

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD JAY FOSTER II,

Defendant-Appellant.

UNPUBLISHED

November 20, 2007

No. 272366

Wayne Circuit Court

LC No. 05-008877-01

Before: Wilder, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of vehicular manslaughter, MCL 750.321, and felonious driving, MCL 257.626c. We affirm.

I. Background

Defendant's convictions arise from a traffic accident at the corner of Elmhurst and Holmur Streets in Detroit. The victims' car was traveling west on Elmhurst Street. Rufus Young was driving, Linda Lee was in the front passenger seat, and Jalen Williams was in the back seat. Defendant was driving northbound on Holmur Street, which had a stop sign at the intersection with Elmhurst. Young had the right of way. Defendant's car failed to stop at the stop sign and collided with Young's car as it proceeded through the intersection. Defendant contended that he did not see the stop sign because it was obscured by tree branches.

II. Sufficiency of the Evidence

Defendant argues that there was insufficient evidence to support his vehicular manslaughter conviction because the prosecutor failed to prove that defendant proximately caused Williams' death. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000).

Involuntary manslaughter is the unintentional killing of another, without malice, during the commission of an unlawful act not constituting a felony and not naturally tending to cause great bodily harm, or during the commission of some lawful act negligently performed, or in the negligent omission to perform a legal duty. *People v Mendoza*, 468 Mich 527, 536; 664 NW2d

685 (2003). Defendant's conduct need only be "a" substantial cause of another's death, not "the" proximate cause. *People v Tims*, 449 Mich 83, 96-97; 534 NW2d 675 (1995).

There was no dispute that defendant failed to stop at the intersection and that his car struck the victims' car with such force on the driver's side that both doors would not open. The paramedics who arrived at the scene testified that Williams was unconscious, had massive head trauma, had massive oral trauma (he was missing four teeth), his pupils would not dilate, and the amount of blood coming from his mouth prevented intubation. Williams died a few days later at the hospital. The medical examiner testified that Williams died from intense swelling of the brain due to a closed-head injury. Viewed in the light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant was a substantial cause of Williams' death.

III. Effective Assistance of Counsel

Defendant argues that defense counsel was ineffective for failing to request an instruction on contributory negligence based on Young's conduct, and for not objecting to the trial court's erroneous manslaughter instruction.

The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, is the right to the effective assistance of counsel. *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must show that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the result of the proceedings would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005).

Defendant argues that defense counsel was ineffective when she failed to request a contributory negligence instruction based on Young's conduct. Even if a contributory negligence instruction, see CJI2d 16.20,¹ would have been appropriate in light of evidence that Young was speeding, defendant was not prejudiced by the absence of the instruction. While the contributory negligence of a third party is a factor to consider in determining whether the defendant's negligence caused the victim's death, it is not a defense. *Tims, supra* at 99. Any contributory negligence by Young would have been relevant only to the issue whether defendant's acts were a substantial cause of the harm, i.e., whether the contributory negligence

¹ CJI2d 16.20 provides:

If you find that [name deceased] was negligent, you may only consider that negligence in deciding whether the defendant's conduct was a substantial cause of the accident.

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; 549 NW2d 325, amended 453 Mich 1204 (1996).

Here, there was no dispute at trial that defendant proceeded through the intersection without stopping at a stop sign, and collided with Young’s car in the intersection. Because any negligence by Young was not the sole cause of the alleged harm, there is no reasonable probability that the outcome of trial would have been different had a contributory negligence instruction been given.

Defendant also argues that defense counsel was ineffective for failing to object to an erroneous manslaughter instruction that allowed the jury to convict defendant based on his rate of speed alone. We find no merit to this claim. Although there was no objection to the court’s instructions on the record, following a bench conference at the conclusion of the instructions the trial court informed the jury that its manslaughter instruction was erroneous and reread the instruction, omitting the erroneous language and instead giving an instruction that comported with CJI2d 16.12. Defendant does not argue that the standard jury instruction was erroneous. Because the record discloses that the trial court promptly corrected its erroneous instruction following a bench conference with counsel, there is no basis for concluding either that defense counsel’s performance was deficient or that defendant was prejudiced in connection with this issue.

IV. Defendant’s Standard 4 Brief

Defendant raises several issues in a supplemental pro se Standard 4 brief, none of which have merit. Initially, defendant repeats each of the issues raised by his appellate attorney. For the reasons discussed in sections II and III of this opinion, we reject these claims of error.

A. Improper Split of Proceedings

Defendant argues that he was improperly tried before Judge Carole Youngblood when Judge Leonard Townsend presided over most of the pretrial proceedings. Because defendant did not object to Judge Youngblood presiding over his trial, this issue is not preserved and we review the issue for plain error affecting defendant’s substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant argues that Judge Youngblood’s substitution violated his due process rights under *Schell v Baker Furniture Co*, 461 Mich 502; 607 NW2d 358 (2000). Defendant’s reliance on *Schell* is misplaced. The Court in that case held that a chief judge cannot enter dispositive orders on cases that have been assigned to other judges. *Id.* at 514-515. Here, the record shows that each judge presided over the case at the time he or she entered any orders. Thus, we find no plain error. Accordingly, defendant’s related ineffective assistance of counsel claim is without merit. See *Mack, supra* at 130.

B. Effective Assistance of Counsel

Defendant raises numerous additional claims of ineffective assistance of counsel. Although defendant raised some of these claims in a motion for a new trial, because no *Ginther*² hearing was held, our review is limited to mistakes apparent from the record. See *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Defense counsel was not ineffective for failing to pursue a claim that the charges were maliciously brought against defendant because he filed a complaint against a police officer. Malicious prosecution is a tort that may be brought by a defendant in an independent civil action. *Matthews v Blue Cross & Blue Shield of Michigan*, 456 Mich 365, 377-378; 572 NW2d 603 (1998). It is not an affirmative defense to a criminal prosecution as defendant asserts. Defense counsel was appointed to represent defendant only in his criminal case, not to pursue a civil action.

Next, defense counsel was not ineffective for failing to move for a directed verdict or judgment notwithstanding the verdict on the basis that the medical testimony failed to establish who or what caused Williams' head injury. For the reasons explained in section II of this opinion, such a motion would have been futile. See *Mack, supra* at 130. Contrary to what defendant argues, the parties' experts did not agree that defendant's car was traveling only 33 miles an hour.³

Defendant also argues that defense counsel was ineffective when she agreed to the trial court's response to the jury's request for clarification of the application of the reasonable person standard in the gross negligence instruction. When the jury asked whether the standard should be applied from defendant's position driving the car or from the perspective of a third party observing the situation, the trial court responded by giving a definition of a reasonable person. Defendant does not argue that the definition was improper. Nonetheless, we agree that it was not responsive to the jury's request, which was directed more at the application of the reasonable person standard. However, in the absence of any substantive error in the instructions given, we find no basis for concluding that the result of the trial would have been different had a more focused response been provided. Thus, defendant has not established the requisite prejudice to establish an ineffective assistance of counsel claim. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant also argues that defense counsel was ineffective for failing to object to the prosecutor's remarks during closing argument. The prosecutor stated, "He disregarded a stop sign, didn't take into consideration maybe there would be some children playing in the street. That's gross negligence." Although defendant correctly observes that no one testified that there were children in the street, the prosecutor did not state that there were. Rather, she was arguing

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

³ The prosecution's expert explained that he agreed with defendant's expert's results only if his methodology was used, but the prosecution's expert did not believe that defendant's expert's methodology was correct.

the concept of gross negligence to illustrate defendant's failure to appreciate the risk of harm he created. The prosecutor's argument was not improper. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). Accordingly, defense counsel was not ineffective for not objecting. See *Mack, supra* at 130.

We reject defendant's remaining ineffective assistance of counsel claims because they either lack record support, *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), or are insufficiently briefed, *People v Hicks*, 259 Mich App 518, 532; 675 NW2d 599 (2003).

C. Sentencing

Although defendant argues that his manslaughter sentence is disproportionate, he was sentenced within the sentencing guidelines range and does not allege a scoring error or claim that the trial court relied on inaccurate information. Accordingly, we must affirm defendant's sentence. See MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004).

We reject defendant's claims that the sentencing guidelines as applied to his manslaughter conviction violate the manslaughter statute because the guidelines did not give the trial court discretion to impose a fine only. In construing a statute, we must give effect to the Legislature's intent. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). The Legislature has specifically provided that the statutory sentencing guidelines are to be used for enumerated felony convictions, which include manslaughter. MCL 769.34(2). Accordingly, there is no merit to defendant's argument.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood