STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 2005
v	No. 256298 Oakland Circuit Court
ANTONIO CHAD RUSSO, Defendant-Appellant.	LC No. 2002-183101-FC

Before: Jansen, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of involuntary manslaughter, MCL 750.321,[1] and operating a motor vehicle while under the influence of intoxicating liquor causing death, MCL 257.625(4)(a). Defendant was sentenced to concurrent prison terms of 75 to 180 months for each offense. He appeals as of right. We affirm.

I. Underlying Facts

Defendant's convictions arise from his involvement in a single-car accident on September 30, 2001, during which the victim was killed. On September 29, 2001, at approximately 9:00 p.m., Andrew Ellis drove his convertible Trans Am to the victim's house, where defendant and the victim had been drinking. Ellis joined the two men, drank a couple of beers and, at about 9:45 p.m., the three men got into Ellis' car and went to a Farmington Hills bar. During the next two to three hours, the men continued drinking. Ellis testified that upon leaving the bar, he felt too intoxicated to drive, and asked if defendant or the victim could drive. Ultimately, defendant got into the driver's seat, Ellis got into the passenger seat, and the victim got into the backseat. Defendant let down the car's convertible top, and Ellis "passed out" briefly. Ellis testified that when he awoke, they were on an expressway, and defendant was driving "way over 100 miles an hour." Ellis indicated that he warned defendant to "slow down" a "couple of times," but defendant failed to do so.

At trial, several motorists who were on the expressway testified that defendant passed them while driving recklessly and at a high rate of speed. Ellis testified that eventually the car

[1] Defendant was originally charged with second-degree murder, MCL 750.317.

crashed into a median wall and the victim was killed, but he could not recall any specific details of the accident. According to a Michigan State Police accident investigator, the car skidded across the expressway and hit a median wall head on, and the victim, who was not wearing a seatbelt, hit the windshield and fell from the car. The investigator explained that given the characteristics of the skid marks, location of debris, and extensive damage to the car, defendant had to have been traveling at an extremely high rate of speed at the time of the accident. He opined that "without a doubt [the car] was going 120 [miles an hour] or more." Some motorists who had observed defendant's driving testified that, after the crash, they observed two people get out of the car, and a third man lying in a pool of blood, and called 911. Ellis testified that, after he approached the victim, he told defendant that the victim was dead. In response, defendant asked him to tell the police that the victim was driving so that he would not get into trouble.

When the police arrived, an officer determined that defendant was the driver, and was intoxicated. An officer explained that defendant had a strong order of intoxicants emanating from his person, had red and watery eyes, slurred speech, and staggering movements, and appeared confused and nervous. Defendant subsequently vomited, and "passed out" in a police car. Two subsequent tests of defendant's blood alcohol level revealed results of .15 and .194.

II. Double Jeopardy

We reject defendant's first claim that his convictions and sentences for both OUIL causing death and involuntary manslaughter violate his double jeopardy protections against successive prosecutions.[2] Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense, including a second prosecution for the same offense after an acquittal, or a second prosecution for the same offense after a conviction. US Const, Am V; Const 1963, art 1, § 15; *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). A constitutional double jeopardy challenge presents a question of law that this Court reviews de novo. *Id.* at 573.

A. Procedural History

On June 26, 2002, defendant pleaded no contest to OUIL causing death. At the plea hearing, defendant acknowledged that "no promises" were made to him in exchange for the plea other than a "*People v Cobb*[3] understanding that [the trial court] will stay within the guidelines." On August 20, 2002, the trial court sentenced defendant to a prison term of four to fifteen years. The judgment of sentence, which was filed on August 27, 2002, indicated that a second-degree murder charge had been dismissed. In an order entered on September 18, 2002, the trial court vacated the judgment of sentence "due to clerical error," and issued an amended judgment of sentence that indicated that the second-degree murder charge was "still pending."

On January 22, 2003, defendant moved to dismiss the second-degree murder charge, arguing that double jeopardy protections precluded separate convictions of OUIL causing death

[2] Defendant raised this issue in a motion for a new trial, which the trial court denied.

[3] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

and second-degree murder. In response, the prosecution maintained that, pursuant to *People v Werner*, 254 Mich App 528; 659 NW2d 688 (2002),[4] it was not barred from proceeding to trial on the second-degree murder charge, and noted that there was never any implication that the murder charge would be dismissed as a result of defendant's plea to OUIL causing death. The second-degree murder charge was not dismissed.

On March 11, 2003, defendant moved to withdraw his plea to OUIL causing death, arguing, inter alia, that his plea "was not 'knowing and intelligent' because he tendered [it] under the mistaken belief that it would be dispositive of the entire matter," that the prosecutor notified him that he planned to try him for second-degree murder, and that "he must be allowed to withdraw his plea and go to trial on both charges." During a March 19, 2003, hearing, the court granted defendant's motion to withdraw his plea to OUIL causing death, and the trial court acknowledged that the trial would be based on both charges contained in the information. No written order reflecting the trial court's oral ruling was entered.

B. OUIL Causing Death

Defendant now argues that his plea to OUIL causing death "was not withdrawn" because the trial court's oral ruling was not reduced to writing, and, therefore, by proceeding to trial, he was subjected to a second prosecution for the same offense after a conviction. Defendant correctly argues that a court speaks through its orders and not its oral pronouncements. See *People v Vincent*, 455 Mich 110, 123; 565 NW2d 629 (1997). Further, MCR 2.602(A) requires that orders be "in writing, signed by the court and dated with the date they are signed." However, as is the case here, there are circumstances where "[a]n oral ruling has the same weight and effect as a written order." *McClure v H K Porter Co*, 174 Mich App 499, 503; 436 NW2d 677 (1988). See also *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996) (noting that oral orders are to be given the same weight and effect as those in writing).

Here, defendant moved to withdraw his plea and was granted the relief that he sought. The order was issued in open court and the trial court's reasons for promulgating the order were delineated in defendant's motion, which the trial court noted it had reviewed. As such, the order carries the indicia of formality associated with a written order. See *Vincent*, *supra* at 125. Further, the parties unquestionably knew that, through its oral pronouncement, the trial court had granted defendant's motion to withdraw his plea, and thereafter acted in reliance on the court's ruling. For example, in a subsequent pretrial motion, defendant stated that his motion to withdraw his plea to OUIL causing death "was granted by the Court." When trial commenced in November 2003, the trial court delineated the charges of both second-degree murder and OUIL

[4] In *Werner*, *supra* at 535-536, this Court held that convictions of both second-degree murder and OUIL causing death do not violate double jeopardy provisions. This Court explained that the Legislature intended for the OUIL causing death statute to enforce societal norms other than those enforced by the second-degree murder statute. Additionally, the OUIL causing death statute and the second-degree murder statute each contained an element not found in the other, and dual convictions of a higher offense and a lesser cognate offense are permissible where the Legislature intended to impose cumulative punishment for similar crimes, even if both charges are based on the same conduct. *Id*.

causing death, without objection from defendant, and both the prosecutor and defense counsel discussed both charges during trial. Also, in its final instructions, the trial court gave the required elements for both second-degree murder and OUIL causing death. In short, defendant never acted contrary to his plea being withdrawn. Given defendant's actions and the certainty of the record, he cannot now complain of an error. To hold otherwise would allow defendant to harbor error as an appellate parachute. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

For these reasons, the trial court's oral issuance of the order granting defendant's motion to withdraw his plea to OUIL causing death effectively resolved the matter. Consequently, defendant was not subjected to a second prosecution for the same offense after a conviction, and, thus, his double jeopardy protections were not violated.

C. Second-degree Murder

Defendant also argues that his conviction for involuntary manslaughter, as a lesser offense of second-degree murder, violates his double jeopardy protections against a second prosecution for the same offense after an acquittal. Defendant relies on the judgment of sentence that initially dismissed the second-degree murder charge before the count was reinstated in the amended judgment of sentence. We disagree.

The record does not support defendant's claim that he was "acquitted" of second-degree murder, and that the charge was thereafter dismissed. Rather, the record establishes that when defendant pleaded guilty to OUIL causing death, no promises were made in relation to the charge of second-degree murder in exchange for the plea. In fact, during the plea hearing, the prosecutor specifically indicated that the second-degree murder charge was not being dismissed. Further, contrary to defendant's allegations, there were no double jeopardy grounds on which the trial court could have dismissed the charge of second-degree murder, because the double jeopardy protections do not prohibit convictions of both second-degree murder and OUIL causing death. See *Werner, supra*.

Consequently, despite defendant's claim, this matter does not concern double jeopardy protections. Rather, it concerns a clerical mistake in a judgment of sentence, which "may be corrected by the court at any time on its own initiative . . ." MCR 6.435(A). In sum, the August 27, 2002, judgment of sentence erroneously indicated that the second-degree murder charge had been dismissed. Because the error was plainly clerical in nature, the trial court properly corrected the error. Thus, this issue is without merit.

III. Effective Assistance of Counsel

Defendant also argues that defense counsel was ineffective for moving to withdraw his plea to OUIL causing death. We disagree. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing,[5] this Court's

[5] Although defendant states that this issue is preserved because he moved for a new trial, he fails to indicate where he raised a claim of ineffective assistance of counsel.

review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Defendant claims that his first attorney acted without his consent when he moved to withdraw the plea to OUIL causing death. Defendant was not at the plea hearing, and defense counsel waived his presence, noting that he was incarcerated. However, apart from his general assertion that his first attorney acted contrary to his "client's wishes," defendant has not identified any proof or provided any affidavits to support his claim. "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001) (citation omitted). Further, as discussed in part II (B), defendant's subsequent actions belie his claim that he did not acquiesce in the decision to withdraw the plea. In short, defendant has not shown, nor does the record support, that initial counsel moved to withdraw the plea without defendant's consent.

We also reject defendant's claim that the decision to withdraw the plea prejudiced him. In arguing that he was prejudiced, defendant asserts that he was "re-expos[ed] to jeopardy," and that the "[p]rejudice is obvious." As previously indicated, however, this Court has held that the double jeopardy protections do not preclude separate convictions of both second-degree murder and OUIL causing death. *Werner*, *supra*. Moreover, the prosecution never indicated that it would not prosecute defendant for second-degree murder as a result of his no contest plea to OUIL causing death. Consequently, even if the plea had not been withdrawn, defendant could have been tried for second-degree murder. Further, we have reviewed defendant's claim and the record, and do not find any "obvious" prejudice as a result of trial counsel's actions. In sum, on this record, defendant has not established a claim of ineffective assistance of counsel. *Effinger*, *supra*.

IV. Prosecutorial Misconduct

We reject defendant's claim that he is entitled to a new trial because the prosecutor impermissibly denigrated defense counsel and the defense, and argued facts not in evidence. Generally, this Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). But because defendant failed to timely object to the prosecutor's conduct below, we review his unpreserved claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

A. Denigration of Defense Counsel and the Defense

Defendant claims that the prosecutor denigrated defense counsel and the defense by implying that defense counsel was trying to mislead the jury by citing to the victim's alleged negligence. We disagree. A prosecutor may not personally attack the credibility of defense counsel or suggest that defense counsel is intentionally attempting to mislead the jury. *Kennebrew*, *supra*; *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). The jury's focus must remain on the evidence and not be shifted to the attorney's personalities. See *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996).

Review of the challenged remarks reveal that it was not an improper personal attack on defense counsel and were plainly focused on refuting defense counsel's assertions made during trial and closing argument that defendant was not responsible for the victim's death. Viewed in context, the prosecutor's remarks conveyed his contention that, based on the evidence, any defense concerning the victim's intoxication or failure to wear his seatbelt was a pretense and irrelevant. In making the challenged remarks, the prosecutor urged the jurors to evaluate the evidence, and consider that, in light of defendant's actions and the medical examiner's testimony, defendant was responsible for the victim's death. A prosecutor is free to argue reasonable inferences arising from the evidence as they relate to his theory of the case, and is not required to phrase arguments and inferences in the blandest possible terms. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996); *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Moreover, otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). Consequently, this claim does not warrant reversal.

B. Facts Not in Evidence

Defendant also contends that on several occasions during closing and rebuttal arguments, the prosecutor impermissibly argued facts not in evidence when he stated that defendant was driving "up to 130 miles an hour" or "between 100 and 130 miles an hour," because there was no testimony that he drove 130 miles an hour. We disagree. A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). However, in this case, the prosecutor's statements were reasonable inferences from the evidence as they related to his theory of the case. *Fisher*, *supra*. During trial, Ellis, a passenger in the car, testified that defendant was driving "way over 100 miles an hour." Several witnesses who were traveling on the expressway also testified concerning defendant's speed and opined that it was in excess of 120 miles per hour. The Michigan State Police accident investigator opined that "without a doubt [defendant] was going 120 or more." Thus, the prosecutor's statement was not improper.

VI. Sufficiency of the Evidence

Defendant also argues that the trial court erred by denying his motion for a directed verdict on the charge of second-degree murder because there is no evidence of malice. We disagree. This Court reviews a trial court's decision on a motion for directed verdict de novo to determine whether the evidence, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). This Court

will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of the witnesses. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of second-degree murder are "(1) a death; (2) caused by an act of the defendant; (3) with malice; and (4) without justification or excuse." *Werner*, *supra* at 531 (citations omitted). "Malice is defined as 'the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.'" *Id*. (citation omitted). When a defendant intentionally sets in motion actions likely to cause death or great bodily harm, malice may be inferred. *Id*. An actual intent to harm or kill is not required. Rather, the prosecution must establish the intent to commit an act that is in obvious disregard of life-endangering consequences. *Id.*

Viewed in a light most favorable to the prosecution, a rational trier of fact could have found the required elements of second-degree murder, including malice. The evidence showed that, on the day on the accident, defendant drank several beers before driving to a local bar, where he continued to drink for the next two to three hours. Upon leaving the bar, Ellis, the owner the car, announced that he was too intoxicated to drive, and defendant, whose intoxication was undisputed at trial, got into the driver's seat. Ellis testified that, after going onto the expressway, defendant was driving "way over 100 miles an hour," and did not heed his warnings to slow down. As previously indicated, a Michigan State Police investigator opined that defendant was traveling at 120 miles per hour or more. Independent witnesses testified that while driving at an excessively high rate of speed, defendant drove dangerously and erratically, cutting off vehicles and driving on the shoulder. Defendant ultimately hit a concrete wall, and the victim was killed. Ellis testified that, immediately after the accident, defendant asked him to tell the police that the victim was driving so he would not get into trouble.

From this evidence, viewed in a light most favorable to the prosecution, a rational trier of fact could reasonably infer that defendant acted with malice by driving recklessly, at an excessively high rate of speed, while intoxicated. Consequently, the trial court did not err by denying defendant's motion for a directed verdict on the charge of second-degree murder.

VII. 180-day Rule

We also reject defendant's claim that the trial court erred by denying his motion to dismiss the second-degree murder charge for violation of the 180-day rule. Defendant contends that because he was not tried on the second-degree murder charge within 180 days after he was imprisoned on the OUIL causing death conviction, the second-degree murder charge should have been vacated.

The 180-day rule states that an inmate of the department of corrections must "be brought to trial within 180 days" after the prosecution is given notice of untried charges against him. MCL 780.131(1). The purpose of the 180-day rule is to resolve untried charges against prisoners so that the sentences may run concurrently. *People v Chavies*, 234 Mich App 274, 280; 593

NW2d 655 (1999). When a prosecutor fails to make a good-faith effort to bring a defendant's criminal charge to trial within 180 days of the time the prosecutor knows that the defendant is incarcerated in a state prison, the defendant is entitled to have the charge dismissed with prejudice. MCR 6.004(D)(2), *Chavies*, *supra* at 278. However, the 180-day rule does not require that trial commence within 180 days. Rather, if apparent good-faith action is taken within that period, and the prosecutor proceeds promptly toward preparing the case for trial, the rule is satisfied. MCR 6.004(D); *People v Bradshaw*, 163 Mich App 500, 505; 415 NW2d 259 (1987). This Court reviews a trial court's attribution of delay for clear error. *People v Crawford*, 232 Mich App 608, 612; 591 NW2d 669 (1998).

We agree with the trial court that there was no violation of the 180-day rule because the prosecution made a good-faith effort to bring defendant to trial, and the delay in trial was not attributable to the prosecution. This case had a lengthy procedural history. After defendant pleaded guilty to OUIL causing death, he was sentenced on August 20, 2002. A trial date on the remaining charge of second-degree murder was set for October 11, 2002. The trial date was adjourned at the request of the defense. Trial was thereafter set for February 3, 2003, which was also adjourned at the request of the defense. In an affidavit presented to the trial court, the assistant prosecutor averred that "defense counsel informed [him] that he wanted to delay the trial as a tactical and strategic matter - hoping that the victim's family would, with the passage of time, soften their desire to see the case proceed to trial on the second degree murder count." The parties agreed on a new trial date of April 8, 2003.[6]

In sum, although defendant was not brought to trial within 180 days, the delay was attributable to the defense, and there is no indication that the prosecutor failed to make a good-faith effort to bring the criminal charge to trial within the required time. Consequently, this claim does not warrant reversal.

VIII. *Blakely v Washington*

We also reject defendant's claim that he must be resentenced because the trial court's findings supporting his sentence were not determined by a jury, as mandated by *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Our Supreme Court has stated that the holding in *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Consequently, defendant's argument is without merit.

IX. Cumulative Error

We reject defendant's final argument that the cumulative effect of several errors at trial deprived him of a fair trial. Because no cognizable errors warranting relief have been identified,

[6] On March 11, 2003, defendant moved to withdraw his plea to OUIL causing death, which was granted on March 19, 2003. At that point, defendant was no longer in the custody of the Department of Corrections on another sentence while awaiting trial on the present charges. Thus, defendant was a pretrial detainee to whom the 180-day rule does not apply. See *People v Chambers*, 439 Mich 111, 116; 479 NW2d 346 (1992).

reversal under the cumulative error theory is unwarranted. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood