STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 17, 2008
v	No. 274510 Washtenaw Circuit Court
CLAUDIA LUCILLE SMALL, a/k/a KATHERINE PATRICIA SMALL, Defendant-Appellant.	LC No. 05-000855-FH

Before: Wilder, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Defendant appeals of right from convictions, following a jury trial, of negligent homicide, MCL 750.324, operating a vehicle with a suspended license causing death, MCL 257.904(4), operating a vehicle with a suspended license, MCL 257.904(1), possessing a suspended license, MCL 257.324, and operating a motor vehicle without insurance, MCL 500.3102. The trial court sentenced defendant to one to two years in prison for count one; 93 days in jail for count two; 90 days in jail for count three; one year in jail for count four; and 3 to 15 years in prison for count five, with defendant's license to be suspended for no less than five years following her release, and with all sentences to run concurrently. In addition, the court ordered defendant to pay restitution of $1,191,820 to the victim's widow. We affirm.

Defendant first argues that the trial court erred by denying her request to read CJI2d 4.5 to the jury. Alternatively, defendant argues that her trial counsel was ineffective for failing to lay a proper foundation to warrant reading of the instruction. We disagree.

At trial, Ramona Stoller-Lelli, an eyewitness to the automobile collision between defendant and Richard House, the decedent, testified that she saw defendant's vehicle collide with House's van, and then hit the wall that lined the entrance ramp. But Stoller-Lelli testified as follows at the preliminary examination:

Q. And did you then in fact . . . start to brake?

A. Yes. I started braking.

Q. And what, if anything, did you observe as that happened?

> *A.* Well, . . . I was braking as much as I could and I saw the car do . . . exactly what I was afraid was going to happen and that was she did not go into the right, *she went across to the left, hit the wall and started spinning and at that time I saw that she hit the van* in front of her and they both started spinning in front of me, so I was braking . . . as fast as I could[.] [Emphasis added.]

At trial, Stoller-Lelli testified that defendant failed to "just merge easy right and then go over left"; instead, "[s]he did what I thought was going to happen. She went across and she hit a van." Stoller-Lelli further testified that after defendant's car "hit the van . . . she kept going . . . and the two cars just started spinning and they were both hitting that wall." When questioned about the apparent discrepancy in her testimony at trial versus her preliminary examination testimony, Stoller-Lelli reiterated that defendant struck House's van before hitting the wall, but agreed that her preliminary examination testimony "looks a little confusing." Defense counsel asked Stoller-Lelli why she believed her preliminary examination testimony to be confusing, but did not pursue the issue further.

CJI2d 4.5 states:

> (1) If you believe that a witness previously made a statement inconsistent with [his/ her] testimony at this trial, the only purpose for which that earlier statement can be considered by you is in deciding whether the witness testified truthfully in court. The earlier statement is not evidence that what the witness said earlier is true.
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> (2) Evidence has been offered that one or more witnesses in this case previously made statements inconsistent with their testimony at this trial. You may consider such earlier statements in deciding whether the testimony at this trial was truthful and in determining the facts of the case.

Defendant claims that if the court had read the instruction, "the jury may have believed Defendant's version of the accident which supported a finding that it was Mr. House who veered in front of Defendant[,] starting the sequence of events that led to . . . [the] rollover [of his vehicle]." This argument lacks merit.

In *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003), this Court stated:

> [a] defendant's request for a jury instruction on a theory or defense must be granted if supported by the evidence. However, if an applicable instruction was not given, the defendant bears the burden of establishing that the trial court's failure to give the requested instruction resulted in a miscarriage of justice. Reversal for failure to provide a jury instruction is unwarranted unless it appears that it is more probable than not that the error was outcome determinative. [Citations and quotation marks omitted.]

Although defendant asserts that the jury "may" have believed defendant's version of the events if the trial court had read CJI2d 4.5 to the jury, defendant does not demonstrate that the court's failure to read the instruction was outcome determinative. Only defendant and Stoller-Lelli offered detailed eyewitness accounts of the accident at trial, and Stoller-Lelli had no apparent incentive to alter her version of the events.

Further, defendant does not explain why the jury's verdict might have been different if it had heard CJI2d 4.5. She presents only a vague intimation that if defendant struck the wall prior to hitting House's van, she was not responsible for the accident. This is not necessarily the case, as other factors could have contributed to defendant's responsibility for the accident. For instance, defendant claimed that she was driving at a low rate of speed due to poor driving conditions. However, other witnesses who drove on the evening of the incident testified that the night was clear, dry, and bright. If defendant was driving too fast, or in an otherwise "careless, reckless, or negligent manner," MCL 750.324, she would still have violated the statute, whether or not she struck House's van prior to hitting the wall. Defendant does not cite law or provide other reasons as to why she would have been exculpated in the event that she struck the wall prior to hitting House's van. Therefore, defendant's argument on this issue fails.

Defendant also argues that her counsel was ineffective for failing to impeach the witness properly. We disagree.

We naturally begin, as always, with the text of the constitutional provisions in question. The United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." US Const, Am VI. Similarly, the Michigan Constitution provides: "In every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his or her defense . . . ." Const 1963, art 1, § 20. It is too well established to require citation of authority that these provisions not only protect the right of an accused to hire counsel, but affirmatively require the government to provide counsel for the defense of an indigent accused. In addition, these provisions have been interpreted, under the common law of the constitution, to require that the attorney provided by the government must provide "effective" assistance. E.g., *Strickland v Washington,* 466 US 668; 104 S Ct 2052, 80 L.Ed.2d 674 (1984); *Schriro v. Landrigan,* ____ US ____, ____; 127 S Ct 1933, 1939; 167 L Ed 2d 836 (2007).

A constitutional claim of ineffective assistance of counsel is reviewed under the standard established in *Strickland,* which requires the defendant to show that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney guaranteed under the sixth amendment. *People v Harris,* 201 Mich App 147, 154; 505 NW2d 889 (1993). The right to counsel under the Michigan Constitution does not impose a more restrictive standard than that established in *Strickland*. *People v Pickens,* 446 Mich 298, 318-319; 521 NW2d 797 (1994).

Effective assistance of counsel is presumed and defendant bears the burden of proving otherwise. *People v Rocky,* 237 Mich App 74, 76; 601 NW2d 887 (1999). To succeed on a claim of ineffective assistance of counsel, the defendant must show that, but for an error by counsel, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable. *People v Garza,* 246 Mich App 251, 255; 631 NW2d 764 (2001). The defendant bears a "heavy burden" on these points. *People v Carbin,* 463 Mich 590,

599; 623 NW2d 884 (2001). Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003).

At trial, after hearing the parties' arguments on why a reading of CJI2d 4.5 was or was not warranted, the court stated that although it recalled the testimony in question from the preliminary examination transcript, the court did not "believe that rises to the level of an instruction of 4.5." Defense counsel objected that Stoller-Lelli's testimony was confusing, to which the court responded that it still believed that the instruction was not appropriate. Although the prosecutor argued that defense counsel did not lay the proper foundation for the instruction, the court apparently did not make its decision on this basis, as defendant asserts on appeal. Thus, defendant's argument that her trial counsel was ineffective for failing to lay the foundation for CJI2d 4.5 lacks foundation in the record.

In addition, we find that counsel's failure to lay a foundation for the use of CJI2d 4.5 could be viewed as trial strategy. To have focused on the difference between Stoller-Lelli's preliminary examination testimony, and her trial testimony, would have placed even more emphasis to the jury on her trial testimony. Stoller-Lelli was the only eyewitness to the accident, she was a witness for the prosecution, and trial counsel could have made a strategic decision not to overemphasize her testimony. Alternatively, trial counsel could have viewed the difference between Stoller-Lelli's preliminary examination testimony and her trial testimony as trivial, since it merely is a difference over whether defendant struck the wall first or struck the victim's vehicle first (a seemingly immaterial issue). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Garza, supra* at 255.

Defendant next argues that a remand is required for a determination of decedent's proportion of fault for not wearing a seatbelt, and for a concomitant reduction of the restitution order. In other words, defendant argues that this Court should reverse the restitution order, because it did not allocate fault between defendant and decedent, and remand for a hearing on what proportion of fault was attributable to defendant and decedent, respectively (and accordingly what proportion of "damages" should be paid by defendant). We reject this argument.

At the restitution hearing, the trial court ordered defendant to pay restitution totaling over $1.1 million to House's widow, Theodora House. Defendant contends that because Richard House apparently was not wearing a safety belt at the time of the crash, which may have contributed to his death, the trial court should reduce the amount ordered as restitution. Defendant admits that she "was unable to find a Michigan case discussing the issue of restitution under the statutes . . . [where a] [d]efendant was required to pay restitution in spite of the fact that [the] decedent was in violation of the law at the time of the accident".

Defendant does not cite any law supporting her argument, but merely mentions an unspecified "seatbelt law" that she believes impacts her argument. We consider this issue abandoned based on defendant's failure to argue its merits in a meaningful way. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and

elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998).

Affirmed.

/s/ Kurtis T. Wilder
/s/ William B. Murphy
/s/ Patrick M. Meter