STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON RANDALL BOOTH,

Defendant-Appellant.

UNPUBLISHED
September 13, 2007

No. 268085
Jackson Circuit Court
LC No. 05-007008-FC

Before: Bandstra, P.J., and Zahra and Owens, JJ.

PER CURIAM.

A jury convicted defendant of two counts of second-degree murder, MCL 750.317, two counts of operating a vehicle while intoxicated and causing death, MCL 257.625(4), and driving while his license was suspended, MCL 257.904. The trial court imposed concurrent sentences of life imprisonment for each murder and OUIL conviction, and of time served for the license-suspended conviction. Defendant appeals as of right. We affirm.

I. Sufficiency of the Evidence

Defendant first argues that the evidence was insufficient to show malice for purposes of his murder convictions. We disagree.

We review a challenge to the sufficiency of the evidence de novo to determine whether the evidence, when viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that all the elements of the crime were proved beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005); *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

"To prove the elements of second-degree murder beyond a reasonable doubt, the prosecutor must present evidence of (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Lange*, 251 Mich App 247, 250; 650 NW2d 691 (2002). In *People v Werner*, 254 Mich App 528; 659 NW2d 688 (2002), this Court discussed malice as follows:

> Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. Malice may be

> inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. The prosecution is not required to prove that the defendant actually intended to harm or kill. Instead, the prosecution must prove the intent to do an act that is in obvious disregard of life-endangering consequences. [*Id.* at 531 (Internal quotation marks and citations omitted).]

Murder with such a disregard for the likelihood that the defendant's actions could cause death or great bodily harm is commonly referred to as depraved-heart murder. See *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Driving while intoxicated and causing death is not per se depraved-heart murder; the prosecution must show "'a level of misconduct that goes beyond that of drunk driving.'" *Werner*, *supra* at 533, quoting *Goecke*, *supra* at 469. That is not to say, however, that evidence of intoxication is irrelevant, because the decision to drive while intoxicated may be evidence that a defendant disregarded the likelihood that his or her actions could cause death or great bodily harm. See *Werner*, *supra* at 531 (noting that the evidence showed "that defendant drove after becoming seriously intoxicated" while deciding whether the defendant acted with the requisite malice for depraved-heart murder).

In this case, the jury heard evidence from which it could infer that defendant's conduct was far more egregious than mere drunk driving causing death, and that he acted with malice in that he willfully disregarded the natural tendency of his actions to cause death or great bodily harm. *Id*. at 531, 533. More specifically, the jury heard evidence that defendant had blood-alcohol level of .16[1] about an hour and a half after the crash, which would have been higher at the time of the crash, and that defendant's earlier ingestion of cocaine and marijuana may have further impaired his ability to drive. The jury also heard evidence that defendant was angry because he had argued with a patron in one bar and then told a doorman at another that he was angry because he had been previously banned from that bar by its owners. After the doorman told him to find a way home, a witness saw him drive away, squealing his tires, driving over a curb, and going the wrong way down a one-way alley. The witness also said that defendant appeared to be upset when he drove off. The evidence additionally showed that defendant then drove at least fifty-six miles per hour in a speed zone whose limit was less than half that speed and made no attempt to stop or even slow down before driving through an intersection with a flashing red light.

Defendant emphasizes that there was also evidence that he told a nurse he had fallen asleep at the wheel. However, the prosecution is not required to disprove every arguable theory of innocence, but is only required to prove its own theory beyond a reasonable doubt. *People v Richardson*, 139 Mich App 622, 626; 362 NW2d 853 (1984). Further, the jury was free to disbelieve defendant's protestations that he fell asleep at the wheel. See *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998) ("It is the province of the jury to determine questions of fact and assess the credibility of witnesses.").

[1] Twice the proscribed "0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine." MCL 257.625(1)(b).

Defendant also argues that there was no showing that his earlier use of cocaine and marijuana contributed to the crash. However, sufficient evidence was presented for the jury to convict defendant notwithstanding his earlier use of cocaine and marijuana. Moreover, a toxicology and pharmacology expert opined that defendant had ingested marijuana twelve to fifteen hours, or sooner, before his blood was drawn less than two hours after the crash. The expert also opined that defendant had ingested cocaine "between six hours or so" before the blood draw, that the cocaine metabolites could break down even after the blood was drawn, and that use of alcohol could prolong the effects of cocaine. She additionally indicated that even a small amount of cocaine could have a significant impact on a person's judgment and abilities even eight hours later. Defendant's argument is without merit.

Defendant next argues, citing *Goecke, supra* at 465-466, that the prosecution was obliged to show that defendant had failed to heed warning signs that his driving would cause death or great bodily harm, such as narrow misses, in order to establish depraved-heart murder premised on driving while intoxicated. Although *Goecke* analyzed cases that involved such warning signs, the warning signs are properly characterized as *evidence* of depraved-heart murder rather than as elements, or otherwise necessary evidence, of it. *Goecke, supra* at 464-465, left open whether the malice necessary for depraved-heart murder would be tested objectively or subjectively, reasoning that voluntary intoxication was not a defense to depraved-heart murder, and that "[o]nly a highly unusual case would require a determination of the issue whether the defendant was subjectively aware of the risk created by his conduct." Defendant's argument that warning signs were necessary to establish the requisite intent is essentially a claim that this Court should apply a subjective test. But this case does not require that distinction, because the prosecutor submitted sufficient evidence under either an objective or subjective standard. See *id.* at 465-466. A reasonable person would objectively understand that defendant's disregard for traffic rules, excessive speed, extreme intoxication, and driving away while angry create the likelihood that death or great bodily harm would result. Further, the evidence, considered in the light most favorable to the prosecutor, also showed that defendant was in fact subjectively aware of the risk he created. Defendant knew that he had been drinking, had used marijuana, having admitted as much to police and a nurse, and that he had been advised before the crash to find a way home. Driving over a curb while exiting a parking lot should also have dispelled any misperception that defendant was capable of driving safely, particularly at excessive speeds.

For these reasons, we conclude that the jury had a reasonable evidentiary basis for concluding that defendant satisfied the malice element for second-degree murder.

II. Mention of the Preliminary Examination

Defendant next argues that the trial court denied him a fair trial when it instructed the jury that the district court had found probable cause to put defendant on trial. We disagree.

Defendant admittedly did not object to the trial court's comments, thus leaving this issue unpreserved. See *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). See also *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003).

In this case, both the prosecutor and defense counsel questioned witnesses by referring to earlier testimony, with defense counsel expressly identifying "the preliminary exam transcript" as the source. The trial court afterward advised the jury as follows:

> You've heard some mention made by the attorneys of a preliminary examination. A preliminary examination is held in district court for a determination by a district judge as to whether there's enough (inaudible) matter to proceed to trial. If there is, then it gets up to fifth floor to me. And so that's what they're talking about, when they say, "You've been here before and you testified," because everything's then transcribed . . . .

Defendant complains that this was an improper and prejudicial instruction. We disagree. The trial court's comment was not an "instruction," but rather an explanation. Importantly, that explanation included no mention that the district court had found sufficient evidence to establish probable cause. See *People v Hudson*, 123 Mich App 624, 625; 333 NW2d 12 (1982). We hold that that benign explanation did not pierce the veil of judicial impartiality. See *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). The trial court was in the best position to view the jury's reaction to the attorneys' comments regarding prior testimony, and was duty-bound to exercise its discretion to clear up any confusion in the minds of the jurors, who may well have wondered if they had missed something when hearing about changed testimony. That explanation was within the court's broad discretion in matters of trial conduct. *Id.*

Moreover, at the close of proofs, the trial court instructed the jury that defendant was presumed innocent and that it was their duty to determine the facts, including whether each element of each crime was proved beyond a reasonable doubt. It further instructed the jury that the defendant's having been charged with a crime was not evidence, and that the court's comments were neither evidence nor otherwise intended to influence the verdict. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 487; 581 NW2d 229 (1998). In light of these instructions, we reject defendant's argument that the occasion demanded some additional limiting instruction.

Defendant additionally asserts that the trial court's comment constituted was an improper opinion and hearsay. But defendant does not develop these theories, and cites no authority to support them. Accordingly, we need not address these arguments. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). In any event, the comment was not an opinion, but an explanation, and was not an assertion "offered in evidence to prove the truth of the matter asserted," MRE 801.

For these reasons, defendant has failed to show that the challenged comment was plain error, let alone one that affected his substantial rights. *Jones*, *supra*; *Carines*, *supra*.

III. Prosecutorial Misconduct

Defendant next argues that the prosecutor committed prosecutorial misconduct that warrants reversal. We disagree. Because plaintiff did not object to the challenged comment, this issue is not preserved. See *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996). Accordingly, our review is limited to ascertaining if there was plain error affecting substantial

rights. *Jones, supra*; *Carines, supra*. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

Defendant takes issue with the prosecutor stating during closing argument that defendant would not have been charged with murder if he had merely caused the deaths while drunk driving, but that his actions were far more egregious. Defendant further argues that by mentioning why defendant had been "charged" with murder, "the prosecutor implicitly argued that the jury should rely on the prosecutor's (unproven with evidence) proper exercise of the charging function."

The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 23 (2005). "The prosecutor may not ask the jury to convict the defendant on the basis of the prosecutor's personal knowledge and the prestige of his office rather than on the evidence." *People v Fuqua*, 146 Mich App 250, 254-255; 379 NW2d 442 (1985) (Emphasis omitted), overruled in part on other grds, *People v Gray*, 466 Mich 44, 642 NW2d 660 (2002). In *Gray*, this Court concluded that the following prosecutorial argument required reversal, despite the lack of an objection below:

> We, the people who represent you in the Prosecutor's office that deal with these all the time, we review the facts of these cases. We decide what crime to charge based on our knowledge of the criminal law. And if we've charged an armed robbery, and I submit that I've been here through this trial and I submit that an armed robbery's been proven and that these other crimes, though you will be instructed on those crimes, those aren't the crimes that occurred. This Court deemed these remarks "so egregious that we cannot say that a curative instruction would have obviated the resulting prejudice." *Fuqua, supra*.

In this instance, the challenged comment included no statement that the prosecutor's office had made the decision to charge defendant with murder. Although the prosecutor's role in charging decisions is well known to courts and attorneys, lay jurors are less likely to share in that knowledge. Defendant's argument that the statement concerning why defendant was charged with murder suggested that the jury should rely on the prosecutor's decision is speculative and conclusory. In any event, a timely objection could have triggered an instruction that would have cured any possible prejudice. We additionally note that the comment was responsive to defense counsel's opening argument that if defendant was the driver, he was guilty at most of drunk driving causing death: "By going above and beyond that and asking for second-degree murder—there's obviously not an intent to kill here [sic]." Further, again, the jury was instructed to decide the case solely on the basis of the evidence, and that defendant's having been charged was not itself evidence. For these reasons, the comment in question does not amount to plain error.

IV. Sentencing

Finally, defendant, in his brief on appeal, under the heading for relief requested, injects the argument that he is entitled to resentencing for his OUIL causing death convictions, on the

grounds that the sentencing guidelines were not scored for those convictions, and that any guidelines scoring for those offenses would have produced a recommendation short of the life sentences he received. However, defendant has not included any such issue within his statement of the questions presented, which forfeits appellate review. *People v Albers*, 258 Mich App 578, 584; 672 NW2d 336 (2003). See also MCR 7.212(C)(5).

The argument is without merit in any event. That a person convicted of OUIL causing death as a habitual fourth offender faces a possible life sentence is not in dispute. MCL 257.625(4)(a) authorizes a maximum sentence of fifteen years' imprisonment for OUIL causing death, and MCL 769.12(1)(a) authorizes a sentencing court to impose a sentence of life or lesser term on a habitual fourth offender in connection with a crime which, upon first conviction, subjects an offender to a maximum sentence of at least five years.

Moreover, "If sentences are to be served concurrently, there is no reason why a defendant's offenses should be scored separately because all of the defendant's sentences will be served at the same time. The sentence for the most severe offense will encompass the sentences for any lesser offenses." *People v Hill*, 221 Mich App 391, 396; 561 NW2d 862 (1997). In this case, defendant stood convicted of second-degree murder, and he presents no argument in connection with the life sentences he received for those convictions. Given that the punishment for that crime, even for a first offense, is life or any term of years, MCL 750.317, the trial court did not err in recognizing defendant's OUIL convictions as demanding no separate scoring under the guidelines.

Affirmed.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Donald S. Owens