STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GORDON TODD STEWART,

Defendant-Appellant.

UNPUBLISHED
September 13, 2007

No. 270215
Macomb Circuit Court
LC No. 2005-004135-FC

Before: Borrello, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, operating a motor vehicle under the influence of intoxicating liquor causing death, MCL 257.625(4), operating a motor vehicle while license suspended or revoked causing death, MCL 257.904(4), and possession of an open container of alcohol in a moving vehicle, MCL 257.624a. Pursuant to MCL 769.12, defendant was sentenced as a fourth habitual offender to 35 to 55 years in prison for second-degree murder, 19 to 40 years in prison for operating a motor vehicle under the influence causing death, 19 to 40 years in prison for operating a motor vehicle while license revoked causing death, and 90 days in jail for possession of an open container of alcohol in a moving vehicle. We affirm.

Defendant first argues that the trial court abused its discretion by admitting evidence that he took the truck, which he was driving at the time of the fatal collision, without permission. We disagree. We review a trial court's decision to admit other acts evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion occurs when the trial court's decision falls outside the range of principled and reasonable outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). A trial court's decision on a close evidentiary question ordinarily will not be considered an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

MRE 404(b) governs the admission of evidence of prior bad acts, crimes, or wrongs. To be admissible under MRE 404(b), other crimes evidence generally must conform to three requirements: (1) the evidence must be offered for a proper purpose, (2) the evidence must be relevant, and (3) the probative value of the evidence must not be substantially out weighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). In addition, the trial court, if requested by the defendant, may provide a limiting instruction to the jury consistent with MRE 105. *Id*. However, evidence of prior bad acts is generally admissible

regardless of the requirements of MRE 404(b) when those acts are so blended or connected with the charged offense that proof of one incidentally involves the other or explains the circumstances of the crime. *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996); *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983).

Here, the theft of the truck by defendant was an integral part of his commission of the charged crimes. When a connected, antecedent event naturally flows into the commission of another crime, it is generally said that the jury is entitled to hear the "complete story," and evidence of the antecedent event is admissible. *Sholl*, *supra* at 742. Thus, the challenged evidence was admissible pursuant to the res gestae exception to MRE 404(b).

Next, defendant argues that there was insufficient evidence presented at trial for a rational jury to convict him of second-degree murder. We disagree. We review challenges to the sufficiency of the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Circumstantial evidence and the reasonable inferences that arise therefrom can constitute sufficient proof of the elements of a crime beyond a reasonable doubt. *Id.*

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). In the context of depraved heart murder, malice is 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. Not every intoxicated driving case resulting in death constitutes second-degree murder. *People v Werner*, 254 Mich App 528, 533; 659 NW2d 688 (2002). Instead, to satisfy the malice requirement for second-degree murder, the evidence must show "'a level of misconduct that goes beyond that of drunk driving.'" *Id*., quoting *Goecke*, *supra* at 469.

On the record before us, we cannot conclude that there was insufficient evidence presented at trial to prove malice beyond a reasonable doubt. Defendant's blood alcohol content level was more than twice the legal limit at the time of the accident. Defendant was driving a large and cumbersome vehicle in moderately adverse conditions. He was not authorized to drive the vehicle and took it without permission. There was a strong inference that defendant was unfamiliar with the vehicle and could not control it. Moreover, defendant never obtained a driver license, and when the accident occurred, defendant was driving in the lanes reserved for traffic traveling in the opposite direction. Evidence showed that defendant swerved from the northbound lanes into the center turn lane on two or three occasions. An accident reconstructionist testified that there was no evidence at the scene indicating that defendant had attempted to apply his brakes, and a mechanic who inspected the vehicle found no evidence that the truck was not in proper working order. 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). Here, the evidence supported a finding that defendant intended to do an act, i.e., drive a large unfamiliar vehicle while under the influence of intoxicants, in wanton and willful disregard of the likelihood that the natural tendency of his behavior would be to cause death or great bodily harm. Sufficient evidence was presented from which a rational jury could have found defendant guilty of second-degree depraved heart murder. See *Goecke*, *supra* at 469.

Defendant next argues that his conviction should be reversed because he was absent during a critical stage of the trial. We agree that the trial court erred by allowing defendant to be absent during the supplemental instructions to the jury, but on the record before us, we cannot conclude that the error requires reversal.

To the extent that defendant's argument implicates his Sixth Amendment right of confrontation, his right to be present during the critical stags of the trial, and his right to the effective assistance of counsel, we typically reviews such issues de novo. *People v Krueger*, 466 Mich 50, 53; 643 NW2d 223 (2002); *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002); *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000). However, because defendant's argument in this regard is unpreserved, we review it for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763. To avoid forfeiture under the plain error rule, three requirements must be met: (1) an error must have occurred, (2) the error must be plain, and (3) the error must have affected defendant's substantial rights, which generally requires defendant to show that the error affected the outcome of lower court proceedings. *Id*. at 763-764. Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*. at 774.

Defendant correctly argues that he had a constitutional right, as well as a statutory right, to be present when the instructions were provided. *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984); see also MCL 768.3. Defendant is also correct that his trial counsel could not waive his right to be present for him. "The right to be present at one's felony trial is one of those rights that only the defendant himself can waive. Thus the actions of his trial counsel do not operate as a valid waiver." *People v Montgomery*, 64 Mich App 101, 103; 235 NW2d 75 (1975). The fact that defendant was absent, however, is not a ground for automatic reversal. "[I]t is no longer the law that injury is conclusively presumed from defendant's every absence during the course of a trial." *People v Morgan*, 400 Mich 527, 535; 255 NW2d 603 (1977). Instead, the test for whether a defendant's absence is an error requiring reversal is whether there is any reasonable possibility that the defendant's absence prejudiced him. *Id*. at 536.

A trial court's communications to a jury can be categorized in three ways: "substantive, administrative, or housekeeping." *People v France*, 436 Mich 138, 166; 461 NW2d 621 (1990). Supplemental instructions on the law given by the court to a deliberating jury are substantive communication. *Id*. at 143. Therefore, the trial court strictly erred by issuing the supplemental instructions outside of defendant's presence. However, the inquiry does not stop there. Reversal is not warranted if the prosecutor can demonstrate that the instruction was not prejudicial to the defendant. *Id*. at 143-144. When a trial court's communication with the jury outside of a defendant's presence is of a substantive nature, prejudice is presumed and that presumption "may only be rebutted by a firm and definite showing of an *absence* of prejudice." *Id.* (emphasis in original).

Defendant does not dispute the accuracy of the instructions nor does he indicate on appeal how his presence would have affected the trial court's supplemental instructions. Because the trial court's instructions adequately informed the jury about the elements of second-degree murder and involuntary manslaughter, we conclude that the trial court issued the correct instructions. *People v Clark*, 274 Mich App 248, 255-256; 732 NW2d 605 (2007). In addition, we note that defendant did not have a right to be present during any sidebars or bench

conferences involving discussion of the instructions. See *People v Harris*, 133 Mich App 646, 652; 350 NW2d 305 (1984). On the record before us, we find that defendant's absence from the courtroom during the reading of the supplemental instructions did not prejudice him. Defendant has not shown outcome-determinative plain error on this issue. *Carines, supra* at 763-764.

Defendant finally argues that Michigan's sentencing guidelines violated his Sixth Amendment Right to a jury trial. We disagree. It is a violation of the Sixth Amendment for a trial court to increase a defendant's sentence beyond the maximum sentence permitted by law on the basis of facts found by the court rather than by the jury, other than a prior conviction. *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, Michigan's sentencing scheme is not affected by the ruling in *Blakely* because Michigan uses an indeterminate sentencing scheme in which the trial court sets a minimum sentence but can never exceed the statutory maximum sentence. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Therefore, "[a]s long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Id.* In addition, a defendant's prior record may be used at sentencing, even if the issue of prior convictions is not submitted to the jury, without violating the defendant's constitutional rights. See *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000). Defendant's sentences did not violate the Sixth Amendment right to a trial by jury.

For the same reasons, defense counsel was not ineffective for failing to object to the scoring of the sentencing guidelines. Counsel is not ineffective for making a futile objection. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Christopher M. Murray