

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
August 7, 2012

v

JOSEPH FRANCIS WOJTAS,
Defendant-Appellant.

No. 301522
Macomb Circuit Court
LC No. 09-003727-FH

Before: WILDER, P.J., and K.F. KELLY, and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for operating a motor vehicle while intoxicated causing death, MCL 257.625(4), and manslaughter with a motor vehicle, MCL 750.321. The trial court sentenced defendant to 15 months to 15 years for each conviction. We affirm.

Defendant first argues that the prosecutor committed prosecutorial misconduct when suborning perjury regarding the caloric content of the substance Thick-It, and thus, due process requires a new trial. We disagree.

Defendant failed to preserve his claim of prosecutorial misconduct; therefore, we review for plain error affecting his substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). To show plain error, defendant must show that (1) an error occurred, (2) the error was plain, and (3) the error affected his substantial rights. *People v Wyngaard*, 462 Mich 659, 668; 614 NW2d 143 (2000).

Defendant is correct that a conviction obtained through the knowing use of perjured testimony is plain error—perjured testimony offends a defendant’s due process protections guaranteed under the Fourteenth Amendment. *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). Moreover, a conviction based on the use of false testimony affects defendant’s substantial rights when the testimony could have affected the judgment of the jury. *Id.*

The misconduct’s effect on the trial, rather than the blameworthiness of the prosecutor, is the crucial inquiry. *Id.* The victim in this case, Joseph Sengstock, was obese; the cause of his obesity was before the jury not only through the testimony of Sengstock’s primary physician, but also through the medical examiner and defendant’s own expert. There was ample testimony that

Sengstock was bedridden due to the injuries that resulted from the accident; thus, Sengstock was more likely to gain weight due to lack of movement. Moreover, Sengstock's physicians testified that due to his injuries, Thick-It was medically necessary for him to maintain hydration and consume food and medication. Further, the defense expert testified that whether the substance Thick-It contained 80 calories, as opposed to 30, had no effect on his opinion that Sengstock died of a heart attack resulting from superseding obesity. We find that defendant has failed to show how the testimony of Sengstock's mother and the cross-examination of the defense expert regarding the specific caloric content of Thick-It affected the judgment of the jury regarding Sengstock's weight gain. Accordingly, defendant has failed to show how the error affected his substantial rights.

Defendant next argues that his trial counsel was ineffective for failing to make an offer of proof regarding the effect of cocaine on the heart, object to the prosecutor's introduction of false testimony, and effectively prepare for the prosecution's theory of cause of death. We disagree.

The determination whether a defendant was deprived of his constitutional right to the effective assistance of counsel is reviewed de novo on appeal. *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008). This Court reviews a trial court's findings of fact regarding effective assistance of counsel for clear error. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008). To establish that a defendant was deprived of effective assistance of counsel, he must show that his lawyer's performance was deficient in that he made errors so serious that he was not functioning as the counsel guaranteed by the Sixth Amendment; the defendant must show that the deficient performance prejudiced the defense in that the errors were so serious as to have deprived the defendant of a fair trial. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995). In determining whether an error was prejudicial, the defendant must overcome the presumption that, under the circumstances, the challenged action could be sound trial strategy. *Id.* The defendant must show that there was a reasonable probability that, but for the error, the result of the proceedings would have been different, and a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The assessment must be made without benefit of hindsight. *Id.*

Defense counsel was not ineffective for failing to make an offer of proof regarding the effect of cocaine on the victim's heart. First, counsel is not ineffective for failing to advocate a futile position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). The prosecution elicited testimony through the medical examiner that the amount of cocaine found in Sengstock's system at the time of the accident had no impact on his cause of death. Further, defense counsel's theory in this case was that Sengstock died of a heart attack due to his obesity that superseded the injuries from the accident; defendant argued that Sengstock died of natural causes. Defense counsel therefore had no reason to make an offer of proof regarding the effect of cocaine on the heart, although defense counsel attempted to make such an offer and the prosecution successfully objected.

Second, at the *Ginther* hearing following the trial, defense counsel also stated that he felt the issue would best be addressed through his own expert. The questioning of witnesses is presumed to be a matter of trial strategy. *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008). The fact that defense counsel's strategy failed does not render his assistance ineffective. *Id.*

Defense counsel was also not ineffective for failing to object to the prosecutor's use of the caloric content in Thick-It in cross-examination of a defense witness and calling Sengstock's mother because, again, the objection would have been futile. Similar to the analysis above, counsel does not render ineffective assistance by failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Defense counsel testified that he had no evidence regarding the caloric content of Thick-It one way or the other. The prosecution's evidence in this regard was limited to the testimony of defense expert and Sengstock's mother. Additionally, the prosecution agreed in an alternate theory that Sengstock died of a heart attack due to weight gain, although the prosecution contended the weight gain was brought on by injuries due to the accident. Further, defense expert testified that the caloric content of Thick-It, whether 30 calories or 80, had no impact on whether Sengstock's heart attack was due to natural causes. Therefore, whether Thick-It contained 80 or 30 calories, the defense at trial was not affected. Defense counsel's objection, therefore, would have been futile, and the failure to make the objection did not constitute deficient representation.

Finally, defendant argues that defense counsel was ineffective for failing to question the seizure cause of death argued by the prosecution. However, "[d]ecisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy" *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). And this Court "will not second-guess counsel on matters of trial strategy." *Id.* Moreover, the record belies defendant's claim; the record shows that defense counsel adequately questioned and provided an alternate theory regarding Sengstock's cause of death. Defense counsel questioned both Sengstock's primary physician and the medical examiner regarding whether Sengstock was ever directly diagnosed with a seizure disorder and whether a seizure disorder was ever documented, and counsel highlighted the fact that Sengstock never actually was so diagnosed. In addition, defense counsel challenged the prosecution's theory of the case by retaining an expert to present testimony that defendant's obesity superseded the accident injuries and precipitated a heart attack and that, therefore, defendant died of natural causes. Defendant has failed to show how defense counsel's representation fell below an objective standard of reasonableness.

Defendant's trial counsel was therefore not deficient in failing to make an offer of proof regarding the effect of cocaine on the heart, object to the prosecutor's introduction of false testimony, or effectively prepare for the prosecution's theory of cause of death.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly
/s/ Cynthia Diane Stephens