

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SPENCER HOGAN,

Defendant-Appellant.

UNPUBLISHED

January 25, 2005

No. 250428

Wayne Circuit Court

LC No. 02-008330

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for operating under the influence of alcohol causing death, MCL 257.625(4), and manslaughter with a motor vehicle, MCL 750.321. The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to a prison term of ten to thirty years. We affirm.

On October 17, 2001, the victim came out of a liquor store in Detroit and began to cross the street near the intersection in front of the store. A vehicle came down the street, struck the victim, and continued driving. The vehicle performed a U-turn and returned, parking near the victim. Defendant, who had been driving the vehicle, exhibited glassy eyes and smelled of intoxicants. The police performed a preliminary Breathalyzer test on defendant, and the result was 0.12 percent. Defendant was arrested and driven to the police department, where he submitted to two Breathalyzer tests. The results of these tests were 0.18 percent and 0.16 percent, respectively. Several hours after the accident, the victim died from brain and neck injuries.

Defendant first argues that he was denied a fair trial because the prosecutor committed misconduct during recross-examination of defendant and during his rebuttal argument. To preserve claims of prosecutorial misconduct for review, a defendant must timely and specifically object. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003); *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Because defendant failed to object at trial, we review his claims for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *Ackerman*, *supra* at 448. To avoid forfeiture under the plain error rule, defendant must establish that: (1) an error occurred; (2) the error was plain; (3) and the plain error affected defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003), citing *Carines*, *supra* at 763.

The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial, i.e., whether prejudice resulted. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). We review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *Abraham, supra* at 272-273. During recross-examination of defendant, the prosecutor inquired if defendant used his discovery package to work backwards and create an “elaborate story.” The prosecutor also commented, during his rebuttal argument, that defendant had the advantage of reviewing the discovery materials and “work backwards” to conform his testimony to what was contained in the discovery materials.

In *People v Buckey*, 424 Mich 1, 14; 378 NW2d 432 (1985), the Michigan Supreme Court held that it was proper for a prosecutor to comment on a defendant’s opportunity to conform his testimony to that of the other witnesses because he sat through the trial and heard their testimony. The prosecutor in *Buckey* commented that the defendant had reviewed the police reports, sat through the preliminary examination, and sat through the witnesses’ testimony at trial. *Id.* at 6-7. The Court held that opportunity and motive to fabricate testimony are permissible areas of inquiry of any witness. *Id.* at 15. The Court also stated that the prosecutor’s comments only indirectly related to the defendant’s right to be present at the trial and that any resulting inference was not directly of guilt, but rather that the defendant had the opportunity to conform his testimony because he heard other witnesses testify. *Id.* at 14. The Court held that a prosecutor may not argue that a defendant fabricated testimony in every case where a defendant sits through the trial, but when the evidence supports that inference, the argument is a “perfectly proper comment on credibility.” *Id.* at 16.

Defendant argues that this case is distinguishable from *Buckey* because the prosecutor commented that defendant was not credible, having had the opportunity to review discovery materials. However, we are not convinced that *Buckey* is distinguishable from this case. First, in *Buckey*, the prosecutor did comment on the defendant reviewing the police reports, in conjunction with the fact that he heard the other witnesses’ testimony. *Buckey, supra* at 6-7. Additionally, the prosecutor in *Buckey* was commenting on defendant’s credibility.

In the instant case, defendant’s account of the accident changed several times. He told the police officer who investigated the scene of the accident that he was the one driving his vehicle and that he was going twenty-five to thirty miles per hour. He told the officer who administered the Breathalyzer at the police station that he had drunk one bottle of beer. The following morning, he admitted to another officer that he had drunk one bottle of beer, but alleged that a woman was driving his vehicle when it struck the victim. At trial, defendant testified that he had drunk six or seven bottles of beer in thirty minutes, was the one driving his vehicle, and was driving forty to forty-five miles per hour when he struck the victim. He asserted that the alcohol had not affected him and that the victim had jumped out in front of his vehicle from between two parked SUVs or trucks.

Defendant’s credibility was clearly at issue. As such, the prosecutor properly could comment on the inference that defendant tailored his testimony to what was contained within the police reports and witnesses’ statements. See *id.* at 16. When defendant chose to take the witness stand and testify differently from what he had told the officers previously, the prosecutor had the right to confront defendant, like any other witness, about the reasons for the change in

his story. *Portuondo v Agard*, 529 US 61, 69; 120 S Ct 1119; 146 L Ed 2d 47 (2000). Therefore, it was not improper for the prosecutor to question defendant during recross-examination about reading the discovery materials or to comment during his rebuttal argument on defendant's reading of the discovery materials. Accordingly, defendant has not established error, plain or otherwise, based on this issue.

Defendant next argues that the trial court erred when it allowed the medical examiner to testify about toxicology and alcohol levels. We review a trial court's decision on the admission of expert testimony for an abuse of discretion. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004).

MRE 702, as was in effect at the time of defendant's trial,¹ provides:

If the court determines that recognized 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.

In ruling on the admissibility of expert testimony, a trial court should determine whether the testimony will aid the fact-finder in making the ultimate decision in the case. *People v Smith*, 425 Mich 98, 105; 387 NW2d 814 (1986).

The medical examiner testified that in this capacity he frequently dealt with toxicology generally, and specifically alcohol toxicology. He also testified that he was familiar with the tables used to estimate the quantity of alcohol a person has to consume to reach certain blood alcohol levels. This testimony could well have been helpful to the jury in assessing the credibility of defendant's testimony, that he was unaffected by the alcohol he consumed before the accident. Therefore, the trial court did not abuse its discretion in allowing the medical examiner to testify about toxicology and blood alcohol levels.

Finally, defendant argues that he was denied effective assistance of counsel when his trial counsel failed to request an accident reconstructionist as an expert witness. Because defendant failed to file a motion for a new trial on these grounds or request a *Ginther*² hearing, this issue has not been preserved for appellate review, and our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Whether a defendant has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* We review a trial court's findings of fact for clear error and questions of constitutional law de novo. *Id.*

¹ MRE 702 was amended effective January 1, 2004.

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant argues that his trial counsel was ineffective by failing to request an expert in accident reconstruction to argue that the skid marks left at the scene of the accident were not left by defendant's vehicle. However, defendant testified at trial that he was driving the car that struck the victim. The investigating officer used the skid marks to estimate that defendant was driving a minimum of 44.35 miles per hour, and defendant admitted that he was driving between forty and forty-five miles per hour. Defendant also testified that when he saw the victim, he slammed on the brakes and swerved to try to avoid hitting the victim. A witness to the accident also stated that he heard tires squeal before he saw defendant's vehicle strike the victim. There is nothing to indicate that an accident reconstructionist was necessary to defendant's defense. Whether defendant's vehicle made the skid marks was not an issue at trial. As such, defense counsel's failure to request an accident reconstructionist did not fall below the standard of reasonableness for an attorney.

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood