

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEAN LEE RECTOR,

Defendant-Appellant.

UNPUBLISHED

May 8, 2007

No. 266553

Oakland Circuit Court

LC No. 2004-198413-FC

Before: Smolenski, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317; operating a vehicle under the influence of a controlled substance, causing death, MCL 257.625(4); and possession of marijuana, MCL 333.7403(2)(d). The trial court sentenced him to concurrent prison terms of 25 to 40 years for the murder conviction, 10 to 15 years for the OUI causing death conviction, and one year for the possession of marijuana conviction. He appeals as of right. We affirm.

I Basic Facts and Proceedings

Defendant's convictions arise from an automobile accident in which Elvira White was killed when her Mercury Mountaineer was struck by defendant's 2001 Ford F-150 pickup truck, which ran a red light. Witnesses at trial observed defendant traveling at fluctuating speeds above the speed limit, swerving from lane to lane, and running several red lights over the course of approximately five miles. According to the witnesses, defendant's truck swerved around vehicles that were stopped at a red light and struck White's vehicle as she was turning left on a green arrow. Defendant's speed at the time of impact was estimated at between 86 and 91 miles an hour. After the collision, defendant tested positive for cocaine. Defendant denied being under the influence of cocaine at the time of the accident, and claimed at trial that his truck was out of control because of a stuck throttle or unintended acceleration.

II Sufficiency of the Evidence

Defendant first argues on appeal that the evidence was insufficient to support a conviction of second-degree murder. We disagree.

A. Standard of Review

When reviewing a claim regarding the sufficiency of the evidence, we must view 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 proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). The standard of review is deferential and this Court is required to draw all reasonable inferences and make credibility choices in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

B. Analysis

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). “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.” *Id.* Defendant argues that there was insufficient evidence of malice.

Although defendant argues that he did not intentionally speed, the jury was not required to accept that the throttle on defendant's truck malfunctioned and he drove as carefully as he could under the circumstances. Viewed in a light most favorable to the prosecution, the evidence indicated that defendant ingested cocaine, drove his truck at high speeds well above the speed limit for nearly five miles, passed several vehicles while swerving in and out of his lane at fluctuating speeds, ran several red lights, did not apply his brakes or sound his horn before running a red light and striking White's vehicle broadside at a speed in excess of 80 miles an hour. The evidence was sufficient to enable the jury to find, as it did, that defendant intentionally acted in wanton and wilful disregard of the likelihood that the natural tendency of his behavior was to cause death or great bodily harm. Thus, defendant's second-degree murder conviction was supported by sufficient evidence.

III Accident Jury Instruction

Defendant next argues that the trial court's failure to instruct the jury in accordance with CJI2d 7.1 (accident as a defense to murder) denied him a fair trial. We disagree.

A. Standard of Review

Because defendant did not request this jury instruction at trial, or object to the instructions as given, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 766-767; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001).

B. Analysis

Jury instructions must include all the elements of the charged crimes and must not exclude material issues, defenses, and theories if the evidence supports them. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). The principal issue the jury was required to decide at trial was whether defendant's excessive speeds and disregard of traffic laws and signals was intentional, or instead attributable to an unintended mechanical problem with the throttle.

The trial court instructed the jury that to convict defendant of second-degree murder it must find that defendant acted with malice, which “may be inferred from evidence that the Defendant intentionally set in motion a force likely to cause death or great bodily harm.” Under the trial court’s instruction, the jury could not have convicted defendant of murder if it believed his theory that an unintended mechanical problem caused the accident.

Furthermore, the jury was also instructed on involuntary manslaughter with a motor vehicle, and negligent homicide. If the jury had any doubts regarding whether defendant had the requisite malice for second-degree murder, it would have acquitted him or convicted him of one of the lesser-included offenses, which did not require a finding of malice. See *People v Hawthorne*, 474 Mich 174, 185; 713 NW2d 724 (2006). Instead, the jury rejected the lesser offenses and found that defendant had the requisite intent to support a verdict of second-degree murder. Under these circumstances, defendant has not shown a plain error that affected his substantial rights.

IV Judicial Impartiality

Defendant next argues that the trial court’s questioning of witnesses pierced the veil of judicial impartiality, and that the court was biased against him. We disagree.

A. Standard of Review

Because defendant did not object to the trial court’s questions at trial, he must demonstrate a plain error that affected his substantial rights. *Carines, supra* at 763-764.

B. Analysis

MRE 614(b) provides that a trial court “may interrogate witnesses, whether called by itself or by a party.” However, the court must be careful that its questions are posed in a neutral manner and do not distort the evidence so as to pierce the veil of impartiality. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). The test is whether the court’s questions may have unjustifiably aroused suspicion in the jury as to witness credibility or whether partiality may have influenced the jury to defendant’s detriment. *People v Sterling*, 154 Mich App 223, 228; 397 NW2d 182 (1986). Here, the record discloses that the trial court’s questions were principally intended to clarify testimony. Further, the questions were brief, neutral, nonargumentative, and did not pierce the veil of judicial impartiality. Thus, a plain error has not been shown.

Defendant also argues that the trial court should have disqualified itself because it was biased. “A party that challenges a judge for bias must overcome a heavy presumption of judicial impartiality.” *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Disqualification is not warranted absent a showing of actual bias. *Id.*

Defendant argues that the trial judge was biased against him because his daughter-in-law was killed in a car accident. The trial judge addressed this issue at a posttrial hearing. He explained that the circumstances of this case and his daughter-in-law’s accident were completely different and that there was no merit to defendant’s claim that he could not fairly and impartially preside over defendant’s trial because of his daughter-in-law’s accident. The mere fact that the

trial judge had a close family member who was tragically killed in an automobile accident does not mean that the judge was incapable of fairly presiding over defendant's trial. Because the record is devoid of any indication of actual bias, we reject this claim of error.

V. Exclusion of Evidence

Next, defendant argues that the trial court abused its discretion by excluding testimony from a lay witness concerning the witness's experience with a stuck throttle in a Ford F-150 truck. Defendant further argues that the exclusion of this evidence denied him his constitutional right to present a defense. We disagree.

A. Standard of Review

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000). Constitutional questions are reviewed de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

B. Analysis

The witness would have testified that he was a passenger in a truck of an unknown model year in which the accelerator became stuck after it became entangled with a floor mat. Defendant testified at trial that he was not aware of any carpet mat or debris blocking the gas pedal of his truck at the time of the accident. Because there was no evidence that the circumstances that caused the stuck accelerator in the witness's vehicle were present here, the trial court did not abuse its discretion in excluding the witness's testimony as irrelevant. MRE 401. Furthermore, defendant was otherwise permitted to present evidence regarding his theory that the accident was caused by a mechanical problem with the throttle and, therefore, he was not denied his constitutional right to present a defense.

VI Due Process

Relying on *Riggins v Nevada*, 504 US 127; 112 S Ct 1810; 118 L Ed 2d 479 (1992), and *Washington v Harper*, 494 US 210; 110 S Ct 1028; 108 L Ed 2d 178 (1990), defendant argues that his due process rights were violated because psychotropic medications were involuntarily administered to him before trial, which thereby impaired his mental capacity at trial and also affected his credibility before the jury. We find no merit to this argument.

The record does not support defendant's claim that the medications in question, Seroquel and Sinequan, were administered involuntarily. Rather, the record discloses that defendant asked for some medication because he was having trouble sleeping while in jail. He was originally given Benadryl, but it caused uncomfortable side effects so he was then given Seroquel and Sinequan. Before receiving these medications, defendant signed a consent form that listed the possible side effects of these drugs. The record also fails to support defendant's claim that the drugs affected his mental processes and interfered with his ability to prepare for and testify at trial. By the time defendant testified at trial, he had been taking Sinequan and Seroquel for approximately three months, and the dose of Seroquel was last increased 21 days before his testimony. Defendant never complained about any side effects caused by the drugs. Further, at a posttrial evidentiary hearing, defense counsel testified that he did not notice anything unusual

about defendant's behavior during trial, did not observe any indication that the medications interfered with defendant's ability to understand questions and respond appropriately, and believed that defendant's testimony was consistent with their other conversations. In light of this record, there is no merit to this issue.

VII Prosecutorial Misconduct

Defendant next argues that the prosecutor's conduct denied him a fair trial. We disagree.

A. Standard of Review

Because defendant did not object to the alleged misconduct below, our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763-764; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Id.* at 721.

B. Analysis

Defendant first specifically argues that the prosecutor misled the jury on the law regarding the intent necessary for second-degree murder. We disagree. Viewed in context, the prosecutor's remarks were consistent with the concept of malice for purposes of second-degree murder. *Goecke, supra* at 442. In particular, the prosecutor's statements that defendant didn't care what happened comported with the concept that defendant acted in wanton and wilful disregard of the likelihood that the natural tendency of his behavior was to cause death or great bodily harm. There was no plain error. Furthermore, defendant concedes that the trial court properly instructed the jury on the necessary intent for second-degree murder. The jury is presumed to follow the court's instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), which were sufficient to protect defendant's substantial rights.

Defendant also argues that the prosecutor made an improper appeal to sympathy. Appeals to the jury to sympathize with the victim constitute improper argument. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). The prosecutor's remarks in this case were far less inflammatory than those in *Watson, supra*, which were not deemed to be prejudicial. Further, the trial court instructed the jury that it must base its verdict only on the evidence and the law, and "must not let sympathy or prejudice influence your decision." In the absence of an objection, the trial court's instruction was sufficient to cure any perceived prejudice.

Defendant also argues that the prosecutor improperly shifted the burden of proof by commenting that the only evidence supporting defendant's stuck throttle theory came from defendant, who was not credible. A prosecutor may not infringe on a defendant's right not to testify, and a defendant has no burden to produce any evidence. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). However, once a defendant "advances evidence or a theory, argument on the inferences created does not shift the burden of proof." *Id.* The prosecutor does not shift the burden of proof by commenting on the improbability of a defendant's theory. *Id.* A prosecutor may draw inferences from the testimony and argue that a witness, including the defendant, is not worthy of belief. *People v Buckey*, 424 Mich 1, 14-15; 378 NW2d 432 (1985);

People v Thomas, 260 Mich App 450, 455; 678 NW2d 631 (2004). In the instant case, defendant testified and advanced his stuck throttle theory. It was not improper for the prosecutor to argue that defendant's testimony was not credible and that his stuck throttle theory lacked evidentiary support. Thus, there was no plain error.

Defendant also contends that the prosecutor argued facts not in evidence. The record does not support defendant's claim that the prosecutor made "a critical misstatement of the facts" relative to whether defendant received morphine before or after Nurse Colombo saw him at the hospital. At best, there was conflicting testimony on this issue, so the prosecutor's argument was not without evidentiary support. Further, the jury was instructed that it was the sole judge of the facts, and that the remarks of the attorneys were not evidence. Moreover, apart from Colombo's testimony, a police officer at the accident scene testified that defendant appeared to be "high." Given these circumstances, defendant has not established a plain error affecting his substantial rights.

Because we have not found any plain errors with respect to the prosecutor's conduct, there is no merit to defendant's argument that the cumulative effect of the prosecutor's conduct denied him a fair trial. *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002).

VIII Effective Assistance of Counsel

Next, defendant argues that trial counsel was ineffective. We disagree.

A. Standard of Review

The denial of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo. *LeBlanc, supra* at 579. .

B. Analysis

To establish a claim of ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient performance so prejudiced the defense as to deprive defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

Defendant first argues that counsel did not properly investigate the case or present evidence to support defendant's theory of the case. The record discloses that trial counsel successfully filed a motion for an investigator, but then made a "conscious decision" not to get an expert witness once he saw that the prosecutor's experts could not rule out defendant's claim that the throttle became stuck. Jeffrey Wallis, a mechanic who examined defendant's truck after the accident for mechanical problems, acknowledged at trial that he would have no way to dispute a driver's claim that the throttle plate was stuck open. Although defendant presented an expert witness at a posttrial evidentiary hearing, the witness similarly explained that there was no way to prove that there was, in fact, a stuck throttle in this particular case. Thus, the defense expert's testimony was consistent with what had been presented at trial. It was not objectively unreasonable for trial counsel to decide that it would be more effective for the prosecution's

witness to testify that he could not prove that defendant was wrong, than for a defense expert to testify that he could not prove that defendant was right.

Defendant also argues that counsel was ineffective for not presenting evidence of other mechanical problems with the Ford F-150. Defendant relies on a posttrial recall notice and evidence of different complaints from customers about the 2001 model, but these involve conditions different from the alleged defect in this case. Defendant does not explain how this evidence would have been admissible at trial.

Defendant also argues that counsel was ineffective for failing to request an instruction on accident. As previously discussed, it is apparent from the jury's verdict that it rejected defendant's theory of accident; otherwise it would not have convicted him of second-degree murder. Thus, even if an accident instruction would have been appropriate, defendant has not shown that he was prejudiced by counsel's failure to request the instruction.

Defendant also argues that counsel was ineffective for failing to object to the trial court's questions and the prosecutor's conduct. Having previously concluded that neither the trial court's questions nor the prosecutor's conduct was improper, we likewise reject defendant's related ineffective assistance of counsel claims.

IX Sentencing

Finally, defendant argues that the trial court erred in scoring offense variable 9 of the sentencing guidelines at ten points, on the basis that at least two persons were placed danger of injury or loss of life by defendant's conduct, MCL 777.39. Defendant concedes that there is factual support for the trial court's scoring decision, but argues that the scoring was improper because it was not based on facts found by the jury, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree. Our Supreme Court has determined that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 143; 715 NW2d 778 (2006). Thus, there was no sentencing error.

Affirmed.

/s/ Michael R. Smolenski

/s/ Kurtis T. Wilder

/s/ Brian K. Zahra