STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 12, 2002
v	No. 228670 Oakland Circuit Court
MOHAMAD BAZZI, Defendant-Appellant.	LC No. 99-168020-FC

Before: Zahra, P.J., and Neff and Saad, JJ.

PER CURIAM.

Defendant, Mohamad Bazzi, was charged with second-degree murder, MCL 750.317, operating a motor vehicle while under the influence of intoxicating liquor (OUIL) causing death, MCL 257.625(4), OUIL causing serious injury, MCL 257.625(5), and minor in possession of alcohol, MCL 436.1703. Defendant appeals as of right his jury trial convictions of negligent homicide, MCL 750.324, OUIL causing death, OUIL causing serious injury and minor in possession of alcohol. Defendant was sentenced to seven months to two years' imprisonment for the negligent homicide conviction, seven to fifteen years' imprisonment for the OUIL causing death conviction, twenty-three months to five years' imprisonment for the OUIL causing serious injury conviction, and ninety days' imprisonment for the minor in possession of alcohol conviction. We affirm.

I. Basic Facts and Procedure

This case arises out a fatal traffic accident in the early morning hours of July 22, 1999. Ronnie Hashem and Kassen Anani were riding in a convertible Chevrolet Camaro driven by defendant, when the car hit the back of a semi-truck. Hashem was killed. Defendant and Anani suffered severe injuries.

There was evidence presented at trial that sometime after 10:00 p.m. on July 21, defendant, Hashem and Anani drove to a liquor store where defendant purchased two 22-ounce bottles of beer. Thereafter, the three men traveled to a night club, where defendant was observed drinking. The three men left the club around 2:00 a.m. with Hassen Bazzi, defendant's cousin, and Sami Johair. Bazzi and Johair traveled in a Corvette. Defendant, Anani and Hashem eventually began traveling southbound on I-75. Anani testified that defendant was driving dangerously and at speeds approaching 100 mph. Defendant collided with the semi-truck in the

right lane. There was evidence presented at trial that the collision occurred while defendant attempted to switch from the right lane to the center lane.

Defendant was taken to Beaumont Hospital. An emergency technician drew defendant's blood so that prior to any surgery, surgeons would be aware of any chemicals in defendant's blood. The emergency technician personally took defendant's blood to the clinical pathology department where a serum examination revealed a result of 132. Toxicologists testified that this result means defendant's blood alcohol level was somewhere between .088 and .12.

Defendant was interviewed in the emergency room by a Troy police officer. The officer smelled a strong odor of intoxicants on defendant. Defendant admitted to the officer that he had consumed one 22-ounce container of beer.

The prosecutor's theory of the case was that defendant, by choosing to drive at speeds approaching one hundred miles an hour while intoxicated, created a high risk of death or great bodily harm and was therefore guilty of, among other things, second-degree murder. Defendant's theory of the case was that although he was speeding, he was not intoxicated and the accident would not have happened if his car was not cut off by the car driven by his cousin. During jury voir dire, the prosecutor exercised peremptory challenges to excuse from the jury an African-American juror and a juror who belonged to an ethnic minority.[1] The jury that was selected to hear the case included at least one member of an ethnic minority.[2]

II. Analysis

Defendant, an Arab-American, first argues that he was denied his right to due process and a fair trial because the prosecutor exercised peremptory challenges to remove minority jurors in an unlawfully discriminatory manner. We disagree.

Although a prosecutor is generally allowed to exercise peremptory challenges for any reason, the equal protection clauses of the United States and Michigan Constitutions forbid the prosecutor from challenging potential jurors based solely on their race. *Batson v Kentucky*, 476 US 79, 89; 106 S Ct 1712; 90 L Ed 2d 69 (1986). A prima facie case of purposeful discrimination may be made by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. *Id*. at 93-94. To establish such a case, the defendant must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of a protected class.[3] *Id*. at 96. The

[1] The race or ethnicity of this challenged juror is unclear in both the lower court record and the briefs filed by the litigants. Defendant maintained at trial that the prosecutor exercised a peremptory challenge to excuse a person who appeared to be "Turkish or Middle Eastern."

[2] At trial, defense counsel admitted that one "juror of color" was selected to serve on the jury. Neither the briefs nor the lower court record discloses the specific ethnicity or race of this juror. In addition, the prosecutor also represented to the trial court that one other juror had "some type of Hispanic background." Notwithstanding the lack of clarity in the briefs and record, the litigants appear to agree that at least one member of an ethnic minority served on the jury that convicted defendant.

[3] The United States Supreme Court has held that a defendant may challenge a prosecutor's race
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defendant must also show that these facts, and any other relevant circumstances, raise an inference that the prosecutor used his peremptory challenges to exclude potential jurors on account of their race. *Id*. Such "relevant circumstances" include a "pattern" of strikes against minority jurors, or racially motivated questions or statements by the prosecutor during voir dire. *Id*. at 97. The mere fact that the prosecutor used a peremptory challenge to excuse one or more members of a protected class is insufficient to create a prima facie case. *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989). Likewise, the fact that no member of a minority ended up sitting on the jury is also insufficient to create a prima facie case. *Id*.

In this case, defendant has failed to establish a prima facie case of discrimination. Not all minority jurors were peremptorily dismissed by the prosecutor, and the jury was not devoid of minorities. Under the circumstances of this case, defendant has failed to establish that there was a "pattern" of racially motivated peremptory strikes. In addition, defendant makes no allegation that the prosecutor engaged in any other type of discriminatory conduct. Simply put, defendant has failed to establish even an inference of discrimination. As a result, the trial court did not abuse its discretion in concluding the prosecutor did not exercise his peremptory challenges in a discriminatory manner.

Next, defendant argues that the trial court erred in allowing the prosecutor to introduce the results of defendant's blood test run by medical personnel at the hospital. The results in question established that defendant's blood alcohol level was between .088 and .12. Evidentiary rulings are reviewed for an abuse of discretion. *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). "An abuse of discretion exists if an unprejudiced person would find no justification for the ruling made." *Id*., citing *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

Defendant contends the document reporting the 132 serum examination result should not have been admitted in evidence. The document was admitted by the trial court under the business record exception to the hearsay rule, MRE 803(6). This exception provides:

> A memorandum, report, record or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of the information or the method or circumstance of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

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based peremptory challenge of a potential juror regardless of whether the defendant and the excluded juror are of the same race. *Powers v Ohio*, 499 US 400, 411-412; 111 S Ct 1364; 113 L Ed 2d 411 (1991).

The Beaumont emergency technician who drew defendant's blood and delivered it to the hospital lab testified that the document was a record Beaumont Hospital kept in the ordinary course of business and was a part of defendant's medical file. The document was sent, via fax machine or printer, to the trauma room from the laboratory after the testing was completed. We conclude the trial court did not abuse its discretion in admitting this medical record. The lower court record establishes that the document was generated at or near the time the test was run and was generated by knowledgeable hospital personnel who keep the records in the ordinary course of business activity.

Further, the result of the blood test was admissible by statute. MCL 257.625a(6)(e) provides:

> If, after an accident, the driver of a vehicle involved in the accident is transported to a medical facility and a sample of the driver's blood is withdrawn at that time for medical treatment, the results of a chemical analysis of that sample are admissible in any civil or criminal proceeding to show the amount of alcohol or presence of a controlled substance or both in the person's blood at the time alleged, regardless of whether the person had been offered or had refused a chemical test. The medical facility or person performing the chemical analysis shall disclose the results of the analysis to a prosecuting attorney who requests the results for use in a criminal proceeding as provided in this subdivision. A medical facility or person disclosing information in compliance with this subsection is not civilly or criminally liable for making the disclosure.

Defendant's blood was drawn after he had been in an accident and taken to a medical facility. The blood was drawn in the course of medical treatment to determine prior to any surgery whether any chemicals were in defendant's system. Under these circumstances, the results of the blood test were admissible pursuant to the above-cited statute.

Defendant claims that absent the showing that the testing machine was properly calibrated and that the operator of the machine was qualified, there is insufficient foundation to support the admission of the blood test results. In essence, defendant argues that foundational requirements applied to chemical testing performed primarily for criminal prosecutions should be applied to testing performed solely for medical treatment but later used in criminal proceedings. We find no merit in defendant's argument. Significantly, the plain language of the statute imposes no such requirement. See *People v Wager*, 460 Mich 118, 121; 594 NW2d 487 (2000). Moreover, the fact that the testing is performed for medical treatment provides sufficient indicia of reliability to forego foundational requirements traditionally applicable to chemical testing performed for non-medical reasons. Defendant was free to question or otherwise challenge the medical equipment on which these tests were conducted. However, such challenges would go to the weight and not the admissibility of test results. *Id.* at 126.

Next, defendant argues that charging him with second-degree murder and OUIL causing death violated his protection against double jeopardy. We disagree.

The Double Jeopardy Clause of the Fifth Amendment protects against two general governmental abuses: (1) multiple prosecutions for the same offense after an acquittal or conviction, and (2) multiple punishments for the same offense. *People v Herron*, 464 Mich 593,

599; 628 NW2d 528 (2001). In the instant case, defendant claims that the latter protection was violated. However, because defendant was not actually convicted of second-degree murder, he was clearly not punished for both second-degree murder and OUIL causing death.

Further, our Supreme Court has stated that charging a defendant with second-degree murder and OUIL causing death, for the death of a single person, does not amount to prosecutorial overreaching or a violation of a defendant's right to be free from multiple punishments. *Herron, supra* at 603, 606 n 8. When warranted by the facts, the OUIL statute does not limit a prosecutor's ability to charge an intoxicated driver with murder. See *People v Kulpinski*, 243 Mich App 8, 20; 620 NW2d 537 (2000). Defendant's claim in this regard is without merit.

Last, defendant argues that the trial court erred in denying his motion for a new trial on the ground that the verdict was against the great weight of the evidence. We disagree.

Defendant's claim in this regard is premised on his assertion that the trial court erred in admitting the blood test results. Defendant concedes in his brief that if the test results were properly admitted, then there was sufficient evidence to support the jury's verdict. As previously discussed, the blood test results were properly admitted. Therefore, defendant's premise for this claim is incorrect, and relief is not warranted.

To the extent that defendant argues that the negligent homicide verdict is inconsistent with the OUIL causing death verdict, relief is not warranted. First, this inconsistency argument is not properly presented. Ordinarily, no argument will be considered which is not set forth in the statement of questions presented on appeal. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). In this case, the question presented deals with the weight of the evidence, not the consistency of the verdict. Second, even if the argument was properly presented, a jury's verdict need not be consistent in light of its power of leniency. *People v Torres*, 452 Mich 43, 75; 549 NW2d 540 (1996); *People v Lewis*, 415 Mich 443, 450-453; 330 NW2d 16 (1982); *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980). Defendant does not claim the jury reached a compromise verdict. *Lewis, supra*. As a result, defendant is not entitled to relief.

Affirmed.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Henry William Saad