

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH JOSEPH MAZUREK,

Defendant-Appellant.

UNPUBLISHED

May 29, 2008

No. 275755

Arenac Circuit Court

LC No. 06-003165-FH

Before: Servitto, P.J. and Cavanagh and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of involuntary manslaughter with a motor vehicle, MCL 750.321. Defendant was sentenced as a third habitual offender, MCL 769.11, to a prison term of 171 months to 30 years. Because the exclusion of defense witnesses was harmless error, there was no prosecutorial misconduct, and defendant was properly sentenced within the appropriately scored sentencing guidelines, we affirm.

Defendant's conviction arises from a single car accident in which Scott Pickvett, a passenger in defendant's vehicle, was killed. The accident occurred at approximately midnight on February 12, 2006. According to witnesses, defendant attended a party earlier that night and was drinking beer both at the party and while driving to the party. After the party, defendant went to a bar where he had a mixed drink. Defendant left the bar with Pickvett and Stacey Bouckaert. According to Bouckaert, after leaving the bar, defendant began driving crazy, swerving in and out of lanes and driving very fast. She became very scared and repeatedly begged defendant to let her drive. Another motorist, Scott Hidden, testified that defendant passed in front of his stopped vehicle at a high rate of speed before losing control and flipping over 2-1/2 times. Hidden estimated that defendant was traveling 65 to 70 mph in a 35-mph zone. An accident reconstructionist believed that defendant was traveling approximately 69 mph when he lost control and opined that the cause of the accident was excessive speed and possible alcohol usage. Defendant left the scene after the accident.

Defendant testified that he had consumed only one beer and part of a mixed drink before the accident, and denied being intoxicated. He claimed that he lost control of the vehicle because of icy road conditions and because Pickvett grabbed the steering wheel. He testified that he did not remember getting out of the car and leaving the accident scene because he sustained a head injury. His next recollection after the accident was waking up at the home of a friend, Richard Mendoza.

I. Exclusion of Defense Witnesses

Defendant first argues that the trial court erred by preventing him from calling several defense witnesses who would have testified concerning his post-accident injuries and state of mind, thereby denying him his constitutional right to present a defense and to compulsory process. The trial court determined that evidence of post-accident events was not relevant and, therefore, barred defendant from calling the proposed witnesses.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005).

A defendant has a constitutional right to present a defense and call witnesses. *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006); *People v Hayes*, 421 Mich 271, 278-279; 364 NW2d 635 (1984); *People v McFall*, 224 Mich App 403, 407; 569 NW2d 828 (1997). But this right is not absolute, and the accused must still comply with established rules of procedure and evidence. *Hayes, supra* at 279. All relevant evidence is generally admissible, and evidence which is not relevant is not admissible. MRE 402. In *People v Sabin (After Remand)*, 463 Mich 43, 56-57; 614 NW 2d 888 (2000), our Supreme Court discussed the concept of relevancy:

MRE 401 defines relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Relevant evidence thus is evidence that is material (related to any fact that is of consequence to the action) and has probative force (any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence). Materiality, however, does not mean that the evidence must be directed at an element of a crime or an applicable defense. A material fact is one that is in issue in the sense that it is within the range of litigated matters in controversy. [Citations and quotations omitted.]

In other words, evidence is admissible if it is helpful in shedding light on any material point. *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001).

In this case, the principal issue for the jury to decide was whether defendant operated his vehicle in a grossly negligent manner, thereby causing Pickvett's death. The prosecutor argued that defendant was grossly negligent because he drove his vehicle recklessly and at an excessive speed, and because he was under the influence of alcohol. At trial, the prosecutor introduced evidence that defendant left the accident scene, and suggested that this was evidence that defendant realized that he had done something wrong or knew that he was intoxicated. Conversely, defendant denied leaving the accident scene because of some consciousness of guilt, and instead claimed that he sustained a head injury, lost consciousness, and somehow ended up at a friend's house. The trial court later instructed the jury on flight, explaining that a person may run away or hide after an alleged crime for innocent reasons or because of a consciousness of guilt, and that it was up to the jury to decide this issue.

Considering the parties' theories, arguments, and instructions, we conclude that the reason why defendant left the accident scene was a fact of consequence to the action. The testimony of defendant's proposed witnesses was probative of that issue and, therefore, relevant.

Accordingly, the trial court abused its discretion by precluding defendant from calling witnesses to offer testimony concerning defendant's physical condition and state of mind after the accident.

We conclude, however, that the error was harmless. When a constitutional error is preserved, a new trial is required unless it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005).

Although defendant was not allowed to call witnesses to testify regarding his post-accident condition, defendant testified at trial that he suffered a head injury and did not remember leaving the accident scene. Thus, evidence of this alternative explanation for why defendant left the scene was presented to the jury. Ultimately, however, the jury was not required to determine defendant's reasons for leaving the scene. Rather, it was required to determine whether defendant operated his vehicle in a grossly negligent manner, causing Pickvett's death. The evidence of defendant's gross negligence was overwhelming. That defendant was driving recklessly and substantially in excess of the speed limit was supported by the testimony of Bouckaert, a passenger in defendant's car, and Hidden, another motorist who witnessed the accident, and their testimony was in turn supported by the testimony of an accident reconstructionist. Additionally, another witness testified that defendant was drinking beer that whole night while at a party, and also while driving to the party, and an empty beer box and several empty beer cans were found in and alongside defendant's vehicle after the accident. Defendant testified that he had consumed a couple of drinks prior to the accident and was driving over the speed limit. None of defendant's proposed witnesses had any personal knowledge of the circumstances of the accident or the events leading up to the accident. Under these circumstances, we are persuaded beyond a reasonable doubt that the jury's verdict would have been the same even if defendant had presented witnesses who could have confirmed that defendant appeared disoriented from an apparent head injury after the accident. Therefore, reversal is not required.

II. Prosecutorial Misconduct

Defendant raises several claims of prosecutorial misconduct. Questions of misconduct by the prosecutor are decided case by case. This Court examines the pertinent portion of the record and evaluates the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). Unpreserved claims of misconduct are reviewed for plain error affecting substantial rights. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003).

The prosecutor's questioning of Bouckaert and Hidden with regard to whether defendant was driving in a manner that disregarded the safety of others was not improper. Their opinion testimony was permissible under MRE 701, which allows opinion testimony from lay witnesses if it is rationally based on their perceptions and is helpful to a clear understanding of a fact in issue. *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994).

Next, the prosecutor did not violate *People v Johnson*, 54 Mich App 678, 680; 221 NW2d 452 (1974), in which this Court held that a prosecutor may not interrogate a defendant about the collateral facts comprising a prior conviction that the defendant has acknowledged on direct examination. Defendant testified on direct examination that he had a prior "conviction" for "B &

E and a home invasion.” The prosecutor merely clarified on cross-examination that this involved two separate felony convictions. Further, because the prior convictions were a matter of evidence, the prosecutor properly could comment on them in closing argument and argue that defendant was not worthy of belief. *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007).

Defendant also argues that the prosecutor improperly asked him to comment on the credibility of other prosecution witnesses. There was, however, no objection to the prosecutor’s examination at trial. Moreover, viewed in context, the prosecutor was merely seeking to ascertain which facts were in dispute, which is proper. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). Thus, there was no plain error.

The prosecutor did not misstate the testimony of Pierson and Bouckaert by stating that Pierson testified that defendant was pounding down beers and drinking the whole time at the party, and that Bouckaert testified that it was obvious that defendant was drunk. At trial, Pierson testified that defendant was drinking beers while driving to the party and then the “whole night” while at the party. Bouckaert similarly testified that defendant was drinking that night and that she told the police that defendant had consumed alcohol and she knew that he should not be driving. The prosecutor’s remarks were properly based on the evidence and reasonable inferences from the evidence. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001).

Further, the prosecutor did not improperly denigrate defense counsel by asking the jury in his rebuttal closing argument to disregard defendant’s close friendship with the decedent, and by characterizing defense counsel’s “friendship argument” as a red herring designed to distract the jury from the actual issue in the case. The prosecutor’s remarks were responsive to an issue that defense counsel raised in his closing argument, and were intended to keep the jury focused on the issues the jury was required to decide. There was no plain error. *Id.* at 592-593.

Next, we find no merit to defendant’s argument that the prosecutor made an improper comment concerning disposition or punishment. See *People v Goad*, 421 Mich 20, 25; 364 NW2d 584 (1984). The prosecutor merely referred to the jury’s option of finding defendant guilty of the lesser offense of negligent homicide and asked the jury to find defendant guilty of the greater charged offense. There was no plain error.

Lastly, we reject defendant’s argument that the prosecutor improperly shifted the burden of proof by commenting on defendant’s failure to provide evidence corroborating his testimony that he suffered a head injury in the accident. We agree that the prosecutor should have avoided such an argument in this case considering that defendant was precluded from presenting witnesses who could have given testimony supportive of his claim of a head injury; nonetheless, there was no objection. Defendant has not established that his substantial rights were affected by the prosecutor’s argument, where the evidence supporting the verdict was overwhelming. *Barber, supra* at 296.

III. Sentencing

Defendant challenges the trial court’s scoring of offense variables 3 and 18 of the sentencing guidelines. The trial court’s scoring of the sentencing guidelines will be upheld if

there is any evidence in the record to support it. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

The trial court scored 50 points for OV 3, which is proper where the victim was killed, the offense involves the operation of a vehicle, and the offender was under the influence of or visibly impaired by the use of alcoholic liquor. MCL 777.33(2)(c)(i). The court also scored ten points for OV 18, which is proper where the offender operated a vehicle while under the influence of alcoholic or intoxicating liquor. MCL 777.48(1)(c).

Contrary to what defendant argues, the testimony at trial describing defendant's consumption of beer and alcohol and erratic driving on the night of the offense provided ample support for the trial court's scoring of OV 3 and OV 18.

Finally, after reviewing the record, we conclude that the trial court did not impermissibly consider defendant's failure to admit guilt when imposing sentence. *Dobek, supra* at 104. The challenged comments were responsive to remarks made earlier by defendant, defense counsel, the prosecutor, and the decedent's mother concerning whether defendant had accepted responsibility for his conduct. Viewed in context, the court's remarks do not reflect an intention to enhance defendant's sentence because of a refusal to admit guilt.

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly