

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 21, 2014

v

SHAWN WILSON REEVES,

Defendant-Appellant.

No. 315840
Ingham Circuit Court
LC No. 10-001247-FH

Before: SAAD, P.J., and OWENS and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals his jury conviction of operating while intoxicated (OWI) causing death under MCL 257.625(4). For the reasons stated below, we affirm.

I. FACTS AND PROCEDURAL HISTORY

While driving his truck in the early morning, defendant struck and killed a bicyclist. Defendant consented to a blood test after the accident, which revealed the presence of several controlled substances, including anti-depressants and cocaine. The prosecution accordingly charged him with OWI causing death pursuant to MCL 257.625(4), and a jury convicted defendant after trial in the Ingham Circuit Court.

On appeal, defendant argues that: (1) the prosecution presented insufficient evidence to secure his conviction; and (2) his trial counsel gave him ineffective assistance.

II. ANALYSIS

A. SUFFICIENCY OF EVIDENCE¹

¹ A challenge to the sufficiency of evidence in a criminal trial is reviewed de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). A reviewing court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

Our analysis of the nature of the crime charged must start with a review of the statutory language. MCL 257.625 states:

(1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, “operating while intoxicated” means any of the following:

(a) The person is under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance.

* * *

(4) A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1), (3), or (8) and by the operation of that motor vehicle causes the death of another person is guilty of a crime as follows:

(a) Except as provided in subdivisions (b) and (c), the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not less than \$2,500.00 or more than \$10,000.00, or both. The judgment of sentence may impose the sanction permitted under section 625n. If the vehicle is not ordered forfeited under section 625n, the court shall order vehicle immobilization under section 904d in the judgment of sentence.

* * *

(8) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person *has in his or her body any amount of a controlled substance* listed in schedule 1 under section 7212 of the public health code, 1978 PA 368, MCL 333.7212, or a rule promulgated under that section, or of a controlled substance described in section 7214(a)(iv) of the public health code, 1978 PA 368, MCL 333.7214.

Accordingly, under the plain language of the statute, if a person operates a car while he has “any amount” of cocaine² in “his . . . body” and “causes the death of another person,” he violates MCL 257.625(4).³

² Cocaine is a “controlled substance” per MCL 333.7214(a)(iv).

³ MCL 257.625(4) contains two elements: an intoxication element (“a person . . . who operates a motor vehicle in violation of subsection (1), (3), or (8)”) and a causation element (“by the

Here, defendant unconvincingly claims that the trial court lacked sufficient evidence to convict him of violating MCL 257.625. The prosecution presented ample evidence, in the form of the toxicologist’s testimony on defendant’s blood sample, that defendant had cocaine (and other substances) in his system when his car struck and killed the bicyclist. Defendant’s contention that the amount of cocaine found in his body was relatively small—and, by implication, that he was not actually under the influence of cocaine when the accident occurred—is of no consequence, because MCL 257.625 only requires the prosecution to demonstrate that the defendant had “any amount” of cocaine in his body at the time of the accident.⁴ This is exactly what the toxicologist’s testimony demonstrated, and any rational trier operation of that motor vehicle causes the death of another person”). The Michigan Supreme Court has repeatedly addressed the interpretation of these two elements, and has held that they are separate and distinct, though that interpretation has been called into doubt by recent case law.

To violate the intoxication element of MCL 257.625(4), a driver does not actually need to be intoxicated or impaired, or have any knowledge of intoxication or impairment—“[MCL 257.625(8)] simply requires that a person have ‘any amount’ of a schedule 1 controlled substance *in his or her body* while driving.” *People v Derror*, 475 Mich 316, 333–334; 715 NW2d 822 (2006) (emphasis added), overruled in part on other grounds by *People v Feezel*, 486 Mich 184, 205; 783 NW2d 67 (2010). The other element of the offense—causation—is completely separate from the driver’s “intoxication or impairment” and focuses only on whether “the victim’s death [was] caused by defendant’s *operation* of the vehicle.” *People v Schaefer*, 473 Mich 418, 433; 703 NW2d 774 (2005) (emphasis in original). In other words, the relevant inquiry for causation is: was “the victim’s death . . . caused by the defendant’s *operation* of the vehicle, rather than the defendant’s *intoxicated manner of operation*.” *Id.* at 435 (emphasis in original).

This interpretation of MCL 257.625(4) was challenged in *Feezel*, 486 Mich at 211 (“the *Derror* majority’s interpretation of [MCL 257.625(8)] was probably unconstitutional”). But *Feezel* did not overrule *Schaefer* and *Derror*’s broader interpretation of MCL 257.625(4)—it merely held that a specific trace element of marijuana (11-carboxy-THC) was not a “controlled substance” under MCL 333.7212, and thus not within the purview of MCL 257.625(4). *Id.*

In light of this shifting jurisprudence on MCL 257.625(4), defendant’s strongest argument on appeal would have been to repeat the argument he made at trial: namely, that he was not “impaired” at the time of the accident, and thus his *intoxicated operation of the vehicle* could not have been the *cause* of the victim’s death.

As noted, this appeal would not have succeeded at our Court, as *Schaefer* and *Derror*’s interpretation of MCL 257.625(4) is binding on us. But *Feezel* indicates that the Michigan Supreme Court may further review this troublesome issue. Nonetheless, defendant couched his appeal in purely procedural terms, and failed to cite any of the above case law in his brief. For this reason, we do not address this issue at length in the body of our opinion.

⁴ By the same token, defendant’s assertion that MCL 257.625 requires the prosecution to show that defendant *knew* he had cocaine in his system is incorrect—the statute only requires the prosecution to show defendant had “any amount” of cocaine in his body at the time of the accident. See note 3, *supra*. The prosecution thus properly stated the law; defendant is the party that misstated it.

of fact could have found that defendant violated MCL 257.625 based on that testimony. *Herndon*, 246 Mich App at 415. Accordingly, defendant's assertion that the trial court lacked sufficient evidence to convict him of violating MCL 257.625 is without merit.

B. ASSISTANCE OF COUNSEL

1. STANDARD OF REVIEW AND APPLICABLE LAW

Because defendant did not request a new trial or evidentiary hearing based on trial counsel's performance, the issue is not preserved for review. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). If defendant fails to request a *Ginther* hearing, review is limited to mistakes apparent on the record. *Id.* "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id.*

Effective assistance of counsel is presumed and a defendant bears the "heavy burden of proving otherwise." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). To show his counsel was ineffective, a defendant generally must demonstrate that: (1) counsel's performance did not meet an objective standard of reasonableness under prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's errors, the results of the proceeding would be different. *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). The reviewing court cannot substitute its judgment for that of trial counsel on matters of strategy, nor may it employ the benefit of hindsight to assess the competence of counsel. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Trial counsel cannot be held ineffective for choosing not to raise a meritless objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Here, defendant argues that trial counsel gave him ineffective assistance when he: (1) did not object to the prosecutor's statement that defendant was "high on cocaine" when the accident occurred; (2) opened the door to supposedly prejudicial evidence by asking a police-officer witness about defendant's intended destination at the time of the accident; and (3) did not seek appointment of an independent toxicologist.⁵

2. PROSECUTORIAL STATEMENT

In his opening statement, the prosecutor said that defendant was "high on cocaine" when the accident occurred. Defendant says this statement "severely prejudiced" him because the

⁵ As discussed in note 3, *supra*, defendant also alleges that the prosecutor committed misconduct (and that defense counsel was ineffective for failing to object to this supposed misconduct) when he stated that a violation of MCL 257.625 only required the presence of "any amount" of cocaine in defendant's body at the time of the accident. As noted, this is a correct statement of law, and defendant's protestations to the contrary are erroneous. Accordingly, defendant's trial counsel cannot be held ineffective for not making a meritless objection. *Fike*, 228 Mich App at 182.

evidence showed that any effects from his cocaine use had worn off by the time the accident took place, and the jury could have found that he was not under the influence of the drug but for the prosecutor's statement.

Defendant's argument is unconvincing for two reasons. Though it appears inappropriate to characterize defendant as "high on cocaine" when the accident occurred,⁶ defendant's attorney might have made a strategic decision not to object to the prosecutor's statement, because the attorney knew it was not consistent with the evidence and that this would undermine the prosecution's credibility with the jury. In other words, defendant's lawyer could have concluded that if and when the prosecutor did not provide evidence of cocaine intoxication, the jury's faith in the other portions of the prosecutor's case-in-chief would be compromised.⁷

In any event, defendant cannot show that he was prejudiced by counsel's failure to object to the prosecutor's remark. Again, a person violates MCL 257.625 if he drives a vehicle, has "any amount" of controlled substance in his body, and causes the death of another while operating the vehicle. The evidence established that defendant had cocaine in his system at the time of the accident. And the trial court instructed the jury that the statements and arguments of the attorneys were not evidence, and should not be considered as such in its deliberations.⁸

3. STATEMENT ON DEFENDANT'S DESTINATION

At trial, defendant's lawyer asked a police officer dispatched to the scene of the accident about defendant's intended destination. This opened the door to a question from the prosecution on redirect examination that revealed defendant was on his way to a urine-based testing facility, most likely as part of a probation agreement.

Defendant argues this exchange was not relevant and characterized him in a negative light to the jury, and that his trial attorney should have objected to it. Again, defendant's assertions lack merit. His trial attorney's strategy was to show that defendant was not under the

⁶ Although a prosecutor need not set forth an argument in the blandest possible terms, *People v Meissner*, 294 Mich App 438, 456; 812 NW2d 37 (2011), characterizing the evidence in a manner inconsistent with the evidence is prohibited. *People v Unger*, 278 Mich App 210, 241; 749 NW2d 272 (2008). Moreover, because our case law makes "impairment" virtually inconsequential to guilt, the prosecutor's statement would appear at best gratuitous and at worst designed to inflame the jury.

⁷ The prosecutor effectively undermined his earlier statement in his direct examination of the toxicologist, as he specifically mentioned the relatively low amount (15 nanograms per millimeter) of cocaine found in defendant's body at the time of the accident. The toxicologist responded to his question by stating: "[i]t is hard to say what that would mean for any individual, whether that's a lot or little bit because it depends on that person's use of the drug and how much the body is acclimated to it."

⁸ Jurors are presumed to follow the court's instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

influence of cocaine during the accident. As such, it would have been logical for defendant's counsel to highlight that defendant was on his way to have his urine tested for drugs—after all, why would defendant be using any sort of drug right before a drug test? This fact could have bolstered defendant's assertion that he simply fell asleep at the wheel due to fatigue from caring for his wife and child, not as a result of cocaine use. Accordingly, defendant's claim of ineffective assistance of counsel on these grounds is unconvincing.⁹

4. INDEPENDENT TOXICOLOGIST

Defendant's trial attorney did not seek appointment of an independent toxicologist, which defendant claims constitutes ineffective assistance of counsel. According to defendant, an independent expert may have been able to show that he was not drowsy from the anti-depressants he had taken, but instead was tired from cough and cold medicine or from caring for his family.

This argument is unavailing because the combination of drugs in defendant's body and whether they caused him to be drowsy is inconsequential to his violation of MCL 257.625. Moreover, the prosecutor amended the information during trial to remove all references to controlled substances other than cocaine. Thus, whether the anti-depressants in defendant's body did not make him drowsy had no effect on the outcome of the case.

Affirmed.

/s/ Henry William Saad
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly

⁹ Defendant claims the jury asked a question about the drug-test center during its deliberations, and that this is evidence that the police officer's testimony on the subject was unduly prejudicial. However, this claim is not supported by the record. During their deliberations, the jury sent a note to the court that read, in part, "What is ADAM [the drug-testing center]? Why was he going to ADAM?" The court then read the jury the relevant portion of the transcript. According to defendant, the jury's question shows that they were "curious" about ADAM and noted the reference to it, but this has no relevance to defendant's argument that his counsel was ineffective. The jury was instructed to pay attention to the evidence. Noting the reference to ADAM was in keeping with its duty, and defendant has not shown otherwise.