STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ARTHUR W. MERKL,

Defendant-Appellee.

UNPUBLISHED
October 23, 1998

No. 194618
Recorder's Court
LC No. 95-011911

Before: Holbrook, Jr., P.J., and White and J. W. Fitzgerald,* JJ.

PER CURIAM.

Defendant was convicted by a jury of negligent homicide, MCL 750.324; MSA 28.556, following a three-day trial. The trial court sentenced defendant to five years' probation, with six months to be served in the county jail and revoked his driver's license. We reverse, finding ineffective assistance of counsel.

I

Defendant was charged with operating a 1992 Ford van at an immoderate rate of speed in a careless, reckless or negligent manner by failing to stop at a red light, thereby causing the death of Betty Jean White. Defendant's theory at trial was that he was not guilty of negligent homicide because, immediately preceding the accident, he suffered a transient ischemic attack (TIA) or small stroke which caused a temporary loss of consciousness. The prosecution's theory was that defendant was speeding to make the light because he was late for a business appointment, that the light changed to red before he reached the intersection, and that in order to avoid responsibility, defendant concocted the alleged syncopal episode upon learning on September 13, 1995 that the victim had died.

When trial began, the parties stipulated that the deceased was Betty Jean White, age sixty one; that her death on September 13, 1995 resulted from a collision on September 11, 1995; and to the admission of a complete[1] copy of defendant's medical records from St. Mary's Hospital.

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* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

Michael Estepp testified at trial that on September 11, 1995 at approximately 10:00 a.m., he was traveling southbound on Newburgh Road in the city of Livonia. Estepp approached the intersection of Newburgh and Schoolcraft, which is a service drive for I-96 and is one-way in a westbound direction. He observed a red car stopped in front of him at the traffic light, which was red. He testified that the traffic light turned green and the red car proceeded into the intersection. He then saw a Ford van traveling on Schoolcraft enter the intersection and strike the driver's side of the red car that had been in front of him. Estepp testified that he thought the van appeared to be going faster than forty miles per hour. Estepp testified that the impact lifted the car off the ground and into the guardrail. He did not see any indication that the driver of the van applied the brakes before the impact. Estepp testified that he could not recall seeing the driver of the van as the van went through the intersection, and that a man got out of the van within a minute of the accident. Estepp did not speak to the man and testified that he could not identify him.

Brad Christy, a firefighter called to the scene of the accident, testified that he arrived on the scene within four minutes of being called at 10:12 a.m., that the day was clear and dry and that the service drive in that area was pretty flat.

Tony Cecil testified that he was traveling northbound on Newburgh driving a truck and that he stopped at the red light at Schoolcraft. He was the first car stopped at the light. When the light turned green, Cecil began to move forward into the intersection, but stopped when he looked to the right and saw a van traveling westbound on Schoolcraft that did not appear to be stopping. The van proceeded through the intersection and struck a red car that was traveling southbound on Newburgh. Cecil estimated that the van was probably traveling at forty-five to fifty miles per hour when it entered the intersection. Cecil identified defendant as the driver of the van and stated that defendant had gotten out of the van by the time Cecil finished his radio call for help, which he estimated took forty or fifty seconds. Cecil testified that he approached defendant and defendant said to him "the lady ran a red light." Cecil testified that he said to defendant "no she didn't" because the red car had not run a red light, and that defendant said to him that the last he remembered, his light was green. Cecil also testified that people asked defendant how he was, and defendant did not say to them that he had passed out or had been dizzy. Cecil testified that defendant had blood on his left hand and a few scratches.

Timothy Michaels testified that just before the accident, he was traveling southbound on Newburgh in the far right lane and intended to turn right onto Schoolcraft. The light turned green as Michaels approached to make his right-hand turn, but when he looked to the left, he saw a van coming that did not appear to be stopping. The van went through the intersection without slowing down or applying the brakes and struck broadside a red car traveling south on Newburgh. Michaels testified that the speed limit on the service drive was thirty-five miles per hour and estimated that the van was traveling at forty to forty-five miles per hour. Michaels testified that he was able to observe defendant behind the wheel of the van before the impact and he did not appear to be slumped over, and appeared to have both hands on the wheel. He observed defendant talking to people after the accident, but he did not talk to him.

Officer John Gibbs of the Livonia Police Department testified that he arrived at the scene within minutes of the accident. Gibbs testified that it was warm and dry and that the speed limit on the service

drive is 35 miles per hour. He testified that he did not locate any skid marks left by the van before the accident. At the scene, defendant told Gibbs that he entered Schoolcraft by exiting from I-96 west at Newburgh Road. Gibbs testified that the I-96 Newburgh exit (the yield sign at the top of the off-ramp) is less than ¼ mile from the intersection in which the accident occurred.

Gibbs testified that he asked defendant some questions at the accident scene and that defendant told him that a flash of green appeared before him before the crash, that he smelled the air bag, "and something to the fact [sic effect] that he had been unconscious." Gibbs testified that he had had experience as a police officer with airbags deploying in accidents and that he attributed any brief period of unconsciousness to the forceful explosion of defendant's airbag. Gibbs testified that he did not notice defendant limping at the scene and that defendant did not smell of intoxicants. Gibbs testified that he asked defendant to write a statement at the scene, and that defendant cooperated. Gibbs and defendant signed the statement and Gibbs noted the time on the statement, 11:05 a.m. on September 11, 1995. Gibbs read the statement into the record:

> I was travelling [sic] west on Schoolcraft, did not see other vehicle until almost point of impact. My thought at the time was, my God they're going through a red light, since I had a very clear flash go through my mind of a green light. I believe I may have blacked out temporarily, because I became aware of a burning smell, and did not realize till later it was an airbag detonator.

Gibbs testified that defendant's penmanship was legible.

Gibbs testified that he met with defendant again on October 4, 1995 at the Livonia Police Department, and that defendant came voluntarily and brought counsel. Gibbs advised defendant of his rights. Defendant stated that at the time of the accident he was en route, for the second time, from his workplace to an appointment at GM Delphi. The first time he set out he had bad directions, and had gone back to his workplace to call GM Delphi. When Gibbs asked defendant what the color of the traffic light was at the intersection, defendant responded "picture of green, but can't state for sure." Gibbs testified that when he asked defendant to describe the other vehicle, his response was "a maroon vehicle." Defendant told him he had checked on the other driver after the accident and that he had injured his right hand.

Dr. Leonard Sahn, a board-certified neurologist and defendant's expert witness, testified that he had reviewed the following records in connection with this case: evaluations and CT scan done on September 11, 1995; brain MRI scan done on September 23, 1995; an admission sheet from September 13, 1995 listing the admitting diagnosis of chest pain and presyncope; and records from defendant's three-day hospitalization from September 13 to September 16, 1995 including physical and neurological evaluations, progress notes, and cardiac evaluation.

Dr. Sahn testified that in reviewing the records, he noted that one of the neurological findings made was a possible temporary stroke, or TIA:

. . . the initials refer to transient, which means something which is temporary. Ischemic means that there is a lack of blood to a certain part. So a TIA means that there was a temporary loss of blood supply to a part of the brain, causing a stroke like picture, that then resolved.

So it didn't go on to a full blown stroke. It was a temporary stroke, and then it got better.

And it can present in any one of a number of ways. It can present with weakness, or numbness on one side of the body, slurred speech, even as a dizzy spell, or a near fainting episode.

And that was one of the considerations here, because when he was hospitalized afterwards, he was found to have a right facial droop, by more than one examiner.

Had some numbness, I think on the three middle toes of his right foot, according to the medical records, which would suggest something on the left side of the brain, because the left side of the brain controls the right side of the body.

So, that would be one of the prime considerations, is that he might have had a small stroke or a TIA.

Q. Doctor, I'm sorry, you also indicated that your review indicated that there was a syncopal episode?

A. Well, yeah.

Q. What is that?

A. The records reflect that there was a history that Mr. Merkle remembered proceeding in his car, and then remembered nothing until after the accident, and he smelled the odor of the air bag exposive [sic]. And there was obviously a period of time he was either unconscious or doesn't remember.

* * *

Q. I would like you to define syncope, S Y N C O P E?

A. Syncope means that there is a reduction of consciousness, which is related to reduced blood flow to the whole brain, not just to part of it but – everybody probably has experienced where you might bend over and you stand up fast.

And until your postural reflexes kick in, and the blood goes up, the blood kind of comes out of your head, you feel light headed or dizzy, or like you're going to pass out.

Well that's what presyncope is. Or a syncope is, if you go all the way out.

On cross-examination, Dr. Sahn testified that over the last few years he probably gave depositions once or twice a week and that about one fifth of his practice consists of examining individuals to determine the extent of their injuries.

Dr. Sahn testified that with a full syncope, one loses consciousness and faints. When asked by the prosecutor where in the medical records a TIA was mentioned, he testified that it was in the neurological evaluation performed by Dr. Fernando at St. Mary's Hospital on September 16, 1995, that she used the term small subcortical infarct and that meant "kind of the same thing." The prosecutor then questioned Dr. Sahn regarding toe numbness. Dr. Sahn testified that it was possible that injuries such as toe numbness could be related to being in an auto accident, if the accident caused a foot injury.

The prosecution then questioned Dr. Sahn regarding a one page medical record pertaining to defendant's admission to St. Mary's Hospital on September 13, 1995, specifically a nursing data base record. Dr. Sahn testified that he did not have that record. The nursing data base record indicated that defendant went to St. Mary's Hospital at 8:00 p.m. complaining of chest pain, and left arm and back pain. Dr. Sahn testified that that record did not state that defendant was complaining of having passed out, fainting, or being dizzy, and indicated he had no medical history. The risk assessment section of the form was not completed, and nothing was indicated regarding recent history of syncope/seizure disorder.

Dr. Sahn was also questioned regarding an evaluation performed by Dr. Jirodaya at St. Mary's Hospital on September 14, 1995, and he testified that he did not have that record. Dr. Jirodaya's report stated that "he was driving a car, and felt light headed and dizzy, but he didn't pass out." Defendant's chief complaint was listed as chest pain and presyncopal episode, and the evaluation stated that defendant had just found out that the other driver had died.

The prosecutor then questioned Dr. Sahn regarding a report of Dr. Fernando dated September 16, 1995. Dr. Sahn had that record and agreed that it said that defendant told Dr. Fernando that he remembered taking the freeway exit but then remembered nothing until the impact. The report stated "the patient was confused because he did not know how he got to the site of the accident, which was two intersections away from the freeway exit, but he knew he was in an accident."

> *Q.* **This is the first time we see anything about the numbness of his right three toes,** and his right facial droop, am I right, or did you notice anything in the earlier days?
>
> *A.* I don't know that I see anything before Doctor Fernando's note. [Emphasis added.]

On re-direct examination, defense counsel asked Dr. Sahn what the cause of defendant's facial droop and numbness in the extremities was given the history of the case. Dr. Sahn responded that:

> *A.* Well, the best way that you can put it together is, if there is facial droop, and there is nuance of numbness, and he had some kind of an event where either blacked-out or he

got very dizzy or something. You would have to consider, first of all if he blacked out, that there was a global alteration of consciousness.

But the facial droop, you would look for something on the left side of the brain. And sometimes these are just so small, you just don't find them under the diagnostic imaging studies. So, you just look for ominous [sic?] processes that could cause it. If you don't find it, you look at risk factors. You look at the blood cholesterol and blood pressure, and their cardiac status, and diet and exercise patterns. So that's what you do, basically.

On further re-direct examination, Dr. Sahn testified that defendant told Dr. Fernando that a technician had noted his right facial droop. Dr. Sahn testified that he did not know if Dr. Fernando further explored the droop. Dr. Sahn further testified:

Q. Is it possible for a patient to experience syncope and still show negative on all those tests?

A. Certainly.

Q. How do you explain that?

A. Because this is one of the problems that we deal with all the time, in my specialty. It's like you take your car to the mechanic, that it's making a noise, and it doesn't make the noise when you take it to the mechanic.

Well, someone comes in and says I'm having these episodes, but they aren't having them when they come to you.

So, you work them up and you do tests, hoping that maybe they will have one of these, but if it's only happened once. You sometimes can't find what caused it. It's just one of the frustrations.

Q. Is that one of the reasons a patient is interviewed, history is taken?

A. Sure.

Q. And in this case the diagnosis of Doctor Fernando was presyncope?

A. Her diagnosis, let's [sic] me just quote, I don't want to testify for her.

She says, "impression, etiology of the patient, syncopal episode is unknown. And then the right facial droop may be related to a small stroke."

Mary Skupski testified that she was a peripheral vascular technician at St. Mary's Hospital in Livonia. Peripheral vascular technicians perform ultrasounds of peripheral portions of the body to observe patients' circulation. Skupski testified that she received an order to check defendant's carotid

arteries, the arteries that feed the brain and that she performed an ultrasound on defendant on September 14, 1995. Skupski testified that she routinely takes a patient's medical history before conducting the ultrasound. The ultrasound test is placed on video and forwarded to a vascular specialist, along with the medical history and physical. The vascular specialist then prepares a report. Skupski testified that defendant had a noticeable "right sided facial drooping". There was a pulling on the right eye, cheek, chin and lips, and the right side of the face did not move with the left side during speech, so it appeared that defendant was talking out of the side of his mouth.

Regarding defendant's history, Skupski testified that she learned from defendant that he had come in for a syncopal episode, or blackout. Skupski testified that defendant indicated that he had had no prior episodes. She asked him if the right facial drooping had been present before, and defendant indicated that it had not. Skupski testified that she records her observations of patients in writing but that that record does not become part of the hospital's medical records.

On cross-examination, Skupski testified that she had an associate's degree and no bachelor's degree, and that she did not interview any other doctors regarding defendant. She testified that she spent about forty-five minutes with defendant and that she noticed the facial droop right away.

Defendant testified that he was fifty-eight years old, had been married for almost thirty years, and had four children. In 1995, defendant was the general manager and owner of a small manufacturing company called Inventron, located in Livonia on Schoolcraft Road. Defendant testified he had been employed for about twenty-eight years, and the he and his wife had bought the company in 1988. Defendant testified that he recalled September 11, 1995, that it was a Monday, and that that morning, he dropped off his son at school, as he always did, at 9:00 a.m., and that he arrived at the office around 9:15 a.m. He testified that he had a business meeting set for roughly 9:30 a.m. at GM, and that one of his technicians mistakenly told him it was located on Stark Road, when it in fact was located on Steckles (phonetic) Road. Defendant testified that he ended up driving on Stark Road until it ended and did not find the GM office:

> I'm not a native of Livonia and not very familiar with it.
>
> So, I went back to the office and got a cup of coffee. I called the man at General Motors and explained that I didn't really know where the place was, that I had bad directions, and should I still come.
>
> I did not know what his schedule waslike [sic]. He indicated he had nothing [sic] any time would be fine just to come over.

Defendant testified that he had proper directions and left again for the appointment. He testified that he was feeling "generally fine" that morning, was not suffering from any known ailments at the time, and was not treating with a doctor for anything. He testified that prior to September 11, 1995 he had never had a blackout or episode of dizziness leading to black out.

Defendant testified he was driving a full-sized, 1992 Ford conversion van, and entered I-96 at Merriman, traveled approximately two miles, and then took the Newburgh exit. He testified that his top speed on I-96 was about 55 miles per hour because that section of I-96 was heavily patrolled. Defendant testified that as he got off the freeway ramp on Newburgh he took westbound Schoolcraft Road, the service drive, toward Newburgh, and that he planned to go straight through on Schoolcraft at the Newburgh intersection. The following ensued:

Q. What happened then as you got off onto the service drive?

A. I honestly do not remember getting on the service drive itself.

I distinctly remember turning onto the ramp, because that entrance is one that does not have the long lead-in.

In other words you can go either straight or turn, so you have to be conscious of traffic. It's not an exit that [sic] it's an exit only lane.

You're really kind of making a right turn off the freeway there.

As I came up the ramp, I remember seeing the overhead bridge and I saw the light.

Q. What color was the light?

A. The light was green for sure.

Q. Do you know how far away you were from the light when you made that observation?

A. Not from a measurement knowledge, that I know.. [sic] But I was on the ramp. I was just exiting the ramp when I kind of looked at the, what was in front of me. And that was the last thing I remember.

I don't remember what lane I got into. I do not remember getting to the intersection itself. There were trucks at the intersection.

I realized afterwards, I don't remember any trucks. I don't remember seeing any of these things.

Q. Do you recollect what your speed was, as you got on the westbound service drive?

A. I don't remember getting on the service drive, I'm afraid. I really can't address the speed issue. I'm sure I slowed down going up, going onto the ramp. But I cannot say beyond that.

Q. Have you travelled that way before this accident?

A. Quite a few times, yes.

* * *

Q. What then is the next thing you remember after you got onto the service drive?

A. From the time when I was exiting the ramp, and I remember seeing the bridge and the light until I say Miss White's car, I don't remember anything. At the last second I saw a vision of a car there.

I really didn't know I was in an intersection. I didn't know where it came from at the time. But I also have a picture of a green light in my mind, which I think was from the earlier, you know I can't – from the earlier time.

But I did have this, all of a sudden this tremendous rush, because I realized there was a car right in front of me that I hadn't seen. And I did not know what I did. I did not know if I turned or jerked or braked or anything.

I asked the policeman, actually afterwards, did I brake, did I do anything. Because I don't remember anything. And he said there was no evidence of braking, that's all.

Q. Do you recall the actual coming together of the vehicles, the collision?

A. Uh, slightly, yes. I do remember pushing, you know, the car. It was just a momentary thing.

Q. What's the next thing you recall?

A. Waking up in the car, in the van rather, I'm sorry, and smelling smoke; and I thought I was in a fire. I did not realize that I was in the van. I just thought I was in a fire, and I got out. At that time I did not know the air bag had deployed or anything like that. That I found out afterwards.

* * *

Q. Now, I want to direct your attention to the accident scene.

You said as soon as you realized or were conscious or aware what was going on, you smelled smoke and got out of the vehicle?

A. Right.

Q. Do you remember that?

A. I got out of the vehicle, and then I realized I was in the middle of the intersection. And I still have this picture of a green light, to be honest with you. And I asked the

truck driver, did she go through a red light, or did she go into a red light or what, because I had no recollection.

* * *

Q. . . . . Did anything hurt you as you got out of the vehicle? Were you aware of any pain?

A. I wasn't aware of anything at the time, no. Very shortly thereafter I realized that I was bleeding, and had blood all over, but it was just the hand, from my hand, my right-hand not my left as someone else said. My right-hand, and I somehow, somewhere got a rag and just wrapped it all up. And it was just, I had that on me for the rest of the time I was at the scene.

Q. How long were you at the scene; do you remember?

A. Quite a long time. I'm guessing in the range of an hour and half, perhaps even longer.

Q. What went on during that time do you recall?

A. Most of the time I was just sitting on the ground by the guardrail, or sitting on the guardrail itself.

Q. Who else did you talk to, besides the truck driver?

A. There was a second truck driver gentlemen. I went over to see if there was anything that could be done with the other driver.

But within a minute or so then the paramedics and the police were there, and I just went and sat down at the scene.

Defendant testified that he did not recall talking to Officer Gibbs, but recalled that about an hour after the accident Gibbs asked him to write a statement. When shown the statement and asked if it bore his signature, defendant responded "Yeah, the signature is a little bit shaky but yes, that is my signature." Defendant testified that he recalled talking to the medical technicians, that they wanted to take him to the hospital, and that he testified that he would rather not go to the hospital, because he had not been in the hospital in over forty years and did not want to go then. Defendant testified that he told the medical technicians that he would have someone from the office pick him up and take him to the office, that it was two miles away, and that he would call his wife.

Defendant testified that when he got back to the office, he called his wife, and that after she arrived they called for an appointment at St. Mary's Hospital outpatient department, and went to the appointment. The doctor he saw scheduled a CAT scan, EEG and echocardiogram for that afternoon. Defendant testified that he and his wife went to the hospital and had the CAT scan done that afternoon,

but that due to scheduling problems the echocardiogram and EEG were scheduled later in the week. Mary Skupski performed the echocardiogram on Wednesday. Defendant was admitted to the hospital from Wednesday, September 13 through Saturday, September 16, 1995. He testified that he still had symptoms on Wednesday that were bothering him:

> *Q.* Do you know why you went in the hospital?
>
> *A.* Well, yes. Well, there were several things. On Wednesday I still had symptoms. I still had symptoms that were bothering me. I had trouble remembering things. I did not really recall the accident. My face was still, I thought it looked kind of puffy. I'm not, but when looked in the mirror it kind of looked like there was a mask on part of my face.
>
> *Q.* Which side of your face?
>
> *A.* My right side.
>
> *Q.* What other symptoms were you having?
>
> *A.* I also told the doctor on that Monday, and then also on Wednesday that the three toes in my right foot basically felt numb, sort of not quite like when your foot is asleep, more like if you had a bunch of cotton stuck in front of your shoe or something like that. It just feels like there is steady pressure always there.
>
> And I was concerned because of not remembering, the facial things, and the things, and at that point also I was very anxious and I was having chest pains. And this was on Wednesday, and so we went back to the doctor.
>
> We went back to the same outpatient clinic, but because the doctor I had seen on Monday was not there, another doctor admitted me to the hospital, and rescheduled the tests.
>
> *Q.* What did they do for your while you were in the hospital from Wednesday through Saturday?
>
> *A.* Well, it was, basically it was he put me in the coronary intensive care. I was not allowed to get out of bed. I could not, I wasn't even allowed to go to the bathroom, and they had a regimen of blood thinners to prevent further episode they said.

Defendant testified that he was on blood thinners and in bed until Friday night, and that he went home on Saturday. Defendant testified that Dr. Sonia Fernando performed a neurological evaluation of him on Saturday.

On further cross-examination, defendant testified that when the accident occurred he was on his way to Delphi for the second time, that he kidded with the employee who had given him bad directions when he returned to the office before the accident, and that:

> *Q.* Was GM someone you were going to be doing business with?
>
> *A.* They have equipment now, and the service technician had been out there servicing the equipment the week or two before.
>
> They called and said they would like to get some more equipment, that I come down.
>
> *Q.* You were going out there with hopes to sell them something; right?
>
> *A.* Well, it was a matter of telling them what they needed, yes, correct.
>
> *Q.* And this appointment was set for 9:30, by golly you're on your way out there and you can't find the place?
>
> *A.* Right.
>
> *Q.* And it must not have looked very good to them?
>
> *A.* It makes no difference, we talk to them all the time. It's like friends, really. I mean, the guy who has the equipment calls and talks. It's not like I got an appointment with God somewhere, and I have to be worried that I'm going to be late.
>
> On further cross-examination, defendant testified that he learned that Mrs. White had died on the afternoon of Wednesday, September 13, 1995 and that that caused him to be very upset.

On redirect examination, defendant testified that he did not recall having any head pain, but he was disoriented. Defendant did not recall striking his head against anything and did not receive any treatment for any type of head injury. Defendant testified that the outpatient doctor suggested to him on September 11 that he should not drive, and that his wife drove him for about a month, until he saw the doctor. At that point he started driving again.[2]

After deliberating for sixteen minutes, the jury sent a question stating, "1) why no medical records from the 11th, in fact evidence. 2) pictures of the vehicles." The court read the questions into the record and indicated:

> I went into the jury room, after discussion with counsel, and indicated that Joint Exhibit No. 1 was stipulated medical records, and it was their review, and they had to rely on their collective memories.
>
> With respect to the pictures of the vehicles. I also indicated that they were given a complete set of the exhibits.

> The next question was that: Were any medical records included from the 11th? And I again said you have to rely on the evidence produced in [sic] your collective memories.
>
> And then they wanted to know whether or not the Defendant was wearing a seatbelt.
>
> MRS. RENO: And you said?
>
> THE COURT: I said you have to rely on your collective memories.
>
> MRS. RENO: Good for you.
>
> THE COURT: That's it.
>
> (Recess)

Soon after the above, the jury asked for the definition of negligence again. The trial court indicated on the record that it had spoken to the attorneys and reinstructed the jury on the elements of negligent homicide and the definition of ordinary negligence.

About 1 ½ hours later, the court placed on the record that the jury had sent a question regarding the record on speeding tickets and that, with counsel accompanying, the court entered the jury room and instructed that they were to rely on their collective memories.

The jury found defendant guilty of negligent homicide. Following an order of remand by this Court, defendant filed a motion for a new trial alleging ineffective assistance of counsel. The trial court denied defendant's motion following an evidentiary hearing. This appeal ensued.

II

Defendant argues that there was insufficient evidence to sustain a conviction of negligent homicide, MCL 750.324; MSA 28.556. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Defendant claims that the evidence clearly established that he was unconscious at the time of the accident. We conclude that the jury was free to reject this defense. The prosecutor offered evidence to support her theory that defendant was speeding and ran the red light at the time of the accident and had made up symptoms when he learned of the victim's death on September 13, 1995. Several eyewitnesses testified that defendant drove through the red light at forty to fifty miles per hour and did not brake before striking the victim's car in the intersection. The posted speed limit was thirty-five miles per hour. There was testimony that defendant did not appear to be slumped down in his seat as he drove through the intersection, that he got out of the van immediately after the accident and appeared to be fine. We thus conclude that viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to support the conviction of negligent homicide.

III

Defendant raises several additional issues on appeal. We find his claim of ineffective assistance of counsel to be meritorious and dispositive.

A

Defendant argues that he was denied effective assistance of counsel by trial counsel's failure to call defendant's treating neurologist, Dr. Sonia Fernando; failure to introduce defendant's medical records from September 11 and 12, 1995; and failure to object to the prosecutor's improper closing arguments concerning defendant's speeding tickets and subsequent driving. In addition, defendant argues that his trial counsel's hearing difficulties prevented him from providing effective assistance to defendant.

To establish that the right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deny him a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

B

At the *Ginther*[3] hearing, defendant's trial counsel testified that he had been an attorney for thirty-six years. He agreed that the defense theory was that defendant suffered a loss of consciousness before he entered the intersection and, thus, could not have been negligent. He testified that he initially believed that Dr. Fernando's testimony was critical to the defense because she had performed a neurological evaluation of defendant after the accident. He further testified that he did not think that he ever spoke directly with Dr. Fernando, but that she or her secretary had told him that Dr. Fernando agreed with the defense theory. Counsel testified that he faxed a letter to Dr. Fernando on February 28, 1996, asking whether she would testify in defendant's behalf. The letter was admitted into evidence, and counsel testified that he had never seen, and did not know the origin of, the handwritten notations on the bottom of the letter, which stated, "(1) I agree; (2) Sorry I cannot appear in court, but I will be happy to do a video deposition." According to counsel, Dr. Fernando never agreed to a video deposition; rather, Dr. Fernando's secretary told him very tersely that "she is a doctor, she doesn't go to court."

Counsel testified that he decided not to subpoena Dr. Fernando because he was concerned, based on past experience, that forcing her to testify might be adverse to defendant. Counsel testified that in lieu of calling Dr. Fernando, he called Dr. Sahn to testify based on the medical records, as opposed to conducting his own medical examination. Counsel believed that Dr. Sahn could and did supply the same professional testimony as Dr. Fernando would have. However, counsel did indicate in a March 25, 1996 letter to defendant that Dr. Sahn had not done well on cross-examination.

With regard to defendant's medical records, counsel testified that he subpoenaed all of the hospital records and they became the stipulated joint exhibit at trial. Counsel admitted that he had

another medical record at the time of trial dated September 11 and 12, 1995, but he chose not make it part of the exhibit because he believed it to be largely illegible and duplicative of the hospital records. This medical record indicated that defendant told medical personnel on September 11 that his right foot was numb and that he could not remember anything. The medical record contained a handwritten note stating "mild amnesia," which counsel testified he could not read because it was illegible. The September 12 record indicated that defendant had passed out. Counsel conceded that he could have called the author of the record to interpret what he believed to be illegible; however, he was not concerned about producing medical records from the day of the accident because "it was not an issue as far as [he] was concerned." Counsel claimed that he did not recall the prosecutor arguing that, because there were no medical records from September 11 or 12 supporting defendant's contention that he experienced a period of unconsciousness and numbness in his toes, he was contriving his story to avoid liability for the victim's death.

Defendant testified that he did not understand why counsel did not introduce his medical record from September 11 and 12, and that defendant believed the record was important. Defendant testified that when he questioned counsel about the record, counsel told him that the prosecutor and the judge had refused to allow the record to be admitted because they would admit only the hospital records from September 13 through September 16, 1995. Defendant further testified that counsel failed to introduce records of his follow-up visits with Dr. Fernando in October 1995, in which she listed three possible diagnoses, including a TIA as the most likely. Defendant testified that he had brought those records to counsel's attention as well, and that counsel told him that the court refused to admit the records. Defendant testified that counsel told him that Dr. Fernando refused to testify at trial. With regard to counsel's hearing, defendant testified that counsel never informed him of his hearing problem, but it became apparent over the course of the trial. According to defendant, there were several instances during the proceedings when counsel did not hear anything that was said. Defendant claimed that counsel did not hear the judge saying that she was going into the jury room during deliberations until defendant told him after the fact. Joyce Merkl, defendant's wife, testified that she noticed during her conversations with counsel before and during trial that he had a hearing problem.

Dr. Sonya Fernando testified that she had been a neurologist for at least ten years, and that she saw defendant for a neurology consult on September 16, 1995, at St. Mary's Hospital. Dr. Fernando stated that her diagnosis concerning defendant's condition at the time of the accident was a TIA. Dr. Fernando also believed that defendant suffered a syncopal episode at that time, and that the medical condition from which defendant was suffering could manifest itself in a temporary loss of consciousness. Her opinion that defendant was unconscious was based on the history she was given by defendant; however, she considered defendant's facial asymmetry or droop to be a neurological abnormality supporting the diagnosis of a TIA. Dr. Fernando testified that none of the tests provided evidence of a stroke, but that did not rule out the possibility of a problem with the circulation in defendant's brain.

Dr. Fernando testified that she wrote the notations on the letter faxed to her from counsel. Her notations indicated that she agreed with counsel's theory that defendant was unconscious at the time of the accident and, thus, could not have been negligent, and that she would be happy to do a video deposition. Dr. Fernando testified that she never told counsel that she would not testify at trial. Dr.

Fernando admitted that she did not enjoy going to court and that her staff was aware of that, but stated that she never instructed any employee to indicate on her behalf that she would not go to court.

At a subsequent hearing on March 17, 1997, the trial court rendered its oral opinion denying defendant's motion for a new trial. With regard to the medical record from September 11 and 12, the court believed that counsel's decision not to admit it was a matter of trial strategy. The court stated that the record could have been damaging to defendant because defendant testified at trial that the record referenced his facial droop, but the medical record did not, in fact, make reference to that symptom. Moreover, the court believed that the content of the record was covered by Dr. Sahn. Further, the court did not believe that counsel was ineffective for calling Dr. Sahn in lieu of Dr. Fernando. The court noted that Dr. Fernando would have had the same weaknesses as Dr. Sahn on cross-examination - - that the basis for her diagnosis of a syncopal episode was the history related by defendant. The court also noted that Dr. Sahn was much more experienced at testifying at trial.

With regard to counsel's hearing problem, the court stated that there was no evidence of prejudice to defendant. The court noted that the courtroom had poor acoustics, that others also had difficulty hearing, that the prosecutor had a very soft voice, and that defense counsel was observed moving closer to witnesses so that he could hear them. The court noted that defense counsel's thorough closing argument indicated that he heard the testimony presented.

C

First, defendant claims that counsel's failure to call Dr. Fernando constituted ineffective assistance of counsel because she was the doctor who examined defendant and could have testified more knowledgeably and competently than Dr. Sahn, and would have appeared more credible than Dr. Sahn, a "hired gun" who testified that he gave one or two depositions per week. Defendant argues that Dr. Sahn had never examined defendant and at times appeared unfamiliar with the medical records that formed the basis of his testimony.

In order to establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). A reasonable probability is a probability sufficient to undermine the outcome. *Pickens*, *supra* at 314, citing *Strickland*, *supra* at 314. Decisions as to what evidence to present and whether to call a witness are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d (1997). Moreover, that a strategy does not work does not render its use ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

While we are troubled by counsel's conclusion that Dr. Fernando would not testify in light of the written notation on counsel's letter to her and her testimony at the hearing, we conclude that defendant has not shown the requisite prejudice.

Second, defendant claims that counsel was ineffective for his failure to introduce defendant's medical record from September 11 and 12, 1995. The September 11 and 12 record consisted of two pages of handwritten notes from the St. Mary's outpatient clinic in Livonia, where defendant was treated soon after the accident. The first page, dated September 11, states in part, "was in car accident this morning -- doesn't remember anything about it -- foot is numb." The remainder of the notes are in different writing and are hard to read, but clearly include the words "mild amnesia." The handwriting on the second page, dated September 12, 1995, is difficult to read but appears to include the words, "passed out." Thus, the record from September 11 and 12 indicates that defendant complained of loss of consciousness or memory and numbness in his foot immediately after the accident, and before the victim died on September 13. Counsel testified at the *Ginther* hearing that he was aware of the record from September 11 and 12, but considered the record illegible and unimportant.

In finding that trial counsel was not ineffective, the trial court stated that the records could have been damaging to defendant because defendant testified at trial that the records referenced his facial droop, but the records do not in fact make reference to that symptom. However, the following exchange concerning defendant's facial droop demonstrates the confusion throughout the trial concerning defendant's medical records:

> PROSECUTOR: Did you see anything in your medical records, prior to encountering Mary Skupski, that says anything about any facial problem that you had?
>
> DEFENDANT: Those records are not here, you know that.
>
> PROSECUTOR: Excuse me, Your Honor, I ask that be stricken. I don't know what he's talking about.
>
> [DEFENSE COUNSEL]: I am going to object, Your Honor. She's asking – Mary Skupski clearly testified that her notations were not part of medical records. Now she's asking did he notice her notations in the medical records. There is no facts in evidence to allow her to ask that question.
>
> COURT: The objection is overruled, and the motion is denied.
>
> PROSECUTOR: Did you notice anything in your medical records, prior to when you saw Mary Skupski on the 14th, that says anything about any kind of facial problem that you had?
>
> DEFENDANT: There are no medical records here prior to the 14th, or prior to the 13th, period. There is no medical records [sic] of the day that I saw the doctor on the 11th here.
>
> PROSECUTOR: These have been stipulated to being your complete medical records?
>
> DEFENDANT: From the, only from the hospital, from the hospital.

PROSECUTOR: Where did you go first?

DEFENDANT: I went to the outpatient clinic, and those records are not here.[4]

We do not agree with the trial court that defendant definitively testified that the disputed medical record contained references to the facial droop. In any event, even though the disputed record does not mention the facial droop, the record was made the day of the accident and does mention mild amnesia and toe numbness. The record was thus critical to the defense. Further, the contents of the record was not covered by Dr. Sahn's testimony.

The omitted record was essential for rebutting the prosecutor's theory that defendant contrived that he lost consciousness only after he learned on September 13, 1995 that the victim died. The critical nature of this evidence is highlighted by the two notes the jury sent during deliberations asking whether there were medical records from September 11. The jury apparently was looking for evidence that corroborated defendant's account of the accident. The court responded to the jurors by reminding them that joint exhibit 1 constituted the stipulated medical records and by telling them to rely on their collective memories. We conclude that the chronology and timing of the September 11 and 12 record made it important evidence in this case, and that trial counsel was ineffective for not responding to the prosecutor's theory of the case by utilizing the record.

Trial counsel's failure to introduce the September 11 and 12 record fell below an objective standard of reasonableness. It was imperative that the defense demonstrate that defendant reported symptoms associated with a TIA and/or a syncopal episode soon after the accident. The record from September 11 and 12 stated that defendant complained of toe numbness as well as partial loss of memory or consciousness. The record frontally refuted the prosecutor's theory that defendant did not report any symptoms associated with a TIA or syncopal episode until after the victim died on September 13. As noted above, the significance of the record is highlighted by the jury's inquiries about medical records from September 11. In light of the prosecution's theory and argument, and the jury's inquiry, we conclude that, defendant has shown that counsel's error fell below an objective standard of reasonableness and that but for trial counsel's error, the results of the proceeding may have been different. *Stanaway, supra* at 687-688. Therefore, defendant is entitled to a new trial.

In view of the foregoing, we do not address defendant's remaining claims of error, except to observe that the trial court should assure that all communication with the jury is in open court and on the record.

Defendant's conviction is reversed and the matter is remanded for a new trial. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Helene N. White
/s/ John W. Fitzgerald

[1] There was considerable argument at the close of trial regarding the completeness of the medical records. See n 7, *infra*. Regarding the stipulation to admit the medical records, the record states:

> MRS. RENO [counsel for the prosecution]: Three [the third stipulation] Your Honor, I believe we discussed last time that the Court was in receipt of the medical records of the Defendant, Mr. Merkle [sic.]
>
> And I have looked at the Court's copy. And I'm satisfied that that is a complete copy of the medical records from St. Mary's Hospital, and I believe that Mr. Necker has requested that we stipulate to its admission, and I have no problems with that.
>
> MR. NECKER: That's correct, your Honor.
>
> THE COURT: All right, then this will be joint exhibit.
>
> MRS. RENO: The ones in the envelope are the ones I looked at.
>
> THE COURT: This one.
>
> MRS. RENO: Correct.
>
> MR. NECKER: There could be another – my stipulation.
>
> MRS. RENO: I would note that I think that there are things that are not included in the copy that Mr. Necker has, things that are not part of the record, and I want the total record.
>
> THE COURT: Okay. Joint Exhibit Number One.
>
> MR. NECKER: May I ask what you're referring to, because I thought I had all the records.
>
> THE COURT: Is's [sic] a complete record, complete medical record?
>
> MRS. RENO: I believe there is a certificate from the medical record. I think there are many things in there like nursing notes and medications and things like that that weren't included.
>
> MR. NECKER: Fine, I have no objection. If you want that you can have that.

[2] There was also testimony regarding defendant's driving record, the admission of which defendant challenges on appeal. Because our disposition of defendant's ineffective assistance claim makes it unnecessary to do so, we do not recite this testimony or address this claim of error, except to observe that defendant opened the door to this testimony with his testimony on direct examination.

[3] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[4] It appears from the record, see n 1 *supra*, that counsel represented to the prosecutor and the court that joint exhibit 1 constituted defendant's "complete" medical records. The court had also represented to the jury that the joint exhibit constituted defendant's "complete" medical records, which conflicted with defendant's testimony and undoubtedly caused confusion. During jury deliberations, the prosecutor raised this issue, arguing that counsel had represented to her that joint exhibit 1 contained all of defendant's medical records, that the prosecution had first learned that defendant had been to a clinic before going to St. Mary's Hospital when defendant "blurted it out" at trial, that the jury might believe that the prosecution was "sandbagging" or withholding records from them, and that the court should either reinstruct the jury that the parties had stipulated that exhibit 1 was a complete set of defendant's medical records or that the court should consider holding counsel in contempt. Counsel responded that he had represented to the prosecution that the records were complete hospital records. The trial court denied the prosecution's requests.