STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 16, 2004
v	No. 250812 Bay Circuit Court
ARTHUR WILLIAM KUCH, Defendant-Appellant.	LC No. 02-010419-FH

Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

PER CURIAM.

A jury convicted defendant Arthur William Kuch of one count each of operating a vehicle under the influence of liquor ("OUIL") causing death,[1] OUIL causing serious injury,[2] and negligent homicide.[3] The trial court sentenced defendant to seventy-five months to fifteen years in prison for the OUIL causing death conviction, to twenty-nine to sixty months in prison for the OUIL causing serious injury conviction, and to sixteen to twenty-four months in prison for the negligent homicide conviction. Defendant appeals his convictions and sentences, and we affirm.

I

On February 2, 2002, at approximately 5:00 p.m., defendant drove himself and his friend Rhonda Kaczynski to the Wil-lew Bar on the corner of Two Mile Road and Midland Road in Bay County. Defendant testified that he had about four or five twelve-ounce cans of beer at the bar before he and Kaczynski left the bar at shortly after 9:00 p.m. Defendant and Kaczynski drove westbound on Midland Road. Jeff and Shannon Smith were also driving westbound on Midland Road at approximately 9:38 p.m., and saw defendant's car suddenly turn left at the intersection of Eleven Mile Road and Midland Road. Defendant's car struck a car being driven eastbound by Jeffrey Dzurka. The Smiths both testified that there was no way for Dzurka to avoid the accident because defendant turned so suddenly. Dzurka died as the result of injuries he

[1] MCL 257.625(4).

[2] MCL 257.625(5).

[3] MCL 750.324.

sustained during the accident. Kaczynski sustained an open compound leg fracture that required two surgeries to repair, and resulted in her being unable to walk without crutches for several months. The Smiths testified that they went to defendant's car to see if the driver and passenger were injured, and saw defendant in the driver seat. They testified that defendant smelled of alcohol. Jesse Kaczmarek was driving on Eleven Mile Road toward Midland Road, and saw defendant's car turn and hit Dzurka's car. She got out of her car to help, and also smelled alcohol on defendant.

Trooper Timothy Robbins of the Michigan State Police testified that at the time of the accident, he was an at-scene crash investigator for the State Police, and that he became an accident reconstruction specialist about a month after the accident. He was also a part-time paramedic, and was working in that capacity the night of the accident in an ambulance that responded to the crash scene. At the accident scene, Trooper Robbins spoke to defendant, who was still in his car. Trooper Robbins noticed that defendant's eyes were red and watery, and that defendant smelled of intoxicants. He asked defendant to stand outside of the car, and defendant was unsteady on his feet. Trooper Robbins asked defendant how much he had had to drink, to which defendant replied something to the effect of "too much." Defendant then said that he was in pain, and he was placed in an ambulance. Trooper Robbins then performed a field sobriety test that involved asking defendant to follow the trooper's finger with his eye. Defendant's performance during this test indicated that he was intoxicated.

Michigan State Police Trooper Tiffany Robbins, Trooper Timothy Robbins' wife, was dispatched to the scene of the accident. At the scene, she spoke with defendant, who was strapped to a stretcher inside of an ambulance. Defendant told her that he had just left a bar and had had a few drinks. She noted that defendant smelled of intoxicants, that his eyes were glassy, and that his speech was slurred. As Trooper Timothy Robbins took defendant to the hospital, Trooper Tiffany Robbins asked him to return to the scene of the crime to assist in his capacity as a crash-scene investigator.

After defendant was taken to the Bay Medical Center, a blood sample was taken by hospital staff at approximately 12:30 a.m. Trooper Tiffany Robbins again spoke to defendant, who again told her that he had been drinking. She gave defendant some limited field sobriety tests[4] and then requested a search warrant for samples of defendant's blood.[5] At 1:33 a.m. and 1:34 a.m., respectively, two blood samples were obtained, sealed in a box, and sent to the State Police forensic lab for testing.

The blood sample taken by hospital staff at approximately 12:35 a.m. was placed in a centrifuge to separate the red blood cells from the serum, which is mostly water. The serum was then tested, and revealed a blood-alcohol content of .12.[6] The blood samples taken pursuant to

[4] The tests were limited because defendant was strapped to a gurney.

[5] Trooper Robbins testified that she obtained the warrant not because defendant had refused to give a sample, but simply because she chose to get a warrant prior to obtaining blood samples.

[6] Blood-alcohol content results indicate the number of grams of alcohol present in one hundred milliliters of blood. Here, the .12 result shows that there were .12 grams of alcohol per one

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Trooper Tiffany Robbins' search warrant revealed a blood alcohol content of .07. Unlike the sample taken at 12:35 a.m., these samples were not separated into serum; rather, the samples were analyzed as whole blood. Michelle Glinn, Ph.D., supervisor of the Michigan State Police forensic lab, explained that a serum blood test will register a blood-alcohol content that is sixteen percent higher than one conducted on whole blood. Consequently, Dr. Glinn opined that the serum blood-alcohol content of the sample taken from defendant at 12:35 a.m. was the equivalent of a whole-blood blood-alcohol content of approximately .10. Based on these results, she opined that defendant's blood-alcohol content at the time of the accident was likely approximately .19.

II

Defendant argues that the trial court erred in granting the prosecution's pre-trial motion to bar defendant from introducing evidence that Dzurka had marijuana in his bloodstream at the time of the accident, and that there were marijuana cigarettes found in Dzurka's car.

A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

Defendant cites this Court's opinion in *People v Moore*, 246 Mich App 172; 631 NW2d 779 (2001), in support of his argument that the trial court erred when it precluded the admission of evidence of marijuana in Dzurka's bloodstream. In *Moore*, this Court noted that while contributory negligence of a victim is not a complete defense to negligent homicide, it is a factor to consider to determine whether the negligence of the defendant cause the victim's death. *Id.* at 175, citing *People v Tims*, 449 Mich 83, 97; 534 NW2d 675 (1995). In *Moore*, the defendant drove a tractor-trailer and turned right from a parking lot onto the road. *Id.* at 173. Because traffic was stopped at a red light, the defendant could not complete his turn, and his truck occupied the right lane and one-third of the right center lane. *Id.* The victim was driving at about twenty-five miles per hour in the right center lane while the defendant was either stopped or moving very slowly. *Id.* The victim struck the front of the truck, and crossed several lanes into traffic moving the opposite direction, and was struck and killed. *Id.* This Court held that the trial court abused its discretion when it barred evidence that the victim had marijuana in his blood, and reasoned that the evidence was relevant to determine whether the defendant's negligence caused the victim's death. *Id.* at 179. This Court also held that the trial court similarly abused its discretion when it barred evidence of the victim's failure to wear a seatbelt. *Id.* at 178-179. Accordingly, this Court reversed the defendant's conviction and remanded for a new trial. *Id.* at 180-181.

The facts here can be distinguished from *Moore*. Here, there was no evidence that Dzurka was driving in a negligent manner. Jeff and Shannon Smith both testified that there was nothing Dzurka could have done to avoid the crash because of the fact that defendant turned suddenly in front of him. The probative value of this evidence would have been greatly outweighed by its prejudicial effect. See MRE 401; MRE 403.

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hundred milliliters of blood serum.

Accordingly, we hold that the trial court did not abuse its discretion when it granted the prosecution's motion. Were we to hold otherwise, we would nevertheless hold that the error was harmless, because the evidence established clearly that there is nothing that Dzurka could have done to prevent the accident.

III

Defendant alleges two instances of prosecutorial misconduct that denied defendant of a fair trial. However, defendant failed to object in either instance. Our review, therefore, is for a plain error that affects defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is not warranted unless a plain error resulted in the conviction of an actually innocent defendant, or seriously affected the fairness of the judicial proceedings independent of the defendant's innocence. *Id.* We will not find an error requiring reversal where any prejudicial effect could have been alleviated but for a defendant's failure to request a curative instruction. *Id.* at 449.

A

Defendant maintains that the prosecutor deprived him of a fair trial during jury selection when, during *voir dire*, the prosecutor introduced Dzurka's wife and daughter. Defendant says that this unfairly evoked sympathy among members of the jury. However, neither Dzurka's wife nor his daughter were called as witnesses at trial, or even mentioned during the rest of the trial. The record shows that the prosecutor introduced Dzurka's wife and daughter to see whether any potential juror knew either of them in an effort to *avoid* any bias against defendant in the jury pool. The prosecution correctly points out that often one will know a person by looking at him or her even if one does not know the person by name. Indeed, during *voir dire*, a potential juror stated that though he did not know their names, he recognized Troopers Timothy and Tiffany Robbins as customers of a former employer.

Because it is unlikely that the brief reference and appearance of Dzurka's wife and daughter caused any bias among the jury, because it appears that the prosecutor introduced them to *avoid* any bias toward defendant, and because defendant could have alleviated any prejudice by asking for a curative instruction, we hold that there was no plain error that affected defendant's substantial rights.

B

Defendant asserts that he was deprived of a fair trial when during closing arguments, the prosecutor said that there was nothing in evidence to show that Dzurka had anything to do with causing the accident. Defendant maintains that this statement was dishonest because evidence of marijuana in Dzurka's blood was withheld from the jury. However, we have already held that there was no error in precluding this evidence. Moreover, as we discussed above, Jeff and Shannon Smith both testified that there was nothing Dzurka could have done to prevent the accident. The prosecution can argue the evidence and draw reasonable inferences from trial testimony. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998).

Accordingly, we hold that the prosecutor's statement did not constitute a plain error affecting defendant's substantial rights.

IV

Defendant claims that his sentence of seventy-five months to fifteen years in prison for OUIL causing death is disproportionate.

When we review a sentence under the legislative sentencing guidelines, we must affirm any sentence in which the minimum sentence falls within the guidelines range unless there was an error in the scoring of the guidelines, or the sentencing court relied on inaccurate information when it scored the guidelines. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 268; 666 NW2d 231 (2003).

Here, defendant concedes that the appropriate guideline range for sentencing is fifty to one hundred months in prison. His minimum sentence is seventy-months in prison. Because his minimum sentence falls within the guideline range, we must affirm defendant's sentence.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Henry William Saad