

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TODD MATTHEW SONDEY,

Defendant-Appellant.

UNPUBLISHED

December 23, 2003

No. 242145

Jackson Circuit Court

LC No. 02-001022-FC

Before: Talbot, P.J., and Owens and Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of second degree murder, MCL 750.317; operating a motor vehicle under the influence of intoxicating liquor (OUIL) causing death, MCL 257.625(4); operating a motor vehicle under the influence of intoxicating liquor, third offense, MCL 257.625(1), and driving on a suspended or revoked license causing death, MCL 257.904(4). The trial court sentenced defendant to concurrent terms of life imprisonment for the second degree murder conviction, ten to fifteen years' imprisonment for the OUIL conviction, three to five years for the OUIL third offense conviction, and ten to fifteen years for the driving on a suspended or revoked license causing death conviction. We affirm the second degree murder and the OUIL convictions and, pursuant to the prosecution's request on appeal, we vacate the convictions for operating a motor vehicle under the influence of intoxicating liquor causing death, MCL 257.625(4); and driving on a suspended or revoked license causing death, MCL 257.904(4).

Defendant first contends that the prosecution presented insufficient evidence to sustain his second-degree murder conviction. We review challenges to convictions based on the sufficiency of the evidence de novo. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748, amended 441 Mich 1201 (1992). Due process requires that a prosecutor introduce evidence sufficient to justify a rational factfinder in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). 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." *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Malice is "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id.* at 464.

In light of this Court's recent decision in *People v Werner*, 254 Mich App 528; 659 NW2d 688 (2002), we decline defendant's invitation to determine whether proof of malice should be held under a subjective or objective standard. See *id.* at 531-534. *Werner* indicated that a highly unusual case of drunk driving might "require a determination of the issue whether defendant was subjectively aware of the risk created by his conduct." *Id.* at 532, quoting *Goecke, supra* at 532. According to *Werner*, "not every intoxicated driving case resulting in a fatality constitutes second-degree murder." Rather, to satisfy the malice requirement for second-degree murder, the evidence must show "a level of misconduct that goes beyond that of drunk driving." *Werner, supra* at 533, quoting *Goecke, supra* at 469. Thus, malice may be inferred from evidence that establishes "'the intent to do an act that is in obvious disregard of life-endangering consequences.'" *People v Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001).

In this case, the facts established a level of conduct that goes beyond mere drunk driving. Defendant had a blood alcohol level well over the legal limit. He knowingly drove with a driver's license that had been suspended for four years. He lived near the scene of the accident and was, therefore, familiar with the terrain of the road on which it occurred. He was speeding down the town's main thoroughfare and later passed a pair of semi-tractor trailers on a two-lane road as they climbed a large hill in an area designated as a no-passing zone. There was evidence indicating that defendant was speeding over one-hundred miles per hour when he drove down a steep decline in a hilly area that blocked the view of vehicles driving in the opposite direction. Police accident reconstruction experts opined that immediately following this maneuver, he lost control of his vehicle and crashed into the car that the twenty-year old decedent was driving in the opposite direction. We conclude that the evidence was sufficient for a reasonable inference that defendant acted in obvious disregard of life-endangering consequences.

Defendant also argues that the evidence was insufficient to meet the malice requirement for the second-degree murder conviction because the testimony of one of the prosecution witnesses was "inherently incredible." We disagree. Questions regarding the credibility of witnesses are to be resolved by the trial of fact, and we do not interfere with the jury's role of determining the credibility of witnesses. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Given the above, and viewed in the light most favorable to the prosecution, we conclude that the evidence was sufficient to support the second-degree murder conviction beyond a reasonable doubt.

Defendant next asserts that the prosecution's closing argument contained numerous instances of prosecutorial misconduct. Defendant failed to object to the prosecutor's alleged misconduct at trial and, thus, has failed to preserve this issue for appeal. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), citing *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). We review unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *Schutte, supra*. Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id.* "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Id.* at 721.

Defendant first contends that the prosecutor vouched for the credibility of his witnesses and bolstered the prosecution's case by denigrating the theory of the defense. Specifically, defendant asserts that his defense strategy was to admit guilt of gross negligence and voluntary

manslaughter, but that the prosecutor denigrated this strategy by describing it as a request to the jury to compromise or “make a deal,” and suggesting that defense counsel was attempting to “trick” the jury into rendering an involuntary manslaughter verdict. While a prosecutor is prohibited from vouching for a witness' credibility or suggesting that the government has some special knowledge that a witness will testify truthfully, *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001), prosecutors are “free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.” *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Prosecutors are given wide latitude and need not confine their arguments to the “blandest of all possible terms.” *Aldrich, supra* at 112. A prosecutor may not denigrate defense counsel, *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996), and may not suggest that defense counsel is intentionally attempting to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001).

From our review of the record, we find no merit to the claims of prosecutorial misconduct. The prosecution's statements constituted proper arguments based on the reasonable inferences from the evidence and from the issues defendant raised in his opening statement.

Defendant next contends that the prosecutor misstated the law when he gave the jury examples of what constituted gross negligence. This Court has held that a defendant may be deprived of a fair trial if a prosecutor makes a “clear misstatement of the law that remains uncorrected.” *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). However, if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can potentially be cured. *Id.* Here, the trial court gave the jury the instructions related to second-degree murder, degrees of negligence, and gross negligence. We find that even if the statements made by the prosecution were erroneous, the error was harmless.

We also disagree with defendant's assertion that the prosecutor misrepresented the evidence by claiming various speeds when defendant's driving speed was never recorded by radar. As the prosecution points out on appeal, the officer testified that he looked at his speedometer when he initiated his pursuit of defendant and noted that he was driving one hundred miles per hour. Defendant does not provide any authority indicating that a radar recording was required or that the officer was not allowed to testify as a witness.

Defendant next asserts that the prosecutor made an improper civic duty argument by referring to the public attention given to drunk driving concerns. A prosecutor may not suggest that the jury convict a defendant as part of its civic duty because such a suggestion introduces issues that are broader than the defendant's guilt or innocence. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). “This type of argument unfairly places issues into the trial that are more comprehensive than a defendant's guilt or innocence and unfairly encourages jurors not to make reasoned judgments.” *Id.*

We conclude that the statements were related to the arguments concerning the element of malice. They questioned whether defendant knew or should have known that his actions had the natural tendency to cause death or great bodily harm. The prosecutor did not exhort the jury to return a verdict of guilty because of issues outside defendant's guilt. Rather, he suggested the jury convict defendant because of his guilt. A prosecutor may ask the jury to convict on the basis of the evidence. *Bahoda, supra*. Even assuming error, it “was cured by a cautionary instruction that ‘arguments of counsel are not evidence.’” *People v Stimage*, 202 Mich App 28,

30; 507 NW2d 778 (1993). Here the court informed the jury both before the opening arguments and during jury instructions that neither the lawyers' statements nor their closing arguments constituted evidence. Therefore, we find no error requiring reversal.

Defendant also argues that the prosecution attempted to appeal to the jury's sympathy for the victim. A prosecutor may not appeal to the jury to sympathize with the deceased and her family. *Watson, supra* at 591. This Court has held that such appeals are improper and provide grounds for reversal. *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988). In his closing argument, defendant's attorney stated that the defendant "will pay a heavy price." He then reiterated that his client caused the accident and was guilty of all the charges except second-degree murder. In rebuttal, the prosecution stated that sympathy should play no part in the jury's deliberations. In direct response to defendant's statement, the prosecutor pointed out several reasons why the decedent and her family were entitled to as much or more sympathy than defendant. We conclude that the prosecutor's rebuttal was made in response to defendant's theory of the case. Even if these statements were improper, the trial court instructed the jurors to not let sympathy or prejudice influence their decision. Such instructions eliminate any prejudice caused by this type of argument. *Watson, supra* at 592.

In sum, we conclude that the prosecutor did not mischaracterize the facts of the case or attempt to mislead the jury during closing arguments. The prosecutor did not introduce any facts not in evidence during his closing arguments. The prosecutor did not make an improper civic duty argument to the jury or improperly attempt to inflame their passions. The prosecutor did not denigrate the defense. The trial judge's instructions cured any misstatements of the law, or any appeals to the sympathies of the jury by the prosecutor. We find no misconduct on the part of the prosecutor amounting to plain error depriving defendant of his substantial rights. *Schutte, supra* at 720.

Finally, defendant contends that the instructions given to the jury concerning negligence, gross negligence, and malice did not adequately differentiate between the degrees of culpability. Defendant's attorney affirmatively expressed satisfaction with the instructions at trial. Defendant has therefore waived the issue. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

Upon the prosecutor's request, we vacate the convictions for operating a motor vehicle under the influence of intoxicating liquor causing death, MCL 257.625(4); and driving on a suspended or revoked license causing death, MCL 257.904(4).

Affirmed in part, vacated in part and remanded for entry of an order vacating the two above counts.

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Karen M. Fort Hood