challenge the prosecution’s circumstantial evidence that only [defendant] drove his boat.”

⁵ Defendant argues that the un interviewed witness’ testimony was important because he “testified about [defendant]’s incoherence and unconsciousness, helping the jury consider the existence and reliability of [defendant]’s words.” Other trial testimony from the first witness on the scene already established, however, that defendant had suffered a severe head injury.

Schutte, 240 Mich App 713, 720; 613 NW2d 370 (2000), citing *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

We reject defendant's claims of prosecutorial misconduct. After reviewing the record, we find that (1) the prosecutor did not improperly vouch for a witness' credibility, but appropriately argued from the evidence that certain witness testimony and certain inferences arising therefrom appeared worthy of belief, *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997); and (2) the prosecutor did not denigrate defense counsel and shift the burden of proof to defendant, but appropriately responded to defense counsel's argument and properly commented on the validity of the defense theory that someone other than defendant drove the boat at the time of the accident. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995); *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

Affirmed.

/s/ David H. Sawyer

/s/ Kathleen Jansen

/s/ Hilda R. Gage