STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 8, 2008
v	No. 273905 Lapeer Circuit Court
DOUGLAS MICHAEL SEE, Defendant-Appellant.	LC No. 05-008427-FC

Before: Zahra, P.J., and Whitbeck and Beckering, JJ.

PER CURIAM.

A jury convicted defendant Douglas See of motor vehicle manslaughter.[1] The trial court sentenced See as a second offense habitual offender[2] to four years to 22 years and six months in prison. We affirm.

I. Basic Facts And Procedural History

At approximately 2:45 p.m. on June 3, 2004, See was apparently driving his pickup truck to work at the Romeo Ford plant for the 3:00 p.m. shift. He was about 13 miles from the plant, traveling southbound on M-53 near Imlay City. Dallas Hainds testified that he saw See approach the intersection of the ramp from I-69 and that See was weaving in and out of heavy traffic. Michael Chisholm testified that the pickup truck driven by See passed him driving "a lot faster than the rest of the traffic." Chisholm saw the traffic light in the intersection change from green to amber, then to red. According to multiple witnesses, See did not slow down at the intersection; rather, he ran the red light and collided with the driver's side of a Tahoe driven by Theresa Bice. See jumped out of the passenger side of his pickup and went to the Tahoe. Bice was dead, still wearing her seatbelt in the demolished driver compartment. See threw up his hands, dropped to his hands and knees, and pounded his fist on the ground and appeared to be very shaken up or hysterical.

[1] MCL 750.321.

[2] MCL 769.10.

At trial, the prosecutor presented State Police Sergeant Timothy Robbins as an accident reconstruction expert. Sergeant Robbins had investigated four crashes at the same intersection from March 2002 through August 2006. The speed limit at the intersection was 45 miles an hour, changing to 55 just past the intersection. Sergeant Robbins calculated See's speed at impact to be 64 to 72 miles an hour. The information recorded by the pickup's airbag sensor was consistent with Sergeant Robbins's calculation. Sergeant stated that there were no skid marks in the intersection, but he noted that See's 2004 pickup would have an antilock brake system that would not leave skid marks. Instead, the pickup would leave deceleration scuffs. Sergeant Robbins saw no deceleration scuffs in the intersection.

II. Sentencing

A. Standard Of Review

See challenges the scoring of offense variables (OVs) 3, 5, and 17, as well as prior record variable (PRV) 5. His arguments on OVs 3 and 17 present questions of law, which we review de novo.[3] His argument on OV 5 presents an unpreserved evidentiary challenge, which we review for plain error affecting his substantial rights.[4]

B. OV 3

See contends that the trial court improperly assigned 25 points under OV 3. The OV 3 statute governs the points attributable to physical injuries to a victim.[5] The trial court assigned 25 points under OV 3, on the ground that the victim, Theresa Bice, sustained a life-threatening injury.[6] See argues that this was error, because Bice suffered a life-*ending* injury rather than a life-*threatening* injury. This is a distinction without a difference. The Michigan Supreme Court has confirmed that trial courts are to assign 25 points under OV 3, even if the victim died from injuries sustained in the crime.[7] Accordingly, we conclude that the trial court correctly scored 25 points against See under OV 3. In light of the clear judicial interpretation of the proper scoring of OV 3 in this context, we also reject See's argument that the relevant statute is unconstitutionally vague.[8]

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[3] See *People v Babcock*, 469 Mich 247, 268; 666 NW2d 231 (2003).

[4] *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

[5] MCL 777.33.

[6] MCL 777.33(1)(c).

[7] See *People v Houston*, 473 Mich 399, 407 n 16; 702 NW2d 530 (2005). See also *People v Brown*, 474 Mich 876; 704 NW2d 462 (2005).

[8] See *People v Boomer*, 250 Mich App 534, 539; 655 NW2d 255 (2002) ("When making a vagueness determination, a court must also take into consideration any judicial constructions of the statute.").

C. OV 5

See argues in his Standard 4 brief that the evidence was insufficient to support scoring any points against him for OV 5. OV 5 requires the trial court to score 15 points if a member of the victim's family sustained serious psychological injury that may require professional treatment.[9] That the family member has not sought treatment for the psychological injury does not necessarily preclude the assignment of points.[10] Here, the trial court found that Bice's untimely death caused serious psychological injury to her family.

This Court must uphold scoring decisions so long as there is any evidence to support the decision.[11] Having reviewed the record, we find that the trial court properly received evidence from Bice's father regarding the nature of his family's psychological injuries, both in the victim's impact statement and in his statement at sentencing. Although Bice's father may arguably have indicated on the impact statement that he himself had sustained no serious psychological injury, he also indicated that the loss of Bice's presence had caused emotional stress, sadness, and an acute feeling of loss in his household. He further stated that he and his family felt depression as a result of See's crime. This evidence was sufficient to allow the trial court to assign points under OV 5 because it was evidence of serious psychological injury that a reasonable person could conclude might require professional treatment.

D. OV 17

We conclude that the trial court was also correct to assign ten points under OV 17 for "wanton or reckless disregard for the life or property of another."[12] See argues that the jury's verdict did not support the conclusion that he was wanton or reckless. Instead, See claims that the trial court should have assigned five points for failure to demonstrate "the degree of care that a person of ordinary prudence in a similar situation would have shown."[13] We disagree. In keeping with CJI2d 16.18, the trial court instructed the jury that gross negligence involves a willful disregard of the results of certain actions. The verdict demonstrated the jury's conclusion that See acted with willful disregard, which in turn supported the trial court's sentencing decision that See acted with reckless disregard for the lives of other drivers. We find no basis for overturning the trial court's conclusion on this point.

E. PRV 5

See argues in his Standard 4 brief that the trial court erred in assigning two points for his prior conviction of attempted fourth-degree criminal sexual conduct. According to See, his prior

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[9] MCL 777.35(1)(a).

[10] MCL 777.35(2).

[11] *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006), citing *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

[12] MCL 777.47(1)(a).

[13] MCL 777.47(1)(b).

conviction should not support a PRV score if the conviction also supports a habitual offender enhancement. This is incorrect. The sentencing guidelines allow trial courts to count a single conviction both in scoring PRV variables and in determining whether habitual offender enhancement is warranted.[14]

III. The Habitual Offender Enhancement

A. Standard Of Review

See argues that the trial court erred in applying the habitual offender enhancement because his conviction for attempted criminal sexual conduct was not a felony. See did not present this issue to the trial court, so we review it for plain error affecting his substantial rights.[15]

B. Applying The Plain Error Standard

We conclude that the trial court correctly determined that, for purposes of the habitual offender enhancement, See's prior conviction was a felony.[16]

IV. Downward Departure From The Sentencing Guidelines

A. Standard Of Review

See maintains that the trial court erred in failing to depart downward from the sentencing guidelines. However, we must affirm a sentence within the guidelines range unless the trial court incorrectly scored the guidelines or relied on inaccurate information in determining the sentence.[17]

B. Applying The Guidelines

As discussed above, the trial court correctly scored the guidelines and properly relied on information in the record to determine See's sentence. Accordingly, we affirm the sentence.

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[14] See MCL 777.21(c)(3) (directing a trial court to, in relevant part, determine a defendant's PRV level and increase the guidelines range for any habitual offender enhancement without any indication that a prior conviction cannot be considered for both purposes).

[15] *Carines*, *supra* at 774.

[16] See *People v Slocum*, 156 Mich App 198, 200; 401 NW2d 271 (1986) (conviction of an attempt to commit a felony supports an habitual offender notice even if the attempt conviction itself is a misdemeanor).

[17] MCL 769.34(10); *Babcock*, *supra* at 261.

V. Sufficiency Of The Evidence

A. Standard Of Review

See argues that the evidence was insufficient to support the jury's verdict. To address this argument, we review the record de novo to determine whether a reasonable juror could have found that the prosecutor proved the elements of manslaughter.[18]

B. Reviewing The Evidence

Our review of the record discloses that there was evidence, including the testimony of multiple eyewitnesses, sufficient to demonstrate that See was driving between 60 and 72 miles an hour, shifting back and forth between traffic lanes. An accident reconstructionist attributed the cause of the collision to See for exceeding the speed limit and failing to yield. Although there was some testimony concerning the visibility of the traffic light and the timing of the light, the jury had the opportunity to consider that testimony as compared to their own assessment of the intersection during the jury view of the intersection. We must defer to the jury's superior position to determine the weight and credibility given to trial evidence.[19] Further, the determination whether excessive speed constitutes gross negligence is typically a jury question, to be determined based on the totality of the circumstances.[20] We conclude, given the jury view of the intersection and the testimony about the manner in which See was driving immediately prior to the accident, that the evidence was sufficient to support the verdict.

VI. Ineffective Assistance Of Counsel

A. Standard Of Review

See argues in his Standard 4 brief that his trial counsel was ineffective, in that counsel made at least eight separate mistakes from the preliminary examination to the sentencing. See did not raise these concerns before the trial court. As such, we review the allegations for mistakes that are apparent from the record.[21]

B. Legal Standards

To prevail, See must show that counsel's errors were so serious as to render the result of the trial unreliable.[22]

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[18] *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

[19] See *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974).

[20] *People v McCoy*, 223 Mich App 500, 504; 566 NW2d 667 (1997).

[21] *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

[22] *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

C. Applying The Standards

In reviewing the record, we find no serious errors by counsel. Most of the errors that See alleges were matters of trial strategy, for which he has not overcome the strong presumption that the strategy was sound.[23] With respect to the alleged evidentiary errors, we find that the evidence was admissible and, as such, defense counsel was not required to present objections.[24] Moreover, See's speculation that the outcome of the trial might have been different had certain evidence been adduced or excluded is insufficient to demonstrate any prejudice. Accordingly, we reject See's contention that his trial counsel was ineffective.

Affirmed.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Jane M. Beckering

[23] *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

[24] *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).