STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 12, 2002
v	No. 230836 Grand Traverse Circuit Court
CLARK BAIRD PENZIEN, Defendant-Appellant.	LC No. 00-008192-FH

Before: Hood, P.J., and Saad and E. M. Thomas*, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of operating a motor vehicle while visibly impaired (OWI), MCL 257.625(3), entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with operating a motor vehicle under the influence of intoxicating liquor (OUIL), third offense, MCL 257.625(8). The evidence showed that defendant was involved in a one-car accident in which he suffered a laceration to the head. Police officers and emergency workers testified defendant slurred his speech and staggered, that he appeared to be intoxicated, and they detected the odor of intoxicants about his person. A lay witness testified he got within three feet of defendant, but he did not detect the odor of intoxicants. Defense counsel argued that defendant's behavior at the time of the accident was attributable to the head injury rather than to his consumption of a small quantity of alcohol.

The prosecutor requested and the trial court read an instruction on the lesser included offense of OWI. Defendant did not object to the instruction. The jury acquitted defendant of OUIL, but convicted him of OWI.

Defendant argues that trial counsel rendered ineffective assistance by failing to object to the giving of an instruction of the lesser included offense of OWI, and by failing to call an expert witness to testify regarding the effect of a head injury on behavior. We disagree in each instance, and affirm defendant's conviction.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional

* Circuit judge, sitting on the Court of Appeals by assignment.

norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20. Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2000). Counsel is presumed to have afforded effective assistance, and a defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

An offense may be a lesser included offense of another offense even if the penalties for the two offenses are the same. *People v Torres (On Remand)*, 222 Mich App 411, 420-421; 564 NW2d 149 (1997).[1] The offense of OUIL requires that the defendant have operated a vehicle while his ability to drive was substantially and materially affected by the consumption of intoxicating liquor. The offense of OWI requires that the defendant have operated a vehicle while his ability to drive was so weakened or reduced by the consumption of intoxicating liquor that he drove with less ability than would an ordinary, careful, and prudent driver, as visible to an ordinary, observant person. The offense of OWI is a necessarily included lesser offense of OUIL. *Oxendine v Secretary of State*, 237 Mich App 346, 354-355; 602 NW2d 847 (1999).

Evidence that supports a greater offense will always support a necessarily included lesser offense. If evidence has been presented that would support conviction of a lesser offense, the trial court must instruct on the lesser offense if either party so requests. *Torres*, *supra*, 416. In this case the evidence supported a conviction of OWI. *Oxendine*, *supra*, 354. The trial court was required to grant the prosecutor's request and instruct the jury on the lesser included offense of OWI. *Torres*, *supra*. Defense counsel did not render ineffective assistance by failing to raise a meritless objection to the giving of a required instruction. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

The failure to call a witness or to present other evidence constitutes ineffective assistance only when it deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), modified 453 Mich 902; 554 NW2d 899 (1996). Defendant sustained a head laceration in the accident. Counsel argued the injury caused defendant to behave in such a way that he appeared to be intoxicated. Defendant has not established that medical evidence that his behavior was caused by his head injury could have been obtained. Therefore, we conclude that counsel's decision to simply argue the point was trial strategy. We do not substitute our judgment for that of counsel regarding matters of trial strategy. *People v*

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[1] Defendant had two prior convictions of OWI within ten years. Therefore, conviction of either OUIL or OWI would result in the entry of a felony conviction carrying a maximum term of five years in prison. MCL 257.625(8)(c); MCL 257.625(10)(c).

Rice (On Remand), 235 Mich App 429, 445; 597 NW2d 843 (1999). Defendant has not overcome the presumption that counsel rendered effective assistance. *Rockey, supra*.

Affirmed.

/s/ Harold Hood
/s/ Henry William Saad
/s/ Edward M. Thomas