STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 8, 2009
v	No. 280940 Kalamazoo Circuit Court
TRAVIS WILLIAM HATFIELD, Defendant-Appellant.	LC No. 06-002212-FH

Before: Zahra, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of operating a motor vehicle under the influence of intoxicating liquor, third offense, MCL 257.625(1), and driving with a suspended license, MCL 257.904(3)(a). The trial court sentenced him to 24 months' probation and one day in jail with credit for one day served. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This case originates from an early morning single car accident. As the dispatched officer approached the scene, he saw defendant, the only person in the area at the time, standing approximately 50 yards away. Defendant ""immediately began to stagger away to the north, away from the vehicle." Defendant appeared as though he was having difficulty with his balance. The officer stopped defendant and asked him if he was all right (in reference to the car accident). Defendant stated that he wasn't aware of an accident and didn't recall seeing a car off the roadway. As the officer spoke with defendant, the officer noticed that his words were slurred, his eyes were bloodshot, and he had a strong odor of intoxicants. When asked what he was doing in the area, defendant told the officer that he was attempting to walk home from a pub, which the officer knew was eight to nine miles away. The officer advised defendant that he would be detained while the police investigated the crash.

After determining that the crashed vehicle was unoccupied and locked, the officer asked defendant if he had any keys on him. Defendant replied that he had only his house keys. The officer asked for and received the keys from defendant. Some of them were General Motor's keys, and one of those unlocked the car's door and started the engine. At that point, defendant changed his earlier explanation for being in the area and stated that a friend named "Tool" had driven the automobile and that, after crashing it, he left the keys with defendant before going to get help.

The vehicle was registered to Penny Beaubien. When asked about her, defendant said he "had no idea" who she was. The officer, however, discovered that defendant had previously listed Penny Beaubien as his mother and as an emergency contact on the booking sheets for his prior arrests. At that point, the officer arrested defendant, read him his chemical test rights, and obtained a search warrant to test his blood alcohol level.

On December 1, 2006, defendant filed a motion to suppress his statements to the police at the accident scene and the results of his blood alcohol test, claiming that his arrest was unsupported by probable cause and that the stop and search were illegal. The trial court denied the motion.

On appeal, defendant first argues he was denied his right to remain silent and his right to counsel, alleging the police used statements elicited before *Miranda*[1] warnings were given and after he had requested counsel.

This issue is not preserved because it was never decided by the trial court.[2] *People v Metamora Water Service, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). This Court's review of an unpreserved issue is limited to determining whether the prosecutor demonstrated a plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Miranda warnings are not required unless the accused is subject to a custodial interrogation. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). *Miranda* warnings are not necessary when the accused is simply the focus of an investigation or is a police suspect. *Oregon v Mathiason*, 429 US 492, 495; 97 S Ct 711; 50 L Ed 2d 714 (1977); *People v Hill*, 429 Mich 382, 387-393, 415 NW2d 193 (1987). Further, general on-the-scene questions to investigate the facts of a crime do not necessarily implicate *Miranda*. *People v Ish*, 252 Mich App 115, 118; 652 NW2d 257 (2002).

To determine whether a defendant was in custody at the time of an interrogation, this Court takes into account the totality of the circumstances. *People v Mendez*, 225 Mich App 381, 382-383; 571 NW2d 528 (1997). "An officer's obligation to give *Miranda* warnings to a person attaches only when the person is in custody, meaning that the person has been formally arrested or subjected to a restraint on freedom of movement of the degree associated with a formal arrest." *People v Peerenboom*, 224 Mich App 195, 197; 568 NW2d 153 (1997). Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] After multiple hearings on defendant's motion to suppress the evidence, defense counsel filed a "Supplemental Brief in Support of his Motion to Suppress" wherein he raised, for the first time, alleged violations of defendant's Fifth Amendment rights. However, at the June 8, 2007 hearing, defense counsel presented no testimony and made no mention of a Fifth Amendment violation. Instead, counsel's argument focused on whether there was reasonable suspicion to justify the pat down search of defendant. The lower court ruling was likewise confined to that issue.

into custody or otherwise deprived of his freedom of action in any significant way." *Hill, supra* at 387, quoting *Miranda, supra,* 384 US at 444.

In the instant case, we conclude that a reasonable person in defendant's position would not have felt he was seized within the meaning of the Fourth Amendment at the time of the police officer's initial questions. Further, a reasonable person would not have believed he was in police custody to the degree associated with a formal arrest. The record establishes that the questioning of defendant occurred within minutes of the stop at a time when the officer had an insufficient basis for concluding that defendant had operated the automobile under the influence of intoxicants.

Just as is involved in the typical *Terry*[3] stop, defendant's erratic behavior supported a reasonable suspicion that he had been driving the automobile that recently ran off the road and that he had ingested more alcohol than allowed under state law. Defendant was not handcuffed or unlawfully confined while initially questioned.[4] While defendant was informed that he was being detained, the police never represented that he was under arrest or that he was going to be arrested. These circumstances are not the functional equivalent of a formal arrest or custodial interrogation. Accordingly, the statements made by defendant before his arrest, and his subsequent blood alcohol results, were admissible.

A defendant's Fifth Amendment right to counsel is "designed to counteract the 'inherently compelling pressures' of custodial interrogation.…" *McNeil v Wisconsin*, 501 US 171, 176; 111 S Ct 2204; 115 L Ed 2d 158 (1991). In this case, defendant was not in custody as contemplated by *Miranda* when initially questioned by the officer. Moreover, the record reflects that it was not until after defendant was informed of his chemical test rights that he asked to speak to an attorney. Thus, there is no evidence that defendant asked to speak with an attorney, or that he was denied such a request, prior to the officer's on-the-scene questioning.

Defendant further argues that the trial court erred in denying his motion to suppress because there was no reasonable suspicion for his seizure. Defendant also claims his subsequent detention far exceeded the scope of the stop. This Court reviews a trial court's findings of fact on a motion to suppress evidence for clear error, but reviews de novo the ultimate decision. *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003).

The Fourth Amendment of the United States Constitution and the analogous provision in Michigan's Constitution guarantee the right of the people to be free from unreasonable searches and seizures. *People v Champion*, 452 Mich 92, 97; 549 NW2d 849 (1996) (footnote omitted).

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[3] *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

[4] After patting him down, the officer placed defendant in the patrol car "for his own safety" because defendant could hardly stand on his own. The officer testified that he did not was to leave defendant on the shoulder of the road because he was afraid defendant would fall into the roadway and be struck by a car. Under those circumstances, the fact that defendant was in a police car when he was questioned does not mean that he was "in custody" for *Miranda* purposes. See e.g. *People v Roark*, 214 Mich App 421, 423-424; 543 NW2d 23 (1995); *People v Williams*, 171 Mich App 234, 237-238; 429 NW2d 649 (1988).

"Searches and seizures conducted without a warrant are unreasonable per se, subject to several specifically established and well-delineated exceptions." *Id.* at 98. An exception exists when the police have a reasonable and articulable suspicion "that crime is afoot." *Id.*, citing *Terry, supra*. Police officers may make a valid investigatory stop if they possess a reasonable suspicion that a person has engaged, or is about to engage, in criminal activity. *Id.* "An officer who makes a valid investigatory stop may perform a limited patdown search for weapons if the officer has reasonable suspicion that the individual stopped for questioning is armed and thus poses a danger to the officer." *Id.* at 99.

The record supports that the police officer had a reasonable or particularized suspicion that defendant had been engaged in criminal activity when he was stopped. First, the officer noted a vehicle stuck in the embankment of a highway. As the officer approached, the he saw defendant "making an effort to move away from that vehicle as rapidly as possible." There was no one else around. Moreover, the officer observed "obvious" signs of intoxication. When the officer asked defendant about the car, he replied, "what car?"

The officer detained defendant to ascertain whether he had just been involved in the accident. There was no evidence presented to indicate that defendant was under arrest. The officer who made the initial contact with defendant identified himself and, for the officers' safety before questioning, performed a quick pat down search. Thus, the facts indicate that the officer's suspicions were reasonable and defendant was properly detained pursuant to an investigatory stop.

Moreover, defendant initially claimed he was walking home from a pub, which the officer knew was eight to nine miles away. When defendant's keys opened the door of the vehicle and started the engine, defendant changed his story and told the officer that a friend named "Tool" had crashed the car. At that point, the officer placed defendant under arrest and read defendant his chemical test rights.

Accordingly, the officer's investigation was no longer than necessary to resolve further suspicions raised by defendant's responses and the officer's observations at the scene. See *People v Williams*, 472 Mich 308, 316; 696 NW2d 636 (2005). Thus, when reviewing the facts and considering the totality of the circumstances, the investigatory detention was reasonable in scope and duration. Defendant is not entitled to suppression of the evidence obtained as a result of the investigatory stop.

Next, defendant argues that the prosecutor committed misconduct by questioning the officer, and then commenting in closing, about defendant's prior contacts with the police in which he listed Penny Beaubien as his mother. Defendant claims the trial court erred by denying his motion for a mistrial due to prosecutorial misconduct. We disagree.

This Court reviews a trial court's decision to deny a motion for a mistrial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003); *People v Lett*, 466 Mich 206, 218; 644 NW2d 743 (2002). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the permissible principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

A mistrial should only be granted for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). To warrant reversal, "[t]he 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." *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999). Further, "[a] mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way." *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992).

While the prosecutor's remarks may not have been entirely innocuous, they did not deprive defendant of a fair trial. The remarks were isolated and made no mention of any crimes or convictions. Further, the impact of the statements was insignificant compared to the strong circumstantial evidence presented against defendant. The accident occurred around 4:00 in the morning in a remote area. Defendant was the only person in the vicinity and was seen attempting to distance himself from the automobile when the police arrived. Defendant was obviously intoxicated and changed his story as more facts became known to the police. Defendant possessed a key that opened the vehicle's door and started its engine. The vehicle was registered to Penny Beaubien, who defendant had listed as his mother on booking sheets prepared for his prior arrests.

Moreover, the trial court instructed the jury to decide the case based on the evidence at trial and that the attorneys' statements, arguments, and questions were not evidence. Jurors are presumed to follow the trial court's instructions unless the contrary is clearly shown, which defendant has not done here. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). Accordingly, defendant was not denied a fair trial and his motion for a mistrial was properly denied.

Next, defendant argues the trial court denied him a fair trail by granting the prosecutor's request, over objection, for a special instruction on defendant's alleged false statements.

This Court generally reviews claims of instructional error de novo on appeal, but review the trial court's determination that a jury instruction is applicable to the facts of the case for an abuse of discretion. *People v Dobek*, 274 Mich App 58, 83; 732 NW2d 546 (2007). This Court reviews jury instructions in their entirety. There is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the triable issues to the jury. *Id*

Even if somewhat imperfect, jury instructions do not create error if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "There is no error requiring reversal if, on balance, the instructions fairly present the issues to be tried and sufficiently protect the defendant's rights." *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002).

It is proper to instruct the jury that a false exculpatory statement may be considered as evidence of guilt. *People v Wolford*, 189 Mich App 478, 473 NW2d 767 (1991). "The trial court did not err in instructing the jury that it could consider defendant's false statement to the police as evidence of guilt. The statement, if believed, tends to lead suspicion and investigation in another direction." *Id.* at 481-482, citing *People v Dandron*, 70 Mich App 439, 443-444; 245 NW2d 782 (1976), quoting *People v Arnold*, 43 Mich 303, 304-306; 5 NW 405 (1880). When

the statements relate to the crime and when there is evidence presented to establish that the statements are false, such evidence "may be used as probative evidence of guilt." *Dandron, supra* at 442-444.

Defendant's statements were related to whether he had been driving the automobile while intoxicated and without a license. The statements were proven false both by defendant's subsequent statements and by the testimony of the prosecution witnesses. Moreover, the trial court did not instruct the jury that defendant lied. The instruction made clear that the jurors were to not only determine for themselves whether the statements were in fact false, but were also given the option to consider whether the statements constituted evidence of defendant's guilt. Thus, the trial court's instruction was not erroneous.

Finally, defendant argues that the following comments made by the prosecutor denied defendant a fair trial: 1) "I don't think there will be any contest from the Defendant regarding the issue of intoxication;" 2) that defendant had subpoena power and could have presented the person named "Tool," who he alleged was the driver of the crashed vehicle, as a witness; and 3) that defendant's lawyer is "arguing that [defendant] continue to avoid responsibility for this crime."

This Court reviews de novo claims of prosecutorial misconduct to determine whether a defendant was denied a fair and impartial trial. *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005). Issues of prosecutorial misconduct are decided case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). A prosecutor is entitled to introduce evidence that he legitimately believes will be accepted by the court, as long as that attempt does not involve bad faith by the prosecutor or actual prejudice to the defendant. *Id.* The ultimate test is whether the defendant was denied a fair trial. *Id.* Even when error is found, reversal is not required unless defendant meets his burden of establishing that the error was outcome-determinative and most likely resulted in a miscarriage of justice. *People v Brownridge (On Remand)*, 237 Mich App 210, 216, 602 NW2d 584 (1999).

While the prosecutor in this case expressed his belief during opening statements that defendant was intoxicated at the time of the accident, the prosecutor's opening remarks were based on what he believed the evidence would show. Accordingly, they were not improper. See *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989). The prosecutor correctly believed that defendant's intoxication would remain unchallenged. While a prosecutor cannot comment on a defendant's failure to testify, he may argue that the evidence is uncontradicted. *People v Perry*, 218 Mich App 520; 538; 554 NW2d 362 (1996). As such, no misconduct occurred.

Regarding the prosecutor's suggestion that defendant could have produced "Tool" as a witness at trial, prosecutors are generally afforded great latitude regarding their argument and conduct at trial. *People v Bahoda*, 448 Mich 261; 282-283; 531 NW2d 659 (1995). Moreover, when a defendant advances an alternate theory or alibi, the prosecutor can comment on the defendant's failure to produce corroborating witnesses without shifting the burden of proof, so long as the comments do not burden the defendant's right not to testify. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Defendant told the officer he was not driving the automobile, but that his friend "Tool" was driving. During cross-examination, defense counsel

repeatedly questioned the officer about his efforts to find the alleged driver. Since defendant advanced the theory that he was not the driver, the prosecutor was free to comment on his failure to produce a corroborating witness. *Id.* at 115.

Regarding the other comments at issue, based on the overwhelming evidence against defendant, even if the prosecutor's statements rose to the level of prosecutorial misconduct, they were not outcome determinative and therefore did not result in a miscarriage of justice. *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999); *Brownridge (On Remand), supra.* Finally, the prosecutor based his arguments on the evidence and did not imply that the jury should make its decision on any basis other than the evidence presented.

Affirmed.

/s/ Brian K. Zahra
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood