STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 27, 2007
v	No. 272955 Oakland Circuit Court
SANDEEP NARENDRAN SABAPATHY, Defendant-Appellant.	LC No. 2005-201281-FC

Before: Kelly, P.J., and Meter and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of operating a vehicle under the influence of intoxicating liquor (OUIL) causing death, MCL 257.625(4), and negligent homicide, MCL 750.324. He was sentenced to 5 to 15 years' imprisonment for the OUIL conviction and one to two years' imprisonment for the negligent homicide conviction. We affirm.

Defendant's convictions arise out of a January 5, 2005, motor vehicle accident that resulted in the death of Lindsey Cianciolo. At the time of the accident, it was snowing heavily, and the roads were snow covered. Defendant was driving his vehicle and engaging in "horse-play" with another vehicle driven by one of his friends, Steve Schafer. Defendant passed Schafer's vehicle in the oncoming traffic lane and then lost control of his car, which ran into a ditch and flipped several times. Cianciolo, a passenger in defendant's vehicle, died before paramedics arrived at the scene. Witnesses observed defendant consuming alcoholic beverages in the hours before the accident, and two blood tests conducted after the accident revealed blood-alcohol levels of .142 and .12 grams per hundred milliliters.

Defendant first argues that the trial court erred by admitting testimony of the prosecutor's accident reconstruction expert, Troy Police Officer Larry Schultz, which relied on inadmissible hearsay. We agree. We review a trial court's decision regarding the admission of evidence for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005). The abuse of discretion standard acknowledges that there may be more than one reasonable and principled outcome. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado*, *supra* at 388; *Babcock*, *supra* at 269. "[W]here the decision regarding the admissibility of evidence involves a preliminary question of law, that question is reviewed de novo on appeal." *People v Small*, 467 Mich 259, 261-262; 650 NW2d 328 (2002).

MRE 703 provides:

> *The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence.* This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter. [Emphasis added.]

Officer Schultz opined that defendant's vehicle was traveling between 55 and 58 miles an hour, with a speed of 58 miles an hour at the time that the car passed Schafer's vehicle. Schultz testified that he could not rely on physical evidence to calculate defendant's speed because of the adverse weather conditions. Thus, in making his speed determination, Schultz relied on Schafer's oral statement to a police officer that his vehicle was traveling at 45 miles an hour. Schultz also relied on the oral statement of Rob Misiewicz, a passenger in Schafer's vehicle, indicating that Schafer was traveling at 45 to 50 miles an hour and that defendant was traveling at 60 to 70 miles an hour when he passed Schafer. Schultz opined that defendant was traveling at 58 miles an hour when he passed Schafer's vehicle and that 60 or 70 miles an hour would be extreme considering the road conditions. Evidence of Schafer's and Misiewicz's oral statements was not admitted at trial.

The prosecutor concedes that the trial court violated MRE 703 when it permitted Officer Schultz to testify regarding the speed of defendant's vehicle notwithstanding that his opinion was based on hearsay statements. The prosecutor further contends, however, that reversal is not required because the error did not result in a miscarriage of justice. In cases involving a preserved, nonconstitutional error, the defendant must show that the error resulted in a miscarriage of justice. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999); see also MCL 769.26. Reversal is warranted only if it affirmatively appears that it is more probable than not that the error was outcome determinative. *Lukity*, *supra* at 495-496.

Although we agree that this was error, it does not require reversal because it was not outcome determinative in light of the other evidence presented at trial. Christopher Smagacz, who witnessed the accident, testified that both defendant's and Schafer's vehicles were traveling above the speed limit because he was traveling at 40 miles an hour and "they were gaining on [him]." He opined that they were traveling too fast for the road conditions. Greg MacLean, a passenger in defendant's vehicle, testified that defendant was traveling at approximately 55 miles an hour and that the speed limit was 45 miles an hour. Shortly after the accident, defendant admitted to paramedic Johnny Hull that he had been traveling ten miles an hour over the speed limit. Further, during an interview with Sergeant Robert Redmond, defendant stated that he was traveling "[a]t least 10 over" the speed limit and he did not know if he was traveling as fast as 70 miles an hour. Thus, defendant himself admitted that he was traveling at or near Schultz's estimate of 58 miles an hour, if not over that estimate. Accordingly, defendant has failed to show that, more probably than not, the error was outcome determinative. *Lukity*, *supra* at 495-496.

Defendant next argues that he was denied the effective assistance of counsel when trial counsel failed to investigate and present evidence that the restraint system in defendant's vehicle did not function properly. Defendant preserved this issue for our review by raising it in a motion for a new trial or evidentiary hearing in the trial court, but the court denied the motion. *People v*

Cox, 268 Mich App 440, 453; 709 NW2d 152 (2005). Accordingly, because no evidentiary hearing was held, our review is limited to errors apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). We note that this Court previously denied defendant's motion to remand for a *Ginther*[1] hearing. *People v Sabapathy*, unpublished order of the Court of Appeals, entered October 9, 2006 (Docket No. 272955). Because we conclude that an evidentiary hearing is not necessary to decide this issue, we deny defendant's continuing request to remand this case for the purpose of conducting a *Ginther* hearing.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004), quoting *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and counsel's representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Moorer*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). With respect to the prejudice requirement, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Moorer*, *supra* at 75-76. A defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy. *Toma*, *supra* at 302.

Defendant relies on the affidavit and report of C. Brian Tanner, his accident reconstruction expert who testified at trial. Tanner averred that trial counsel did not ask him to inspect defendant's vehicle to ascertain its crashworthiness. After trial, subsequent counsel retained Tanner to inspect the vehicle, and Tanner opined that, during the rollover accident, an extra five inches of slack developed in the front passenger seatbelt system, which caused Cianciolo's head to be partially ejected from the passenger side window during the rollover. He further opined that if the seatbelt had been functioning properly, Cianciolo would likely not have suffered her fatal head injuries.

Defendant has failed to establish that he was prejudiced by counsel's failure to inspect defendant's vehicle. The causation element of a criminal negligence offense involves both factual and proximate cause. *People v Schaefer*, 473 Mich 418, 435; 703 NW2d 774 (2005), mod in part on other grounds *People v Derror*, 475 Mich 316, 320; 715 NW2d 822 (2006); *People v Tims*, 449 Mich 83, 95; 534 NW2d 675 (1995). Defendant contends that trial counsel's failure to investigate the seatbelt restraint system deprived the jury of the opportunity to consider all factors relevant to the issue of proximate cause. In particular, defendant asserts that, because of the alleged error, the jury was not able to consider Tanner's testimony that Cianciolo likely would have survived if the seatbelt had been functioning properly. Regarding proximate cause, our Supreme Court has stated as follows:

> [P]roximate causation is a "legal colloquialism." It is a legal construct designed to prevent criminal liability from attaching when the result of the defendant's

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

conduct is viewed as too remote or unnatural. Thus, a proximate cause is simply a factual cause "of which the law will take cognizance."

For a defendant's conduct to be regarded as a proximate cause, the victim's injury must be a "direct and natural result" of the defendant's actions. In making this determination, it is necessary to examine whether there was an intervening cause that superseded the defendant's conduct such that the causal link between the defendant's conduct and the victim's injury was broken. If an intervening cause did indeed *supersede* the defendant's act as a legally significant causal factor, then the defendant's conduct will not be deemed a proximate cause of the victim's injury.

The standard by which to gauge whether an intervening cause supersedes, and thus severs the causal link, is generally one of reasonable foreseeability. . . .

The linchpin in the superseding cause analysis, therefore, is whether the intervening cause was foreseeable based on an objective standard of reasonableness. If it was reasonably foreseeable, then the defendant's conduct will be considered a proximate cause. If, however, the intervening act by the victim or a third party was not reasonably foreseeable—e.g., *gross* negligence or intentional misconduct—then generally the causal link is severed and the defendant's conduct is not regarded as a proximate cause of the victim's injury or death.

In criminal law, "gross negligence" is not merely an elevated or enhanced form of ordinary negligence. . . . [I]n criminal jurisprudence, gross negligence means wantonness and disregard of the consequences which may ensue, and indifference to the rights of others that is equivalent to a criminal intent.

Accordingly, in examining the causation element of OUIL causing death, it must first be determined whether the defendant's operation of the vehicle was a factual cause of the victim's death. If factual causation is established, it must then be determined whether the defendant's operation of the vehicle was a proximate cause. In doing so, one must inquire whether the victim's death was a direct and natural result of the defendant's operation of the vehicle and whether an intervening cause may have superseded and thus severed the causal link. While an act of God or the *gross* negligence or intentional misconduct by the victim or a third party will generally be considered a superseding cause, *ordinary* negligence by the victim or a third party will not be regarded as a superseding cause because ordinary negligence is reasonably foreseeable. [*Schaefer, supra* at 436-440 (footnoted citations and quotation marks omitted; emphases in original).]

Even assuming that Tanner correctly opined that defendant's front passenger seatbelt was not functioning properly and Cianciolo would likely not have suffered her fatal head injuries had it been working properly, the condition of the seat belt was not an intervening, superseding cause that absolved defendant of responsibility for Cianciolo's death. The defective condition of the seatbelt would have involved ordinary negligence, at most, and not gross negligence or intentional misconduct, which would have severed the causal link. As such, it was reasonably

foreseeable. *Schaefer*, *supra* at 438-439. Moreover, we cannot opine that Cianciolo's death was "too remote or unnatural" to result from defendant's conduct such that he should be absolved from criminal responsibility. *Id.* at 436. Defendant was racing with Schafer's vehicle in very snowy conditions while he was intoxicated. After passing Schafer's vehicle in the oncoming traffic lane, he lost control of his car, which flipped over and rolled. Because the condition of the front passenger seatbelt was not an intervening, superseding cause, defendant cannot demonstrate a reasonable probability that, had counsel inspected the vehicle and discovered the alleged defect, the result of the proceeding would have been different. *Toma*, *supra* at 302-303; *Moorer*, *supra* at 75-76. Thus, he has not established prejudice, and his ineffective assistance of counsel claim fails. *Toma*, *supra* at 302-303.

Defendant next contends that the trial court's intimidating statements to prosecution witnesses denied him due process and a fair trial. We disagree. We review claims of judicial misconduct to determine whether the court's comments evidenced partiality and could have influenced the jury to the defendant's detriment. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996).

"A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct." *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). In reviewing a claim of judicial misconduct, portions of the record should not be taken out of context, but rather, reviewed as a whole. *Id.* Expressions of impatience, dissatisfaction, annoyance and anger do not evidence bias or partiality if they are within the bounds of what imperfect men and women sometimes display. *Cain v Dep't of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996) (citation omitted). "The test is whether the judge's . . . comments may well have unjustifiably aroused suspicion in the mind of the jury as to a witness' credibility, . . . and whether partiality quite possibly could have influenced the jury to the detriment of defendant's case." *People v Davis*, 216 Mich App 47, 50-51; 549 NW2d 1 (1996) (citations and quotations omitted; emphasis deleted).

Here, the trial court's admonishment of certain prosecution witnesses to testify truthfully did not reflect partiality. During the prosecutor's questioning of MacLean, MacLean testified that he did not remember how much he had to drink, and the trial court admonished him that it did not want to hear any more "I don't remembers." The trial court instructed MacLean to "start thinking." Thereafter, the jury exited the courtroom, and the trial court cautioned MacLean and prosecution witnesses Brandon Noronha and Scott Crosby as follows:

> *THE COURT:* The Court is familiar with what occurred in the exam: "…this confusion, I don't remember, I'm not positive," and all of that. I'm telling him to think and I'm telling you to think. If I feel you're obstructing justice, I will proceed on that basis. Is that clear?
>
> (Affirmative response)
>
> *THE COURT:* I don't care which side you come down on, but I want an honest answer and a precise answer and a truthful answer. Is that clear? I don't want any of this obscure business. And I'm very serious. I will hold you in contempt if I feel you're violating it. Is that clear? I don't care what way you testify, but I don't want any nonsense. Is that clear?

(Affirmative response)

THE COURT: With the foolishness at that exam. Is that clear?

(Affirmative response)

Defendant argues that the trial court's remarks to the witnesses were intimidating such that they denied him due process and a fair trial. Our review of the record, however, shows that the trial court was merely exercising its broad discretion regarding control of the proceedings to ascertain the truth. MCL 768.29; *People v Taylor*, 252 Mich App 519, 522; 652 NW2d 526 (2002). The trial court was clearly seeking to avoid these witnesses giving vague and obscure answers as they did at defendant's preliminary examination, which the trial court characterized as a "farce." Although the trial court's initial warning to MacLean occurred in the jury's presence, the record shows that the court was merely attempting to elicit truthful testimony by telling him to think instead of merely responding that he did not remember when questions were asked of him. The trial court's comments did not evidence partiality and could not reasonably have influenced the jury to defendant's detriment. *Cheeks*, *supra* at 480. In any event, despite the court's warnings, MacLean, Noronha and Crosby often changed their testimony or provided more complete answers only after being confronted with their prior statements and testimony. Therefore, it does not appear that the trial court so intimidated these witnesses that they were precluded from testifying freely and voluntarily regarding the truth as defendant contends.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter