STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 18, 2007
v	No. 270525 Macomb Circuit Court
THOMAS VINCENT MACLEAN, Defendant-Appellant.	LC No. 2005-003694-FC

Before: O'Connell, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, and operating a motor vehicle while intoxicated causing death, MCL 257.625(4). We affirm.

Defendant first argues that his right to a speedy trial was violated. Whether a defendant was denied his constitutional right to a speedy trial is a mixed question of fact and law, and factual findings are reviewed for clear error, whereas questions of constitutional law are reviewed de novo. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). A criminal defendant has a constitutional and statutory right to a speedy trial. US Const, Ams VI and XIV; Const 1963, art 1, § 20; MCL 768.1; MCR 6.004(A); *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000). "The time for judging whether the right to a speedy trial has been violated runs from the date of the defendant's arrest." *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006), citing *United States v Marion*, 404 US 307, 312; 92 S Ct 455; 30 L Ed 2d 468 (1971). The record reveals that the original complaint and arrest warrant were issued in March 1998. However, defendant was not remanded to custody until September 2005, and trial began in February 2006. A defendant's right to a speedy trial is not violated after a fixed number of days, and prejudice is not presumed until after a delay of eighteen months or more. *Id*. at 261-262. The five-month time period between defendant's arrest and trial did not violate defendant's right to a speedy trial.

In conjunction with the speedy trial argument, defendant also argues that the lengthy delay between the time of the offense and the actual arrest violated his due process rights, given that some evidence was no longer available when the arrest was made. In the context of a due process argument, "[b]efore dismissal may be granted because of prearrest delay there must be actual and substantial prejudice to the defendant's right to a fair trial and an intent by the prosecution to gain a tactical advantage." *People v Crear*, 242 Mich App 158, 166; 618 NW2d

91 (2000). A deliberate and improper delay by the prosecution exists when there is evidence of bad-faith conduct designed to prejudice the defendant. *People v Betancourt*, 120 Mich App 58, 62-63; 327 NW2d 390 (1982). If a defendant demonstrates prejudice, the prosecution then bears the burden of persuading the court that the reason for the delay sufficiently justified whatever prejudice resulted. *People v Cain*, 238 Mich App 95, 109; 605 NW2d 28 (1999). Because the claim implicates constitutional due process rights, our review is de novo, but the underlying factual findings are reviewed for clear error. *People v Tanner*, 255 Mich App 369, 412; 660 NW2d 746 (2003), rev'd on other grounds 469 Mich 437 (2003).

The trial court found, after an evidentiary hearing, that there was an adequate explanation for the delay, that the delay was not deliberate, and that there was no bad faith on the part of the prosecution and police. Defendant suffered severe injuries in the accident, necessitating hospitalization, including a closed-head injury. Although an arrest warrant was issued, authorities did not pursue an arrest because of defendant's medical condition. There was police testimony that defendant's family and his attorney were made aware of the arrest warrant; however, no attempt to push the prosecution forward was made by defendant, nor was there any attempt to seek the preservation of evidence or to gather evidence. Authorities were under the impression that defendant, who was treated for several years at a rehabilitation clinic, was not in a state of health such that proceedings should be commenced. In response to inquiries, authorities received numerous letters from the rehabilitation clinic, which were copied to defendant's attorney, that expressed and suggested that defendant's condition remained poor. Indeed, a letter dated June 2, 2005, from the rehabilitation clinic was admitted, and the letter provided as follows:

> This letter is to inform you that Mr. Thomas MacLean continues to be under Broe Rehabilitation Services, Incorporated care due to his traumatic brain injury, psychiatric overlay and chronic pain, which are all a result of his motor vehicle accident. He continues to treat with a psychiatrist and take psychotropic medications as prescribed.

When authorities discovered that defendant was down in Florida and not in the severely injured condition that they were led to believe, an arrest was pursued. While we may disagree with the prosecution's handling of the case before subjecting defendant to arrest, we cannot conclude on this record that the prosecution allowed the delay in order to gain a tactical advantage, nor was there any evidence of a deliberate, bad-faith attempt to prejudice defendant. Although defendant suffered some level of prejudice relative to obtaining evidence of the accident, on balance, reversal in not warranted considering the reason for the delay, defendant's failure to procure or seek the preservation of evidence in the face of the criminal complaint and arrest warrant, and the surrounding circumstances as discussed above.

Defendant next argues that the trial court made several evidentiary errors relative to the admission of testimony by prosecution witnesses not identified by name, the qualifications of a medical technologist, and the admission of blood-alcohol test results. We review for an abuse of discretion a trial court's decision to permit the prosecutor to add witnesses to be called at trial. *People v Callon*, 256 Mich App 312, 325-326; 662 NW2d 501 (2003). We also review for an abuse of discretion a trial court's decision to admit evidence. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). Further, we review for an abuse of discretion a trial court's determination regarding the qualification of an expert and the admissibility of expert testimony.

Id. Where a trial court selects a reasonable and principled outcome from a spectrum of possible principled outcomes, deference is given and the court's decision does not constitute an abuse of discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006) (adopting this standard from *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 [2003], as the new default abuse of discretion standard). To the extent that these issues implicate a question regarding the applicability of the rules of evidence, a statutory provision, or due process, our review is de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999); *People v Izarraras-Placante*, 246 Mich App 490, 493; 633 NW2d 18 (2001).

MCL 767.40a(4) provides that "[t]he prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." "The statute clearly vests the trial courts of this state with the discretion to permit the prosecution to amend its witness list at any time." *Callon, supra* at 327. Here, defendant was provided with the results of the hospital blood test, and, while not identified by name, "Jane Doe RN" and "Jane Doe" were included on the witness list. Defendant did not make further inquiry regarding the identity of the two witnesses. According to the prosecutor, the identity of the nurse and medical technologist involved in drawing and testing defendant's blood was not known until trial began. The trial court did not abuse its discretion by allowing the prosecution to amend its witness list to add specific names where defendant had been provided with the hospital blood test results and was aware that the prosecutor would seek to admit those results into evidence through witnesses involved in the collection and testing of defendant's blood.

Moreover, to warrant reversal, a defendant must demonstrate that the court's ruling resulted in prejudice. *Callon, supra* at 328. Here, the record fails to establish any prejudice to defendant. Defendant asserts that he was prejudiced by not being able to prepare for the testimony of the nurse and medical technologist, but cannot demonstrate how defense counsel's preparation would have been different had the identify of the nurse and medical technologist been known. In sum, the trial court did not abuse its discretion by finding good cause to permit the prosecutor to amend his witness list, nor has defendant demonstrated unfair prejudice that would warrant a new trial. See *Callon, supra* at 328-329.

Regarding the medical technologist's qualification as an expert, MRE 702 provides, in pertinent part:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert *by knowledge, skill, experience, training, or education* may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. [Emphasis added.][1]

[1] We note that MRE 702 previously contained the adjective "recognized" before the words "scientific, technical, or other specialized knowledge." See *People v Dobek*, 274 Mich App 58, (continued…)

The prosecutor moved to qualify the witness "as a medical technologist, analyzing blood samples in the emergency room of the hospital." The witness testified that she had been a medical technologist since 1983, that she had a bachelor of science degree, that she interned in the field, and that she had obtained certification through the American Society of Clinical Pathology. She testified that she had analyzed blood samples a voluminous number of times in her career. She also testified that following proper protocol in analyzing blood was very important and that she learned the procedures through her training in the laboratory and as part of her training as a medical technologist.

The trial court qualified her as an expert in the field of medical technology. We conclude that she was qualified as an expert by her knowledge, skill, experience, training, and education. The trial court determined that her scientific, technical, and specialized knowledge would assist the jury in understanding the evidence and in determining a fact in issue (defendant's blood alcohol level), and she testified regarding the manner in which she analyzed defendant's blood and the results of that test. We find that her testimony was based on sufficient facts or data; the testimony was the product of reliable principles and methods; and she applied the principles and methods reliably to the facts of the case. MRE 702.[2] Accordingly, the trial court did not abuse its discretion in accepting the medical technologist as an expert witness in that field and in permitting her to testify with respect to the blood-alcohol testing.

Defendant next argues that the trial court erred in admitting the results of his blood alcohol test where there was insufficient testimony regarding the chain of custody. MCL 257.625a(6)(a) addresses the admission of blood test results at trial, and provides, in pertinent part:

> The amount of alcohol . . . in a driver's blood . . . at the time alleged as shown by chemical analysis of the person's blood . . . is admissible into evidence in any . . . criminal proceeding. . . .

Additionally, MCL 257.625a(6)(e) concerns the admission of blood test results administered on a driver following an accident:

> If, after an accident, the driver of a vehicle involved in the accident is transported to a medical facility and a sample of the driver's blood is withdrawn at that time for medical treatment, the results of a chemical analysis of that sample are admissible in any civil or criminal proceeding to show the amount of alcohol . . . in the person's blood at the time alleged, regardless of whether the person had been offered or had refused a chemical test. The medical facility or person performing the chemical analysis shall disclose the results of the analysis to a prosecuting attorney who requests the results for use in a criminal prosecution as

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(…continued)

93 n 18; 732 NW2d 546 (2007).

[2] Defendant fails to cite any authority, nor sufficiently develops any analysis, relative to his claim that only a physician or toxicologist could testify to the information encompassed in the testimony given by the medical technologist.

> provided in this subdivision. [See also MCL 257.625a(6)(c) regarding medical personnel qualifications to withdraw blood.]

"To be admissible, the test results must be both relevant and reliable." *People v Fosnaugh*, 248 Mich App 444, 450; 639 NW2d 587 (2001). Suppression of the blood test results is required "only when there is a deviation from the administrative rules that call[s] into question the accuracy of the test." *Id.* The admission of evidence does not require a perfect chain of custody. *People v White*, 208 Mich App 126, 130; 527 NW2d 34 (1994). In *White*, *id.* at 133, this Court held that "[t]he threshold question remains whether an adequate foundation for admission of the evidence has been laid under all the facts and circumstances of each individual case," and that "[o]nce a proper foundation has been established, any deficiencies in the chain of custody go to the weight afforded to the evidence, rather than its admissibility." The *White* panel noted that a break or gap in the chain of custody does not require automatic exclusion of the evidence. *Id.*

At trial, the nurse testified that she drew defendant's blood upon his arrival at the hospital, pursuant to a doctor's orders.[3] The blood went into a vacuum-sealed tube, which she labeled and sent to the laboratory for analysis. The medical technologist testified that, according to her analysis, defendant's blood alcohol level was .28. The results of the blood alcohol test were then admitted into evidence. Defense counsel cross-examined both witnesses regarding their involvement in the collection and testing of defendant's blood, and, during closing argument, highlighted the deficiencies in the chain of evidence. The record arguably supported a conclusion that the chain of evidence was somewhat deficient regarding the manner in which defendant's blood sample arrived at the laboratory for testing. However, no evidence was presented, and defendant does not argue, that the blood actually tested did not belong to defendant. Moreover, given the comparable result in the unchallenged police blood-alcohol test, the accuracy of the hospital blood-alcohol test is evident. Any deficiency in the chain of custody or evidence goes toward the weight of the evidence, not its admissibility. *White*, *supra* at 133. Accordingly, the trial court did not abuse its discretion in admitting the report containing defendant's blood alcohol level.

Defendant next argues that his due process rights were violated where his blood samples were not preserved. MCL 780.655 provided, at the time of the testing,[4] that "[t]he property and things so seized shall be safely kept by the officer so long as necessary for the purpose of being produced or used as evidence on any trial." However, because blood samples themselves are not "produced or used as evidence" at trial, the statutory requirement that property seized be safely kept for use at trial is not triggered by blood samples. *People v Jagotka*, 461 Mich 274, 279; 622 NW2d 57 (1999). Instead, it is the actual test results that are presented to the jury. *Id.* Because test results are not "property . . . seized," the statutory safekeeping provision is not implicated by test results. *Id.* Accordingly, neither the blood sample nor the test results fall within the statutory safekeeping provision. *Id.* Further, contrary to defendant's assertion, he had a

[3] Contrary to defendant's argument, there was testimony that the blood draw was performed under the supervision of a physician.

[4] The 2002 amendment of the statute did not substantively alter the pertinent language. 2002 PA 112.

reasonable period of time within which to request further testing of the blood samples before destruction. *Id*. at 280. As in *Jagotka*, defendant failed to object to the destruction of the sample or to request further testing before the sample was destroyed. *Id*. "Where the police have acted in good faith pursuant to a reasonable policy and have not acted to destroy exculpatory evidence, there is no denial of due process." *Id*. Reversal is unwarranted under the circumstances presented.

Defendant next alleges several instances of prosecutorial misconduct. We review for plain error unpreserved claims of prosecutorial misconduct. *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005). When a prosecutor states that evidence will be presented, which later is not presented, reversal is not required if the prosecutor acted in good faith, *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991), and the defendant was not prejudiced by the statement, *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997). The prosecutor commented during opening statement, before a stipulation was placed on the record, that he was prepared, if necessary, to rebut defendant's potential assertion that the defense was prejudiced due to destruction of evidence. This statement was not made in bad faith and did not prejudice defendant. The statement was ultimately covered by the terms of the stipulation to which the parties agreed, and which the trial court included as part of the jury instructions.

With regard to the other challenged statements made by the prosecutor, there was similarly no misconduct. Otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003). In determining whether an invited response merits reversal, a court should consider the conduct which prompted the prosecutorial response and the proportionality of that response. *Id*. Here, the prosecutor's comments with which defendant takes issue were made in response to comments made by defense counsel. Considered in context, and given their responsive nature, the prosecutor's comments in the case at bar were not improper. See *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004).

Regarding the prosecutor's question to the accident reconstructionist concerning whether he wondered why he had not been contacted earlier, "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The prosecutor's question followed a lengthy discussion in which the trial court ultimately decided that it would allow the prosecutor to ask a few questions because defense counsel had previously opened the door to that line of questioning. "The prosecutor is entitled to attempt to introduce evidence that he legitimately believes will be accepted by the court, as long as that attempt does not prejudice the defendant." *Id*. at 660-661. Defendant has not demonstrated bad faith on the part of the prosecutor, or that he was prejudiced by the prosecutor's question, especially in light of the stipulation regarding the delay which the trial court included as part of the jury instructions.

Finally, the remainder of defendant's claims of prosecutorial misconduct were made outside the presence of the jury, and, therefore, could not have prejudiced defendant. *People v McLaughlin*, 258 Mich App 635, 648-649; 672 NW2d 860 (2003). Defendant has failed to demonstrate plain error regarding his claims of prosecutorial misconduct. Accordingly, he is not entitled to relief on this issue.

Finally, defendant argues that the trial court erred in ruling that the prosecutor would be allowed to rebut evidence of defendant's character with regard to the safety of others with evidence of instances of drunk driving. We review for an abuse of discretion a trial court's evidentiary decision. *Lukity*, *supra* at 488. We review de novo questions of law, such as whether a rule of evidence precludes admissibility of proffered evidence. *Id*.

"Evidence of a person's character . . . is limited to testimony regarding the person's reputation for that character trait." *People v King*, 158 Mich App 672, 678; 405 NW2d 116 (1987). MRE 405(a), concerning reputation and opinion evidence as methods of proving character, provides, in pertinent part:

> In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into reports of relevant specific instances of conduct.

Under MRE 405(a), the defendant can only present favorable character evidence in the form of reputation or opinion testimony. *People v Whitfield*, 425 Mich 116, 130; 388 NW2d 206 (1986). "However, MRE 405(a) permits the prosecution's rebuttal to be done either by cross-examining defense character witnesses concerning reports of specific instances of conduct, or by presenting witnesses who testify to the bad reputation of the defendant." *Whitfield*, *supra* at 130-131. "A character witness for the defense may thus . . . furnish the foundation for the prosecutor to acquaint the jury with matters which otherwise could not be admitted into evidence." *Id*. at 131.

"The prosecutor may *cross-examine* the defendant's witness 'to test his knowledge and candor . . . and for that purpose he may be asked if he has heard of specific acts of misconduct.'" *People v Champion*, 411 Mich 468, 471; 307 NW2d 681 (1981), quoting *People v Rosa*, 268 Mich 462, 465; 256 NW 483 (1934) (omission and emphasis in original). The trial court's ruling that it would allow the prosecutor to impeach the character witness by bringing in evidence of defendant's prior incidents of drunk driving was proper. Moreover, it "allow[ed] defense counsel to make a discriminating choice of the use of [the] character witness[] and the appropriate scope of questioning." *Whitfield*, *supra* at 133.

Here, the proposed opinion testimony of defendant's mother regarding whether defendant lacked traits of willfulness, wantonness, recklessness, or maliciousness with regard to the safety of others, constituted evidence of defendant's character traits. Accordingly, the trial court did not abuse its discretion in ruling that, under MRE 405(a), the prosecutor would be allowed to rebut evidence of defendant's character with regard to the safety of others through examination concerning instances of drunk driving.

Affirmed.

/s/ Peter D. O' Connell
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald