

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL LESLIE RAMSEY,

Defendant-Appellant.

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UNPUBLISHED

March 13, 2008

No. 273446

Livingston Circuit Court

LC No. 05-015157-FH

Before: Saad, C.J., and Murphy and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of failure to stop at the scene of an accident resulting in serious impairment of a body function, MCL 257.617(2), failure to stop at the scene of an accident resulting in death, MCL 257.617(3), operating while intoxicated (OWI) causing serious impairment of a body function, MCL 257.625(5), and OWI causing death, MCL 257.625(4)(a). One victim died and another was seriously injured. Because the claim of prosecutorial misconduct is unfounded and the trial court properly instructed the jury, we affirm.

Defendant first argues that the prosecutor committed misconduct requiring reversal. Preserved questions of prosecutorial misconduct are reviewed de novo to determine if the defendant was denied a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). The propriety of a prosecutor's remarks depends on all the facts of the case when read as a whole and evaluated in the context of defense arguments and their relationship to the evidence at trial. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

All of defendant's challenges relate to a preliminary breathalyzer test (PBT) taken shortly after the accident. During opening argument, defense counsel stated that defendant was charged before the prosecutor's office received results of a blood test. Counsel argued that it was his job to show the jury that defendant had been severely overcharged. After opening arguments, the trial court denied the prosecutor's request to introduce evidence of the PBT results to counter the assertion that defendant had been overcharged.

Defendant first challenges the prosecutor's questioning of a deputy involved in the case, where the prosecutor asked him if he attached any reports to his request for charges after

defendant was arrested. We reject this challenge because the prosecutor's remarks amounted to a fair response to defense counsel's criticism of the prosecutor's office during his opening remarks. *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003). While the trial court had previously prohibited the prosecutor from introducing evidence of the PBT results, it had not prohibited him from introducing evidence that a PBT had been taken. Accordingly, because the record evidences merely a good-faith effort to admit evidence that had not been precluded, no misconduct occurred. See *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007).

Defendant next argues that the prosecutor committed misconduct when a witness testified that he was the individual who calibrated the PBT. The witness was a listed witness and the prosecution provided the witness to the defense for examination without questioning by the prosecutor. Thus, defendant did not waive presentation of this listed witness the prosecutor did not intend to call. This challenge is meritless because the witness merely answered a question posed by defense counsel about the witness's involvement in the case. Accordingly, this claim of misconduct is waived because any error was extinguished when defense counsel invited the error. See *Jones, supra* at 352 n 6. In any event, the trial court struck the witness testimony and instructed the jury to disregard the testimony.

Defendant finally challenges certain comments made by the prosecutor during closing arguments. In his rebuttal closing, the prosecutor stated that defense counsel's strategy was to "blame every aspect" and further stated, "He starts with the prosecutor and says, you know, you guys charged not knowing what the blood alcohol content was. Well you know that's not true." This comment fairly responded to defense counsel's assertion in closing that the charges were filed before the blood test results had been acquired. It is well established that a party is entitled to fairly respond to an issue raised by the other party. See *Jones, supra* at 352 n 6. As our Supreme Court observed fifty years ago in *People v Allen*, 351 Mich 535, 544; 88 NW2d 433 (1958), "counsel for defendants cannot on his side be allowed great latitude to goad and provoke adverse comment or criticism from the prosecutor and then seek a reversal because his strategy succeeded." Further, the comment was vague and did not necessarily lead the jury to conclude that defendant failed the PBT. Also, the court instructed the jury that the attorney's arguments were not evidence. That instruction was sufficient to cure any possible prejudice, see *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001), because jurors are presumed to follow the instructions of the trial court, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also argues that the trial court erred in failing to give an instruction on negligent homicide, MCL 750.324. After conceding that negligent homicide is a cognate offense of operating while intoxicated causing death, defendant asks this Court to create an exception to the rule of *People v Cornell*, 466 Mich 335, 355; 646 NW2d 127 (2002). However, our Supreme Court in *Cornell* interpreted MCL 768.32(1) to conclude that cognate offense instructions are not permitted. *Id.* Accordingly, we reject defendant's request as being beyond the authority of this Court.

Affirmed.

/s/ Henry William Saad  
/s/ William B. Murphy  
/s/ Pat M. Donofrio