

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALFRED ANTHONY TURNER,

Defendant-Appellant.

UNPUBLISHED

April 6, 2001

No. 221262

Clinton Circuit Court

LC No. 98-006577-FH

Before: Holbrook Jr., P.J., and McDonald and Saad, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of negligent homicide, MCL 750.324; MSA 28.556, as a result of a motor vehicle accident. The trial court sentenced defendant to six months imprisonment, thirty-six months' supervised probation, fines, costs and 240 hours of community service. Defendant appeals as of right from the conviction and the trial court's denial of his motion for an evidentiary hearing on the issue of effective assistance of counsel. We affirm.

This case arose when defendant pulled his semi-trailer across US-27 and stopped, resulting in a pickup truck hitting defendant's semi, killing the pickup truck passenger. Defendant contended at trial that the pickup truck driver's negligence was the cause of the accident.

Negligent homicide is the killing of a person through an act of ordinary negligence that only becomes criminal when the victim dies. MCL 750.324; MSA 28.556; *People v Clark*, 171 Mich App 656, 659; 431 NW2d 88 (1988). To be convicted of negligent homicide, the defendant's negligent driving need not be the sole proximate cause of the fatal accident. *People v Dolen*, 89 Mich App 277, 280; 279 NW2d 539 (1977). Thus, defendant's conduct need only be "a substantial cause" of death, rather than "the substantial cause" of death. *People v Tims*, 449 Mich 83, 95-97; 534 NW2d 675 (1995).

Defendant contends that defense counsel failed to effectively impeach the prosecutor's principal witness (the pickup truck driver), and failed to call witnesses and present certain evidence in defendant's favor, thus depriving defendant of effective assistance of counsel. We disagree. Because there is no separate evidentiary record, our review is limited to what is contained in the record, applying the test set forth in *Strickland v Washington*, 466 US 668; 104 S

Ct 2052; 80 L Ed 2d 674 (1984). *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To succeed in his argument, defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994); *Toma, supra* at 302.

Defendant argues that the "absent" evidence would have indicated the pickup truck driver's own acts contributed to the accident. However, as the trial court noted at the motion hearing, even if it was established that the driver's reaction time was impaired, defendant's negligence in entering US-27 before it was safe to do so remained a substantial cause of the accident. Contributory negligence of a third party is not a defense to negligent homicide. *Tims, supra* at 99-100. Moreover, we agree with the trial court's conclusion that impeachment of the driver would not overcome the convincing testimony provided by an independent witness who testified to events leading up to the collision and to witnessing the impact. Questions of credibility are left to the trier of fact. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). Defendant fails to establish that impeachment of the driver would have resulted in a different outcome.

Even if counsel's failure to obtain evidence of other factors contributing to the accident caused counsel's performance to fall below the objective standard of reasonableness under prevailing professional norms, defendant's claim still fails for lack of demonstrable prejudice. *Pickens, supra*. The burden is on defendant to show that his actions were not a substantial factor in the accident; none of the "missing" evidence would contradict the direct testimony concerning defendant's own negligence. Thus, defense counsel's failure to procure evidence was not prejudicial because it did not deny defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995); modified on other grounds 453 Mich 902; 554 NW2d 899 (1996).

Defendant also argues that counsel was ineffective because counsel ignored defendant's insistence that he testify on his own behalf, and that his defense was prejudiced because the jurors were expecting him to take the stand after being told so in counsel's opening arguments. We disagree.

A criminal defendant has federal and state constitutional right to testify. US Const, Am XIV; Const 1963, art 1 §§ 17, 20; *People v Quick*, 51 Mich 547; 18 NW 375 (1884). If a defendant expresses his desire to testify at trial, the court must grant his request, even over counsel's objections. *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985). Alternatively, the right is deemed waived in circumstances where the defendant opts not to testify or acquiesces in his attorney's decision that he not testify. *Id.*

First, we note that defense counsel did not expressly state defendant would take the stand. Instead he alluded to what defendant "will say," in contrast to his language that the others "will testify." These words by themselves, and also in the context of the court's earlier instruction that defendant is not required to testify, lead us to conclude that the jurors could not reasonably have expected defendant to testify. Alternatively, even if they did, the court's instruction that defendant is not requested to testify can be presumed to have cured any prejudice emanating from

this expectation because it is assumed that jurors follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Furthermore, the substance of defendant's testimony was already presented through defendant's expert witness' testimony and little would be gained in having defendant testify.

Second, there is no record support, not even an affidavit, memorializing defendant's repeated insistence that he asked to testify and was denied by defense counsel. In circumstances such as these, this Court must consider defendant as having waived his right to testify because the record shows no objection to defense counsel's actions. *Simmons, supra* at 685. Defendant's claim that his trial counsel was ineffective for failing to question witnesses as directed by defendant is likewise without merit, for the same reasons.

Defendant's final argument is that the trial court erred in denying his motion for an evidentiary hearing. We disagree. The trial court's denial of the motion for a new trial is reviewed for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). An abuse of discretion exists where an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Here, the court agreed with defendant that in failing to discover and obtain evidence impeaching the pickup truck driver's credibility, trial counsel did not meet the objective test for reasonableness under prevailing professional norms. However, the court concluded that this failure did not have a material effect on defendant's case because its admission would not have afforded a different outcome. The trial court clearly evaluated the credibility of the witnesses in deciding the motion for new trial. *People v Mechura*, 205 Mich App 481, 484; 517 NW2d 797 (1994). The court thus concluded it would be futile to order a *Ginther* hearing. In reviewing the trial court's decisions deference is given to the trial court's opportunity to appraise credibility. *People v Canter*, 197 Mich App 550, 561; 496 NW2d 336 (1992). Accordingly, this Court can find no abuse of discretion in the trial court's decision to deny defendant an evidentiary hearing.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Gary R. McDonald

/s/ Henry William Saad