STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 24, 2001
v TRACY PRUITT, Defendant-Appellant.	No. 217351 Saginaw Circuit Court LC No. 98-015664-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v TIRON BROWN, Defendant-Appellant.	No. 217352 Saginaw Circuit Court LC No. 98-015936-FH

Before: Neff, P.J., and O'Connell and R. J. Danhof*, JJ.

PER CURIAM.

Defendants Tracy Pruitt and Tiron Brown were both convicted of three counts each of vehicular manslaughter, MCL 750.321. They were both sentenced to three concurrent terms of six to fifteen years' imprisonment. Defendants appeal as of right. We affirm.

Docket No. 217351

Defendant Pruitt argues that the trial court erred in its application of *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), after he objected to the prosecutor's use of peremptory challenges to excuse two African-American jurors. We disagree.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

In *Batson*, the Supreme Court established a three-part test for evaluating whether peremptory challenges have been used in a discriminatory manner:

> (1) the complaining litigant must make a prima facie showing of discrimination, (2) the burden then shifts to the party exercising the peremptory challenge to articulate a race-neutral rationale for striking the juror at issue, and then (3) the court must determine whether the complaining litigant carried the burden of proving "purposeful discrimination." [*Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 319; 553 NW2d 377 (1996).]

Under *Batson*, the party opposing the exercise of peremptory challenges must first make a prima facie showing of discrimination. Upon a prima facie showing of discrimination, the burden then shifts to the other party to provide a race-neutral reason for dismissing the juror. *Clarke v Kmart Corp*, 220 Mich App 381, 383; 559 NW2d 377 (1996). In the case at bar, defendant Pruitt argued that a prima facie showing of discrimination was made because two African-American members of the venire were peremptorily excused by the prosecutor. The trial court ruled, and we agree, that this was insufficient to establish a prima facie showing of discrimination. As this Court observed in *Clarke*, *id.*:

> In the instant case, the trial court concluded sua sponte, after hearing defendant's race-neutral reason for its first challenge to a minority juror, that a prima facie case had "obviously" been made out because the juror was black. Similarly, the trial court recognized that the two other challenged jurors were minorities because one had a Hispanic surname and the other was "biracial." However, the race of a challenged juror alone is not enough to make out a prima facie case of discrimination. The mere fact that a party uses one or more peremptory challenges in an attempt to excuse minority members from the jury venire, which is at most what was shown in the instant case, is not enough to establish a prima facie showing of discrimination. *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989).

Because defendant failed to make a prima facie showing of discrimination, the trial court was not required to further inquire into the reasons behind the prosecutor's use of his peremptory challenges. See, e.g., *id.* Therefore, defendant Pruitt has not shown error.

Next, defendant Pruitt argues that he was denied a fair trial because of the prosecutor's misconduct. The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Where a defendant did not object to alleged incidents of misconduct, he must establish that "plain error" affected his substantial rights. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Plain error has not been shown with respect to the prosecutor's cross-examination of defendant. The record indicates that the prosecutor was attempting to inquire into the conflicting accounts of the charged incident rather than asking defendant to comment directly on the credibility of the various witnesses. To the extent the prosecutor's questions could be viewed as improper, defendant has failed to show that his substantial rights were affected.

Next, defendant does not explain how the prosecutor's questions concerning statements given pursuant to an investigative subpoena amounted to misconduct. Accordingly, we deem this issue waived. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

We find no error requiring reversal concerning alleged improper closing argument. The record does not support defendant's claim that the prosecutor's remarks during closing argument, viewed in context and in light of defense arguments, were intended to appeal to the jurors' sympathy for the victims' family or urge the jurors to decide the case based on their civic duty. See *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994).

Defendant Pruitt also argues that his right to the effective assistance of counsel under the Sixth Amendment and Const 1963, art 1, § 20, was violated because his defense attorney failed to adequately protect him when he was questioned pursuant to an investigative subpoena. Initially, we note that defendant has not established that his right to counsel under the Sixth Amendment or the state constitution attached at the time he was subject to questioning pursuant to the investigative subpoena, because the record does not indicate that formal proceedings were commenced against him before he was questioned. *People v Anderson (After Remand)*, 446 Mich 392, 402; 521 NW2d 538 (1994); *People v Gonyea*, 421 Mich 462, 469; 365 NW2d 136 (1984). In any event, even if the right to counsel had attached under the Sixth Amendment, the record does not factually support defendant's claim that counsel was ineffective.

In order for this Court to reverse due to ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy, and must show that there was a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). The burden is on defendant to produce factual support for his claim of ineffective assistance of counsel. *Id*.

A person is required to answer questions pursuant to an investigative subpoena unless the question involves a statutory or constitutional right, e.g., the right against self-incrimination. MCL 767A.5(1), 767A.6(3) and (5). Thus, if a question does not implicate a defendant's right against self-incrimination, an attorney cannot properly advise the defendant not to answer the question and expect to avoid further questioning. Indeed, a refusal to answer questions can result in a finding of contempt. MCL 767A.9(2). Here, the record does not indicate that counsel acted improperly with respect to the investigative subpoena. *Hoag, supra*.

Further, defendant has not established a reasonable probability that the outcome of trial would have been different had defense counsel objected to the prosecutor's closing argument or cross-examination of defendant. *Pickens, supra* at 338.

Docket No. 217352

Defendant Brown first argues that his due process rights were violated because of the delay between the charged offenses and the initiation of criminal proceedings. Because defendant did not raise this issue in the trial court, we review the issue for plain error affecting defendant's substantial rights. *Carines*, *supra*.

Charges against a defendant should be dismissed if there is an unjustified delay between the commission of the offense and the filing of an information if the defendant is substantially prejudiced in his right to a fair trial. *People v Ervin*, 163 Mich App 518, 520; 415 NW2d 10 (1987). Before dismissal may be granted due to the delay, there must be actual and substantial prejudice to the defendant's right to a fair trial and an intent by the prosecution to gain a tactical advantage. *People v Adams*, 232 Mich App 128, 134; 591 NW2d 44 (1998); *People v White*, 208 Mich App 126, 134; 527 NW2d 34 (1994). To be substantial, the prejudice must impair the defendant's ability to defend against the state's charges against him such that the outcome of the case will likely be affected. *Adams*, *supra* at 135. Proof of "actual and substantial" prejudice requires more than just generalized allegations. *Id*. See also *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000). The burden is on the defendant to come forward with evidence of prejudice from the delay, while the burden is on the prosecution to persuade the reviewing court that any delay was not deliberate and did not prejudice the defendant. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999).

The two-year delay in this case is primarily attributable to the prior appeal involving codefendant Pruitt. See *People v Pruitt*, 229 Mich App 82; 580 NW2d 462 (1998). Defendant has not shown that the delay involved an attempt to gain a tactical advantage. *White*, *supra*. Furthermore, defendant does not adequately explain what evidence was lost as a result of the delay. Defendant refers to defense witnesses who allegedly could not be located, but offers no explanation concerning these witnesses, such as their anticipated testimony, nor does he explain what specific evidence was allegedly lost because of the delay. Defendant's generalized allegations are insufficient to establish prejudice. *Cain*, *supra* at 109-110. Thus, defendant has not shown that appellate relief is warranted with respect to this unpreserved issue.

Next, defendant Brown argues that he is entitled to a new trial because of the prosecutor's misconduct. Because defendant did not object to the alleged instances of misconduct, we review this issue for plain error affecting defendant's substantial rights. *Schutte*, *supra*. The prosecutor could properly argue that defendant was not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Furthermore, the prosecutor's remarks about drag racing were based on the evidence and reasonable inferences drawn therefrom. *Bahoda*, *supra* at 282. Also, viewed in context, the prosecutor did not ask the jurors to suspend their judgment and decide this case based only on their sympathy for the victims. *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994). In sum, defendant has not established plain error in connection with the prosecutor's remarks.

No error resulted from the trial court's refusal to instruct on reckless driving, MCL 257.626, as a lesser included offense. Even if the parties stipulated that such an instruction be given, the trial court would not have been bound by that stipulation in deciding whether such

instruction was proper under the applicable law. *Kokx v Bylenga*, 241 Mich App 655, 661; 617 NW2d 368 (2000); *In re Ford Estate*, 206 Mich App 705, 708; 522 NW2d 729 (1994).

A court is required to instruct on a lesser included misdemeanor offense where (1) there is a proper request, (2) there is an "inherent relationship" between the greater and lesser offenses, (3) the requested instruction for a misdemeanor is supported by a "rational view" of the evidence, (4) the defendant has adequate notice, and (5) no undue confusion or other injustice would result. *People v Corbiere*, 220 Mich App 260, 262-263; 559 NW2d 666 (1996). This Court reviews the trial court's decision for an abuse of discretion. *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993).

Under the circumstances, the trial court did not abuse its discretion in concluding that a rational view of the evidence did not support an instruction on reckless driving. *People v Stephens*, 416 Mich 252, 262-263; 330 NW2d 675 (1982). Furthermore, because the jury was separately instructed on negligent homicide and rejected that offense in favor of a manslaughter conviction, any error in failing to instruct on reckless driving was harmless. *People v Beach*, 429 Mich 450, 490-492; 418 NW2d 861 (1988).

Next, defendant Brown argues that the trial court erred in admitting evidence that defendant Pruitt had experience as a professional drag-racer. The decision whether to admit or exclude evidence is within the trial court's discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *Id*. Defendant Brown also requested a mistrial after the trial court ruled that the evidence of defendant Pruitt's professional driving experience could be admitted. The grant or denial of a motion for mistrial is also within the sound discretion of the trial court. *Id.* at 503. There must be a showing of prejudice to the defendant's rights in order for there to be error requiring reversal. *Id*. The trial court's ruling must be so grossly in error as to deprive the defendant of a fair trial or amount to a miscarriage of justice. *Id*.

Here, we conclude that the trial court did not abuse its discretion in admitting the evidence. The trial court ruled that MRE 403 did not bar the admission of this evidence. Under MRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *People v Sabin (After Remand)*, 463 Mich 43, 57-58; 614 NW2d 888 (2000). Unfair prejudice does not mean any prejudice, but "refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *Pickens*, *supra* at 336-337, quoting *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984).

As the trial court noted, the evidence of defendant Pruitt's past professional driving experience was relevant to the issues in the case because it was probative of Pruitt's driving skills and knowledge of the risks associated with drag racing, particularly under less than professional racing conditions. Further, the evidence was not unduly prejudicial. Indeed, as the trial court observed, the evidence could potentially be used favorably to either party. Thus, the evidence was not unfairly prejudicial.

Regarding defendant Brown's motion for a mistrial based on the carryover effect of this evidence, we are satisfied that the trial court did not abuse its discretion in denying the motion. *McAlister, supra* at 505. We cannot conclude that defendant Pruitt's past experience as a professional driver affected the jury's view of defendant Brown's role in this accident.

Finally, the trial court did not err in instructing the jury, upon request, regarding defendant Brown's flight from the accident scene. The instruction was supported by the evidence. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999).

Affirmed.

/s/ Janet T. Neff
/s/ Peter D. O'Connell
/s/ Robert J. Danhof