

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JOSEPH CARL WEEDER,

Defendant-Appellant.

UNPUBLISHED

July 31, 2001

No. 217454

Oakland Circuit Court

LC No. 98-161065-FC

Before: White, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of involuntary manslaughter, MCL 750.321, as lesser included offenses of second-degree murder, MCL 750.317, two counts of operating a vehicle while under the influence of intoxicating liquor (OUIL) causing death, MCL 257.625(4), two counts of first-degree fleeing and eluding, MCL 750.479a(5), and operating a motor vehicle while license suspended, second or subsequent offense, MCL 257.904(1) and (3)(b). Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 15 to 22-1/2 years for each of the manslaughter and OUIL convictions, 5 to 7-1/2 years for the fleeing and eluding convictions, and 219 days in jail for the driving while license suspended conviction. Defendant appeals as of right. We affirm in part, reverse in part, and remand.

Defendant had no driver's license, and had been drinking, when he was pulled over by an Oakland County Sheriff's Deputy. As the deputy approached defendant's car on foot, defendant sped away, initiating a high-speed chase. Several miles later, defendant's vehicle collided with a car that crossed his path, killing the two occupants of the other car.

I

Defendant first contends that the trial court erred by denying his request to instruct the jury on negligent homicide, MCL 750.325. We agree. As the prosecutor recognizes, this issue is controlled by *People v McIntosh*, 400 Mich 1, 6; 252 NW2d 779 (1977), wherein the Supreme Court held that "if the jurors are or should be permitted to consider manslaughter committed with a motor vehicle, then, pursuant to MCL 750.325; MSA 28.557, they also should be permitted to

consider negligent homicide.”¹ *McIntosh, supra* at 7. The prosecutor’s disagreement with *McIntosh* must be addressed to the Supreme Court. Hence, the trial court erred by not instructing the jury on negligent homicide as a lesser offense to murder and involuntary manslaughter, and the only question is whether this is error requiring reversal.

Nonconstitutional error is presumed harmless unless a defendant persuades the reviewing court that it is more likely than not that the error was “outcome determinative.” This determination is made by focusing on the nature of the error in light of the untainted evidence of guilt. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). An error is outcome determinative if it undermines the reliability of the verdict. *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000); *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000). In this case, defendant’s defense was predicated on the theory that many factors contributed to the collision and he was not as culpable as the prosecutor was trying to make him out to be. The degree of defendant’s culpability - - wilful and wanton disregard that the natural tendency of his driving was to cause death or great bodily harm (second-degree murder); driving in a grossly negligent, wanton or reckless manner (involuntary manslaughter); or driving at an immoderate rate of speed or in a careless, reckless or negligent manner, but not willfully or wantonly, (ordinary negligence, negligent homicide) - - was a question for the jury.² Where a court erroneously fails to give an instruction that is supported by the evidence, and the instruction is crucial to the defendant’s theory of the case, “[t]here is no question that the error undermine[s] the reliability of the verdict, and thus [is] ‘outcome determinative’ under *Lukity* and *Elston*.” *Rodriguez, supra* at 474. Further, the error was not harmless because the jury did not reject a lesser charge in favor of a greater one. Rather, the jury opted for involuntary manslaughter rather than second-degree murder. Consequently, we reverse the involuntary manslaughter convictions and instruct the trial court, on remand, to enter convictions for negligent homicide, and to resentence accordingly, subject to the prosecutor’s option of retrying defendant on the higher charges of which he was convicted. *People v Gridiron*, 185 Mich App 395, 404; 460 NW2d 908 (1990),³ conviction vacated on rehearing on other grounds 190 Mich App 366; 475 NW2d 879 (1991), amended 439 Mich 880; 476 NW2d 411 (1991).

¹ MCL 750.325 states:

The crime of negligent homicide shall be deemed to be included within every crime of manslaughter charged to have been committed in the operation of any vehicle, and in any case where a defendant is charged with manslaughter committed in the operation of any vehicle, if the jury shall find the defendant not guilty of the crime of manslaughter, it may render a verdict of guilty of negligent homicide.

² The presumption of gross negligence recognized in *People v Lardie*, 452 Mich 231; 551 NW2d 656 (1996), is applicable to the statutory offense of OUIL causing death, of which defendant was also convicted. It does not apply to the offense of involuntary manslaughter. While the jury may conclude that the conduct amounts to gross negligence, no presumption is involved in considering the latter offense.

³ We note that, under the circumstances of this case, the availability of this remedy is left
(continued...)

II

Defendant next raises several claims of error in conjunction with the trial court's limitation on his ability to introduce evidence that the deputy who was chasing him violated several terms of his department's internal pursuit policy. To the extent that defendant's claims are preserved, we review the trial court's exclusion of this evidence pursuant to MRE 403 for an abuse of discretion, but consider the component constitutional questions de novo. *Lukity, supra* at 488.

Although defendant asserts that the exclusion of this evidence denied him his constitutional right to assert a defense, "[i]t is well settled that the right to assert a defense may permissibly be limited by 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *People v Toma*, 462 Mich 281, 294; 613 NW2d 694 (2000), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). The rule on which the trial court relied, which permits a court to exclude irrelevant or immaterial evidence that would be a waste of time or confusing to the jury, imposes a permissible limitation on defendant's right to present a defense.

In order to establish defendant's guilt in bringing about the deaths of the victims, the prosecutor had to prove not only that defendant engaged in certain culpable conduct, but also that defendant's culpable conduct was the proximate cause of the deaths. However, the requirement that defendant's act be "the proximate cause" of the deaths "does not imply that a defendant is responsible for harm only when his act is the sole antecedent." *People v Tims*, 449 Mich 83, 96; 534 NW2d 675 (1995). The contributory negligence of others would only be relevant to the extent that it bears on whether defendant's acts were a substantial cause of the harm, i.e., whether the contributory negligence was an intervening and superseding cause of the harm. When an independent act "intervenes between the act of a criminal defendant and the harm to a victim, that act may only serve to cut off the defendant's criminal liability where the intervening act is the sole cause of harm." *People v Bailey*, 451 Mich 657, 677, amended on denial of rehearing 453 Mich 1204; 549 NW2d 325 (1996). "For the same reason, the contributory negligence of [another] will not exonerate a defendant of criminal responsibility, where the defendant's negligence is a proximate cause of the decedent's death." *Id.* at 678.

Under the facts involved here, the deputy's disregard of the internal pursuit policy, his meeting with a union representative, and the sheriff's department's release of erroneous information to the press, if established, would all be irrelevant because these circumstances do not establish superseding negligence or other superseding causes.

For these same reasons, defendant was not denied his constitutional right to a meaningful opportunity to cross-examine the pursuing deputy. "A limitation on cross-examination that prevents a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right

(...continued)

unaffected by the Supreme Court's recent decision in *People v Bearss*, 463 Mich 623; 625 NW2d 10 (2001).

of confrontation.” *People v Kelly*, 231 Mich App 627, 644; 588 NW2d 480 (1998). However, a defendant’s right to cross-examine witnesses is subject to reasonable limitation in that a defendant is only guaranteed the “right for a *reasonable* opportunity to test the truthfulness of a witness’ testimony.” *People v Ho*, 231 Mich App 178, 189-190; 585 NW2d 357 (1998) (emphasis in original). Defendant argues that after he elicited, over the prosecutor’s objection, the pursuing deputy’s understanding of his department’s chase policy, he was entitled to impeach the witness by demonstrating that his understanding was wrong. However, this would not have shown the deputy to be a liar, only mistaken, and it is clear that defendant sought to introduce the actual chase policy not for impeachment, but as substantive evidence for the previously discussed irrelevant purposes.

Defendant also argues in this regard that, after his offer of proof demonstrated to the court that the pursuing deputy had been wrong about the terms of his department’s pursuit policy, it then became the prosecutor’s responsibility to introduce the very evidence that the prosecutor did not want admitted, and defendant did want admitted, and the court had ruled irrelevant, immaterial, and confusing to the trier of fact—the department’s internal pursuit policy. Because defendant did not preserve this claim of error, he can avoid forfeiture only by establishing that this was plain error affecting his substantial rights that resulted in prejudice warranting reversal. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

“[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with ‘rudimentary demands of justice.’” *Giglio v United States*, 405 US 150, 153; 92 S Ct 763; 31 L Ed 2d 104 (1972), quoting *Mooney v Holohan*, 294 US 103, 112; 55 S Ct 340; 79 L Ed 791 (1935). “‘The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.’” *Giglio, supra* at 153, quoting *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959). The “suppression of material evidence justifies a new trial ‘irrespective of the good faith or bad faith of the prosecution.’” *Giglio, supra* at 153-154, quoting *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). However, a finding of materiality is a prerequisite to a determination that a new trial is required. That is, reversal is not justified unless there is a reasonable likelihood that the false testimony affected the judgment of the jury. *Giglio, supra* at 154; *Brady, supra* at 87; *People v Wiese*, 425 Mich 448, 453-456; 389 NW2d 866 (1986).

The actual pursuit policy was not withheld from defendant or from the court, and there is no indication that the pursuing deputy’s testimony was false, inasmuch as he admitted that he could not quote the pursuit policy and could only testify to what he believed the policy to be.

Finally, with regard to the limitations on his “contributory negligence” defense, defendant argues that, even though the court instructed the jury that it could consider the contributory negligence of the driver of the other car, the court erred by failing to sua sponte instruct the jury that it could specifically consider the contributory negligence of the pursuing deputy. The lack of a request for this instruction leaves this claim of error unpreserved and subject to forfeiture, absent a showing of plain error affecting substantial rights. MCL 768.29; *Carines, supra* at 763; *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). However, in view of the fact that defendant’s strongest theory was that the driver of the other car had been drinking and had pulled out in front of him at the last second when he clearly should not have done so, and

given that defense counsel expressly stated that he wanted the contributory negligence instruction with regard to the other driver's negligence, and given also that defense counsel expressly approved the instructions as read to the jury, defendant affirmatively waived any right to have the jury instructed on the pursuing deputy's contributory negligence. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

Defendant has filed a supplemental brief on appeal and a motion to remand seeking a new trial on the basis that the deputy who chased defendant subsequently gave deposition testimony in two civil cases arising out of the collision that conflicts with the deputy's testimony at defendant's trial. At the depositions, the deputy attributed lower speeds to defendant's vehicle and conceded that many of his actions were prohibited by the department's pursuit policy. On the basis of the foregoing discussion regarding the relevance of the pursuit policy, and because we are reversing defendant's manslaughter convictions, we find the differences in the deputy's testimony to be immaterial. Consequently, we decline to grant the motion to remand or provide any relief on this basis. See MCR 7.211(C)(1); *People v Hernandez*, 443 Mich 1, 15; 503 NW2d 629 (1993).

III

Defendant next argues that he was denied his rights to discovery because the prosecutor failed to: (1) affirmatively disclose before trial that the blood sample drawn pursuant to a warrant was not obtained until more than two hours after the collision; and (2) make it clear that there had been an earlier blood sample, that was drawn and tested by hospital personnel, for purposes of medical treatment. In a supplemental brief, defendant calls this Court's attention to MCL 257.625(8), which places a statutory obligation on the prosecution to respond to a request for test results by furnishing the results at least two days before trial, and bars the admission of the results if the request is not honored. However, the trial court found that the prosecutor had provided defense counsel with documentation of the prior blood test, and we see no basis to disturb that finding. *People v Fox*, 232 Mich App 541, 550-551; 591 NW2d 384 (1998). As for the failure to disclose the delay earlier, a defendant has a constitutional right, under *Brady, supra* at 87, to any evidence that would be favorable to him. However, "[t]here is no general constitutional right to discovery in a criminal case," although a defendant does have a broad right to discovery pursuant to MCR 6.201. *Elston, supra* at 765.

Where a defendant claims that he is surprised by evidence, the preferred remedy is to give the defendant the opportunity to prepare that he may have been denied. Where the harm can be avoided in this manner, "the more severe remedy of suppression would not [be] appropriate." *Elston, supra* at 764. Here, the only opportunity that defendant was potentially denied was the option of moving before trial to exclude the test results on the basis of the delay. However, the court remedied that problem by giving defendant that opportunity during trial. Defendant apprised the court of the same primary authority that he now advances on appeal, and being fully informed, the court declined to exclude the evidence. Moreover, the court's decision was correct. *People v Wager*, 460 Mich 118, 125-126; 594 NW2d 487 (1999).

Next, defendant claims error with respect to the dismissal of a juror and his conviction by an eleven-member jury. After the jury was instructed, and sent home for the day, the officer in charge, Deputy Poulin, arrested the husband of Juror No. 1 because Poulin had grown suspicious of the man, who had attended several days of the trial and who had declined to give his name in casual conversation. While it is not necessary, in order to address the issue presented here, to describe in detail the events giving rise to Poulin's suspicions, it is clear that Poulin's conduct was unjustified. As a consequence of Poulin's actions in arresting and failing to release her husband, Juror No. 1 formed the belief that the officer in charge was capable of fabricating a story, and thus had to be excused on the basis of her potential prejudice against the prosecutor.

On appeal, defendant denounces the violation of Juror No. 1's husband's constitutional rights. However, defendant has no standing to invoke the Fourth Amendment rights of another. *Rakas v Illinois*, 439 US 128, 133-134; 99 S Ct 421; 58 L Ed 2d 387 (1978); *People v Wood*, 447 Mich 80, 89; 523 NW2d 477 (1994). Defendant does, of course, have standing to assert his own constitutional rights to be free from being twice put in jeopardy for the same offense.⁴ After Juror No. 1 was excused, the trial court offered to grant a mistrial. Defendant expressed a willingness to go forward with eleven jurors, but only on the condition that the trial court make a ruling as to whether, if a mistrial were granted, retrial would be barred. The trial court declined to make such a ruling, and defendant elected to go forward with eleven jurors. We view this to be an affirmative, but conditional, waiver of his claim of error predicated on having a jury of only eleven. Hence, we consider whether retrial would have been barred only to determine whether the condition was satisfied.

The Double Jeopardy Clause does not bar all retrials. The Supreme Court of the United States has held that the charged offense may be retried where the mistrial was declared because of a hung jury. The Court has fashioned a balancing test focusing on the cause prompting the mistrial. The thrust of the Court's decisions is that the Double Jeopardy Clause does not bar retrial where the prosecutor or judge made an innocent error or where the cause prompting the mistrial was outside their control. Where the motion for mistrial is made by the prosecutor, or by the judge sua sponte, retrial will be allowed if declaration of the mistrial was "manifest[ly] necess[ary]":

[T]he law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. [*United States v Perez*, 22 US (9 Wheat) 579, 580; 6 L Ed 165 (1824).]

⁴ US Const, Am V; Const 1963, art 1, § 15.

Where the motion for mistrial was made by defense counsel, or with his consent, and the mistrial was caused by innocent conduct of the prosecutor or judge, or by factors beyond their control, or by defense counsel himself, retrial is also generally allowed, on the premise that by making or consenting to the motion the defendant waives a double jeopardy claim.

Where a defendant's motion for mistrial is prompted by intentional prosecutorial conduct, however, the defendant may not, by moving for a mistrial, have waived double jeopardy protection. The United States Supreme Court has held that the Double Jeopardy Clause bars retrial where prosecutorial conduct was intended to provoke the defendant into moving for a mistrial. *Oregon v Kennedy*, 456 US 667, 102 S Ct 2083, 72 L Ed 2d 416 (1982). [*People v Dawson*, 431 Mich 234, 252-253; 427 NW2d 886 (1988) (footnotes omitted).]

In this case, the prosecutor had no prior knowledge that Poulin would arrest a juror's husband, and it appears that Poulin himself did not know that the man he confronted and arrested was a juror's husband until after he confronted and arrested him. Although Poulin's conduct is inexplicable, because his conduct was not intended to provoke a mistrial, had defendant opted for a mistrial, retrial would not have been barred. Consequently, defendant's waiver extinguished any error grounded in only having a jury of eleven. *Carter, supra* at 214-216.

v

Next, defendant raises two more claims that he was denied a fair trial on the basis of the prosecutor's misconduct. In the first of these claims, defendant complains that during the prosecutor's opening statement, he stated that defendant drove "like a wild animal" and that his conduct was "severe" and "brutal." Because defendant did not object to this rhetoric during trial, our review is once again limited by the plain error rule. *Carines, supra* at 463. We find no plain error in this remark.

Defendant also argues that he is entitled to a reversal of his convictions because, during closing arguments, the prosecutor asked the jury to draw an affirmative inference of guilt from the lack of evidentiary support offered by defense counsel for defendant's alternative theory of the case.

A prosecutor may not attempt to shift the burden of proof to the defendant by suggesting that the defendant "must prove something or present a reasonable explanation for damaging evidence." *People v Foster*, 175 Mich App 311, 317; 437 NW2d 395 (1989), disapproved on other grounds *People v Fields*, 450 Mich 94, 115 n 24; 538 NW2d 356 (1995). However, "it is permissible for a prosecutor to observe that evidence against the defendant is uncontroverted or undisputed." *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998). See, also, *Fields, supra* at 115. Here, the prosecutor's remarks were not of such a magnitude as to overcome the court's contemporaneous, and subsequently repeated, instruction to the jury on the burden of proof. The court's remedial instruction was sufficient to dispel any unfair inference the jury might have otherwise drawn from these comments. See *People v Figgures*, 451 Mich 390, 400; 547 NW2d 673 (1996); *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

Accordingly, the remarks could not have denied defendant a fair and impartial trial, and he is not entitled to relief on this basis.

VI

Defendant also argues that the trial court abused its discretion when it imposed prison sentences of 15 to 22-1/2 years for each of the OUIL causing death and involuntary manslaughter convictions. Because we are reversing the manslaughter convictions, we consider this question only with regard to the sentences imposed for OUIL causing death. “A trial court enjoys broad discretion in imposing sentence so that it can tailor each sentence to the circumstances of the case, the particular characteristics of the defendant, and the interests of society in rehabilitating the defendant and deterring others from committing similar offenses.” *People v Poppa*, 193 Mich App 184, 187; 483 NW2d 667 (1992). This discretion is limited, of course, by the principle that a sentence must “be proportionate to the seriousness of the circumstances surrounding the offense and the offender.” *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). “[A] trial court does not abuse its discretion in giving a sentence within statutory limits when an habitual offender’s underlying felony, in the context of his previous felonies, evidences that he has an inability to conform his conduct to the laws of society.” *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). Our review of defendant’s record of prior offenses, and the circumstances of this incident, indicates that defendant’s sentences of 15 to 22-1/2 years’ imprisonment do not violate the principle of proportionality, and that the trial court did not abuse its discretion by imposing them.

VII

Finally, defendant argues that his two convictions for OUIL causing death, and two convictions for involuntary manslaughter arising from the same two deaths, violates his state and federal rights to not be twice placed in jeopardy for the same offenses. To the extent that the issue is not moot, we adhere to this Court’s past recognition that these criminal statutes address different social norms, and that dual convictions for manslaughter and OUIL causing death, arising from the same death, do not violate double jeopardy principles. *People v Kulpinski*, 243 Mich App 8, 12-24; 620 NW2d 537 (2000); *People v Price*, 214 Mich App 538, 542-546; 543 NW2d 49 (1995), partially overruled on other grounds (the mens rea of OUIL causing death) by *People v Lardie*, 452 Mich 231, 256; 551 NW2d 656 (1996).

In sum, we reverse defendant’s convictions for involuntary manslaughter. On remand, the trial court shall enter convictions for negligent homicide, subject to the prosecutor’s option of retrying defendant on the higher charges on which he was convicted. Defendant’s convictions and sentences for OUIL causing death are affirmed, as are the balance of defendant’s convictions and sentences.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Helene N. White
/s/ David H. Sawyer
/s/ Henry William Saad