

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
March 15, 2011

v

MARK JAY STINCHCOMB,  
  
Defendant-Appellant

No. 294783  
Kent Circuit Court  
LC No. 08-012019-FH

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Before: MURRAY, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of negligent homicide, MCL 750.324.<sup>1</sup> Defendant was sentenced to five days in jail, with credit for five days served, and placed on probation for 18 months. Because there was sufficient evidence to support defendant's conviction and because defendant's substantial rights were not affected in this matter, we affirm.

Defendant, Leroy Cobb, and Michael King were car-pooling to work. The group was traveling north on M-37 in defendant's car, which defendant was driving. Cobb was in the front passenger seat, and King was sitting in the back of the vehicle. As they proceeded toward their jobsite, Cobb was looking down to place food items he purchased at the gas station into his lunchbox, and when he looked up, he noticed a slow-moving vehicle directly in front of them and yelled defendant's name. At the same time Cobb was placing items into his lunchbox, defendant was moving a pill bottle from the center console area to the dashboard because the rattling sound of the pills was "distracting" him. Defendant testified he noticed the vehicle at about the same time as Cobb. Defendant swerved left to avoid hitting the vehicle and lost control of the vehicle, which ultimately rolled multiple times before coming to rest upside down. Defendant and Cobb both testified that the vehicle defendant swerved around seemed to appear out of nowhere in front of defendant's car. The vehicle was traveling very slowly, and its taillights were not brightly lit, and were either dirty, dim, or turned off. Neither man noticed the vehicle until it was too close to defendant's car for defendant to slow down in order to avoid hitting the vehicle.

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<sup>1</sup> See, now MCL 257.601d.

Defendant and Cobb sustained serious injuries in the accident. King was ejected from the vehicle, and died of blunt force injuries several days after the accident. Defendant was charged with negligent homicide as a result.

Defendant first argues on appeal that there was insufficient evidence to convict him of negligent homicide. We disagree.<sup>2</sup>

A challenge to the sufficiency of the evidence is reviewed de novo. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). The evidence is viewed in a light most favorable to the prosecution to determine whether a rational jury could find that each element of the crime was proven beyond a reasonable doubt. *Id.* “Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime.” *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999).

A negligent homicide conviction requires that the prosecution prove beyond a reasonable doubt that:

(1) defendant was operating a motor vehicle, (2) defendant was operating the vehicle at an immoderate rate of speed or in a careless, reckless, or negligent manner, (3) defendant's negligence was a substantial cause of an accident resulting in injuries to the victim, and (4) those injuries caused the victim's death. *People v Tims*, 449 Mich 83, 95, 99, 103-104; 534 NW2d 675 (1995).

For negligent homicide, it must be proven that defendant was guilty of ordinary negligence. *People v Traughber*, 432 Mich 208, 217; 439 NW2d 231 (1989). Ordinary negligence is “the want of reasonable care,” or “failing to do what an ordinarily sensible person would have done under the conditions and circumstances then existing.” *Id.*

In this case there was sufficient evidence for a rational jury to find each element of negligent homicide was proven beyond a reasonable doubt. The evidence at trial supported that defendant was suddenly too close to another vehicle on the road to do anything but swerve or strike the vehicle. Viewing the evidence in a light most favorable to the prosecution, the jury could infer ordinary negligence from the fact that defendant did not notice the vehicle until it was directly in front of him and immediately before he noticed the other vehicle, he was moving a pill bottle that was “distracting.” Further, the jury could conclude that defendant was negligent in his operation of the vehicle because he swerved, tried to swerve back, and lost control of the

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<sup>2</sup> While we recognize that the prosecution has broad discretion to bring any charge supported by the evidence, *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004), it is regretful that the obviously unintentional actions of defendant resulted in a negligent homicide charge. By all accounts, defendant simply overcompensated in swerving to avoid a vehicle that was difficult to see and, in doing so, caused the death of his friend and co-worker. We are hard-pressed to think of circumstances more deserving of the exercise of lenient prosecutorial discretion.

vehicle when the road was dry and there was no oncoming traffic. Moreover, the severity of the accident itself supports a reasonable inference of negligence. The jury could have found that defendant was distracted; and thus, not exercising ordinary care.

Defendant also argues there was insufficient evidence that his conduct was a substantial cause of the victim's death, arguing that the victim was not wearing a seatbelt and a turnaround, which he hit before the car rolled, was the reason the accident turned deadly. The contributory negligence of a victim or a third party is not a defense to negligent homicide, but it is a factor for the jury to consider in determining whether defendant's negligence caused the death of the victim. *People v Moore*, 246 Mich App 172, 177-178; 631 NW2d 779 (2001). And, the prosecution must prove only that defendant was "a" cause of the victim's death; the prosecution does not have to prove defendant was the only cause. *Tims*, 449 Mich at 96. The victim died from blunt force injuries he received in the accident, and defendant was responsible for the accident. Because a victim's negligence is not a defense to the charge of negligent homicide, *id.* at 97-98, viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to find defendant guilty.

Defendant next argues that the trial court committed reversible error by failing to give the jury a sudden-emergency instruction. Defendant did not request the sudden-emergency instruction or object to the jury instructions given at trial. MCL 768.29 provides that "[t]he failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused." Lacking a request for the instruction and an objection to the instructions as presented, defendant must establish plain error affecting his substantial rights in order to obtain relief. *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Substantial rights are affected when the defendant is prejudiced, meaning the error affected the outcome of the trial. *Id.* at 763.

The sudden-emergency doctrine applies when the circumstances around an accident are unusual or unsuspected. *Vander Laan v Miedema*, 385 Mich 226, 232; 188 NW2d 564 (1971). The sudden-emergency doctrine provides that in case of an emergency, "a driver is not responsible for the selection of the safer method of avoiding a collision." *Traugher*, 432 Mich at 222-223. Regardless whether the facts in evidence support a sudden emergency instruction, defendant has not shown that the failure to give the instruction affected his substantial rights. *Carines*, 460 Mich at 752-753. The trial court instructed the jury that it must determine whether defendant engaged in ordinary negligence and that ordinary negligence means not taking reasonable care "under the circumstances as they were at the time." This instruction adequately apprised the jury that it must consider the alleged emergency situation surrounding the accident when deciding whether defendant acted with ordinary negligence. Thus, defendant was not prejudiced by the failure of the trial court to give the instruction. *Carines*, 460 Mich at 763.

Finally, defendant argues the prosecutor's closing remarks concerning defendant's expert were improper and prejudiced his right to a fair and impartial trial. We disagree.

Claims of prosecutorial misconduct are reviewed on a case-by-case basis and are considered in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Where, as here, no objection to the prosecutor's conduct was made, we review the claim for plain error affecting substantial rights. *Id.*

In this case, the prosecution argued in closing that defendant's expert's source of income was defense testimony, and insinuated that the expert testified favorably for defendant for pay because he "needs to keep the gravy train rolling." The expert was not, however, questioned regarding whether he was compensated, and he stated he has also served as an expert witness for a prosecutor and in civil trials for both the plaintiff and defense. A prosecutor may not make factual statements to the jury if those statements are not supported by the evidence. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). While the prosecutor also stated that he did not think defendant's expert was lying, the statements concerning the expert's compensation were not supported by the record. The statements were thus improper. Nevertheless, the prosecution's statements were not so egregious as to have affected defendant's substantial rights. Cf. *People v Tyson*, 423 Mich 357, 373-377; 377 NW2d 738 (1985) (prosecution stated in closing that defense expert lacked integrity and was motivated only by money). Additionally, the trial court in this case instructed the jury that it must decide the case only on the evidence, and that statements made by attorneys are not evidence. Thus any prejudice the defendant may have suffered from the prosecution's closing argument was eliminated. *People v Ackerman*, 257 Mich App 434, 449-450; 669 NW2d 818 (2003). Defendant has not shown the prosecution's comments constituted plain error affecting his substantial rights.

Affirmed.

/s/ Christopher M. Murray

/s/ Joel P. Hoekstra

/s/ Deborah A. Servitto