

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REGINALD B. BRIDGEWATER,

Defendant-Appellant.

UNPUBLISHED

May 18, 2001

No. 212889

Wayne Circuit Court

Criminal Division

LC No. 97-008103

Before: Bandstra, C.J., and Gage and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of involuntary manslaughter, MCL 750.321; MSA 28.553, resulting from the deaths of two individuals following an automobile accident. Defendant was sentenced as an habitual second offender, MCL 769.10; MSA 28.1082, to two concurrent terms of 15 to 22½ years' imprisonment. Defendant appeals as of right. We affirm.

Defendant's convictions arose out of an automobile accident that occurred on September 30, 1997, which resulted in the deaths of two individuals. There is no dispute that the vehicle defendant was operating struck a minivan driven by one of the victims. Similarly, there is no dispute that the other deceased victim was ejected from the vehicle defendant was driving. The prosecution's theory of the case was that defendant was speeding on Curtis Avenue, disregarded a red light, and struck the minivan at the intersection of Curtis and Greenfield Avenue. Alternatively, defendant's theory was that an unmarked police car slammed into the vehicle operated by defendant and propelled it into the minivan.

Defendant contends that the trial court's failure to instruct the jury on negligent homicide as a lesser included offense of involuntary manslaughter constituted error requiring reversal. Defendant concedes that he withdrew his request for a negligent homicide jury instruction and approved the actual jury instructions as given. However, he argues that the trial court should have sua sponte read the jury instruction pursuant to MCL 750.325; MSA 28.557. The prosecution concedes that the failure to instruct the jury on negligent homicide was error under MCL 750.325; MSA 28.557; however, it argues that defendant waived this issue by withdrawing his request for the instruction and expressing his satisfaction with the instructions as given. The

prosecution further argues that even if this issue was not waived, defendant was not prejudiced by the omitted instruction and thus any error was harmless.

In *People v Carter*, 462 Mich 206; 612 NW2d 144 (2000), our Supreme Court distinguished between forfeiture and waiver of unpreserved instructional error. In that case, about fifteen minutes into deliberations, the jury sent out a note requesting the testimony of four witnesses and some other exhibits. The trial court discussed the jury's request and its proposed response with the attorneys who both indicated that they had no objection to the trial court's response and were satisfied with the proposed instruction. Thereafter, the trial court instructed the jury in relevant part that the transcripts would not be available for several weeks and it must rely on their collective memories to resolve the issues. The defendant was convicted of first-degree murder, armed robbery and felony-firearm.

On appeal to this Court, the defendant argued, among other things, that the trial court violated MCR 6.414(H)¹ by refusing the jury's request to review the trial transcripts. This Court reversed defendant's convictions and remanded for a new trial, finding that the trial court's denial of the jury's request foreclosed the possibility of having the testimony reviewed at a later time, in violation of MCR 6.414(H), and that such error was not harmless. *People v Carter*, unpublished opinion of the Court of Appeals (Docket No. 199979, issued December 18, 1998).

The Supreme Court granted leave to decide whether the trial court's refusal of the jury's request for the testimony in violation of MCR 6.414(H)² required reversal of the defendant's convictions. The Court held that although the trial court violated the court rule by foreclosing to the jury the possibility of later reviewing the requested testimony, the error did not require reversal of the defendant's convictions because defense counsel specifically approved the trial court's refusal of the jury's request and the court's subsequent instruction to the jury. Thus, the Court held that the defendant waived his rights under the rule, extinguishing any error, and precluded the defendant from raising the issue on appeal. In reaching this conclusion, the Court expressly distinguished between "waiver" and "forfeiture" of a claim of error:

Waiver has been defined as "the 'intentional relinquishment or abandonment of a known right.'" It differs from forfeiture, which has been explained as the "failure to make the timely assertion of a right." "One who

¹ MCR 6.414(H) provides:

If, after beginning deliberations, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

² The prosecution conceded that the trial court's instructions to the jury violated MCR 6.414(H), but argued that the defendant waived the issue when defense counsel expressed satisfaction with the trial court's refusal of the jury's request and its subsequent instruction to the jury.

waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error. Mere forfeiture, on the other hand, does not extinguish an error. [*Carter, supra* at 216; citation omitted.]

Similarly, in *People v Tate*, ___ Mich App ___; ___ NW2d ___ (Docket No. 215400, issued 2/6/01), this Court recently expanded the holding in *Carter* to conclude that a defendant could waive his constitutional rights related to jury substitution. There, the defendant claimed that the trial court erred in excusing an itching juror from service after deliberations began and by replacing the excused juror with an alternate juror that had already been dismissed by the court. *Id.*, slip op, pp 3, 8. In affirming the defendant's convictions, this Court stated that

Pursuant to *Carter*, we conclude that any error in either the instruction regarding the procedure in the event a juror had to be excused or the actual removal of the juror was extinguished by counsel's repeated waiver, either in the form of express approval or by responding "No" when specifically queried by the court whether there was anything further for the record. [*Id.*, slip op, p 3, citing *Carter, supra* at 216.]

Tate further held that the defendant had waived the question of whether it was error to replace the dismissed juror with the excused alternate juror. *Id.*, slip op, pp 5, 7, citing *Carter, supra*.

Here, like *Carter* and *Tate*, defense counsel did not fail to object to the omitted instruction on negligent homicide; rather, counsel expressly withdrew his request for the instruction and then expressed his satisfaction with the trial court's instructions as given. Thus, under *Carter* and *Tate*, defendant's actions waived appellate review and extinguished any error on the part of the trial court. *Carter, supra; Tate, supra*. Therefore, although the trial court's failure to instruct the jury on negligent homicide violated MCL 750.325; MSA 28.557³ which requires that a jury be instructed on negligent homicide as a lesser included offense of involuntary manslaughter, see *People v McIntosh*, 400 Mich 1, 7; 252 NW2d 779 (1977), we conclude that defense counsel's affirmative withdrawal of the requested instruction at trial and his subsequent approval of the trial court's instructions as given waived this issue and precludes appellate relief. *Tate, supra; Carter, supra*. See also *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987). Our decision is further supported by the well-settled principle in Michigan law that a party cannot request or stipulate to an action in the trial court and then argue on appeal that the action was error. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995). Accordingly, we hold that a party waives review of alleged instructional error where he

³ MCL 750.325; MSA 28.557 provides:

The crime of negligent homicide shall be deemed to be included within every crime of manslaughter charged to have been committed in the operation of any vehicle, and in any case where a defendant is charged with manslaughter committed in the operation of any vehicle, if the jury shall find the defendant not guilty of the crime of manslaughter, it may render a verdict of guilty of negligent homicide.

has not only withdrawn his request of the omitted instruction but also approved the instructions as given. *Tate, supra, Carter, supra; People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987). See also MCR 2.516; MCL 768.29; MSA 28.1052.

Alternatively, defendant contends that he was deprived of the effective assistance of counsel by defense counsel's failure to either request a negligent homicide jury instruction or object to its omission. In order to establish a claim of ineffective assistance of counsel, a defendant must show that defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Nimeth*, 236 Mich App 616, 625; 601 NW2d 393 (1999). A defendant claiming ineffective assistance of counsel must also "overcome a strong presumption that counsel's assistance constituted sound trial strategy." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We will not substitute our judgment for that of counsel in matters of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

After reviewing the record, we conclude that defense counsel's decision not to request an instruction on negligent homicide constituted sound trial strategy. The defense theory at trial was that defendant did not cause the two deaths at all; defendant did not argue that his negligent conduct caused the accident and resulting deaths. Consistent with this theory, defendant testified that an unmarked police car struck his completely stopped vehicle, propelled it into the intersection, and caused the victims' deaths. If believed, defendant's testimony would have completely exonerated defendant of the charged offenses. Defense counsel's decisions not to discourage defendant from asserting his right to testify, not to concede that defendant caused the accident, and argue that he was merely negligent rather than grossly negligent, is a quintessential example of trial strategy - seeking the result of complete acquittal rather than conviction of a lesser offense. *Stanaway, supra*. That trial counsel's strategy was ultimately unsuccessful does not constitute ineffective representation.

However, even if defense counsel's decision not to request an instruction on negligent homicide constituted deficient representation, given the other strong evidence substantiating defendant's guilt, we are not persuaded that counsel's representation prejudiced defendant to the extent that the outcome of the trial would have been different. *Stanaway, supra*. The prosecution presented eyewitness testimony from two non-police witnesses establishing that defendant was traveling at an excessive speed (between sixty and eighty miles per hour), disobeyed a red traffic signal, and collided with the minivan in which one of the victims was traveling. The other victim was a passenger in the vehicle defendant was driving at the time of the accident. Testimony was also presented that defendant's car hit the minivan with enough force that the minivan rolled over two or three times. None of the witnesses observed a police vehicle in the area at the time of the collision. Further, all of the officers testified that they observed defendant's reckless driving from a distance of two to three blocks away. On this record, defendant has not overcome the strong presumption that defense counsel engaged in sound trial strategy. Nor has defendant demonstrated that counsel's performance deviated from the professional norms to the extent that, but for counsel's alleged error, the result of the trial would have been different. *Stanaway, supra* at 687-688.

Affirmed.

/s/ Richard A. Bandstra

/s/ Hilda R. Gage

/s/ Kurtis T. Wilder