

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUSSELL PERCY DUNHAM,

Defendant-Appellant.

UNPUBLISHED

August 12, 2010

No. 287584

Eaton Circuit Court

LC No. 07-020341-FC

Before: M.J. KELLY, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree murder, MCL 750.317, and was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 34 to 60 years. Defendant appeals by right. We affirm.

Defendant's convictions arose out of a traffic accident that resulted in the death of two people. Defendant's passenger, Carolyn Merrill, and the driver of the other vehicle, Penny Sharp, both died from injuries sustained in the accident. Defendant had been traveling in excess of 80 miles per hour, failed to stop at a stop sign, and collided with the vehicle driven by Sharp. Defendant's blood alcohol content (BAC) was .17. Defendant argues the evidence was insufficient to support his convictions. We disagree.

We review de novo a sufficiency of the evidence claim. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). We examine the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond reasonable doubt. *Id.* This standard of review is deferential. We must draw all reasonable inferences from the evidence and make credibility choices that support the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The essential elements that must be established beyond a reasonable doubt to sustain a conviction for second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). The element of malice can be satisfied by establishing that the defendant intended to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *Id.* at 464. While not every case in which intoxicated driving leads to death constitutes second-degree murder, when the evidence establishes "a level of misconduct that goes beyond that of drunk driving," a conviction for

second-degree murder can be sustained. *Id.* at 469; see also *People v Werner*, 254 Mich App 528, 533; 659 NW2d 688 (2002).

Defendant argues that his conviction for second-degree murder cannot be sustained because his conduct was not egregious enough to rise to the level necessary to establish the required element of malice. In support, defendant compares the facts present here to other cases in which a defendant convicted of second-degree murder had been driving while intoxicated, and asserts that the level of disregard for risk in those cases cannot be found in the instant case. For example, defendant notes that in *Goecke*, 457 Mich at 449-454, the three defendants engaged in such conduct as driving recklessly at a high rate of speed on a main road, narrowly avoiding collisions, and disregarding traffic signals.

Defendant fails to acknowledge that this Court has also upheld a conviction for second-degree murder when there has been no evidence of near-miss collisions, prolonged police pursuit, or other traffic. In *Werner*, this Court acknowledged that there was no evidence related to defendant's behavior from the time of his departure until the fatal crash occurred, but nonetheless concluded that the prosecution had met its burden by establishing that the defendant had recently experienced an alcohol-induced blackout while driving, but later chose to drink heavily while out with his vehicle. *Werner*, 254 Mich App at 533-534. Thus, there is no set formula for determining when a defendant's conduct is sufficiently egregious to satisfy the element of malice necessary for second-degree murder. *Id.*

In the instant case, the evidence established that defendant's BAC at the time of accident was .17 (more than twice the legal limit) and that he was traveling at a high rate of speed. In addition, defendant failed to stop at a posted stop sign, despite the presence of a "Stop Ahead" warning sign before the intersection and even though there was evidence that he was familiar with the intersection. Also, an accident reconstruction expert testified there was no evidence that defendant applied his brakes before impact, and a lay witness, who observed defendant speeding toward the intersection, testified that he did not hear the sound of brakes being applied. We conclude this evidence viewed in a light most favorable to the prosecution was sufficient to permit a reasonable jury to find the element of malice was proved beyond a reasonable doubt. *Werner*, 254 Mich App at 530, 533-534.

Defendant also claims he is entitled to a new trial because he was denied the effective assistance of counsel at trial due to numerous errors on the part of trial counsel. We disagree.

This Court reviews a trial court's decision on a motion for a new trial for an abuse of discretion. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). Regarding a claim of ineffective assistance of counsel, we review the trial court's factual findings for clear error and the constitutional issue de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To prevail on a claim of ineffective assistance of counsel, defendant must show: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant must also overcome a strong presumption that counsel's actions were the product of sound trial strategy. *Id.* at 715. This Court will not substitute its judgment for that of trial

counsel related to matters of trial strategy. *Id.* Moreover, the fact that a strategic decision was ultimately unsuccessful does not necessitate the conclusion that a defendant was denied effective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant claims on appeal that he was denied effective assistance of counsel due to trial counsel's failure to object to the admission of statements defendant made at the scene of the accident and later at the hospital. The trial court, after conducting a *Ginther*¹ hearing, disagreed. The trial court found that defendant's statements at the hospital were not involuntary and that *Miranda*² warnings were not necessary. While the trial court found that the statements defendant made at the scene might have been suppressed had a motion been filed, it nevertheless determined counsel's failure to move to suppress was the product of a reasonable trial strategy. Moreover, excluding the statements would not have affected the outcome of the trial. We disagree that the accident scene statements were involuntary but find no clear error in the trial court's other findings of fact, and agree that defendant has not overcome the presumption that he received effective assistance of counsel. *Rodgers*, 248 Mich App at 714-715.

Defendant's statement at the hospital in which he denied being the driver at the time of the accident constituted an admission of fact. Defendant's statement at the hospital was essentially entered to show that he denied being the driver at the time of the accident. Without additional proof, this statement would tend to exonerate defendant from the charged offenses. Accordingly, the statement qualifies as an admission of fact and was not subject to a determination that it was voluntarily made. *People v Gist*, 190 Mich App 670, 671; 476 NW2d 485 (1991). Moreover, we defer to the trial court's superior fact-finding ability and find no clear error in the trial court's determination the statement was voluntary. *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997).

Defendant also argues his statements from the hospital should have been suppressed because he was not given the *Miranda* warnings. This claim is also without merit.

Miranda warnings are required when a suspect is subject to a custodial interrogation. *People v Kulpinski*, 243 Mich App 8, 25; 620 NW2d 537 (2000). Whether a person is in custody for *Miranda* purposes depends on the totality of the circumstances, but the key question is whether the accused could reasonably believe that he was not free to leave. *People v Marsack*, 231 Mich App 364, 374; 586 NW2d 234 (1998). The *Miranda* rule is "directed toward police conduct." *City of Grand Rapids v Impens*, 414 Mich 667, 677; 327 NW2d 278 (1982). Here, the circumstances preventing defendant's mobility did not result from police conduct, and he was not under formal arrest. *Peerenboom*, 224 Mich App 197-198.

We also disagree with defendant that *Miranda* warnings were required to render admissible his statements at the accident scene. Police officers may ask general on-the-scene questions to investigate the facts surrounding an accident without needing to recite *Miranda* warnings. See *People v Ish*, 252 Mich App 115, 118; 652 NW2d 257 (2002).

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

² *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant further argues that these statements should have been suppressed because they were inherently unreliable because he had just been involved in a serious accident, was himself severely injured, and had lost consciousness more than once. While these factors may have affected the jury's assessment regarding defendant's credibility and the weight to assign the evidence, they were not the product of police conduct. See *Colorado v Connelly*, 479 US 157, 167, 107 S Ct 515, 93 L Ed 2d 473 (1986), holding "that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." In any event, regardless whether a motion to suppress defendant's statements might have succeeded, defendant cannot demonstrate that the failure to file a motion would have resulted in a different outcome at trial.

Defendant argues that the statements he made in the hospital were necessary to establish the malice element, and that without this evidence, the jury would probably have acquitted him of the more serious charge. This argument fails to recognize that other evidence supported the jury's finding of malice, including defendant's level of intoxication, extreme rate of speed, and disregard of the stop sign. This evidence was sufficient to establish the malice element required for a conviction independent of defendant's attempts to deny that he was driving. Without a showing that the alleged error affected the outcome of the trial, defendant's ineffective assistance claim cannot succeed.

Defendant next argues that trial counsel failed to adequately investigate and prepare his defense by failing to (1) obtain an expert to challenge plaintiff's expert's testimony related to the speed of the vehicle, (2) object to biased or irrelevant evidence, and (3) challenge a jury instruction. We disagree.

We reject defendant's argument that trial counsel should have sought appointment of an expert to challenge plaintiff's expert's testimony related to speed. A criminal defendant may request appointment of an expert if he can demonstrate that there is a nexus between the facts of the case and the need for an expert. MCL 775.15; *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006). But, "[i]t is not enough for the defendant to show a mere possibility of assistance from the requested expert." *People v Tanner*, 469 Mich 437, 443; 671 NW2d 728 (2003). Defendant has failed to make the necessary showing that an expert was necessary for him to present a defense at trial.

While speed was undoubtedly an important issue at trial, there were other factors that supported the prosecution's theory that defendant's conduct rose to the level necessary to establish the required element of malice. Defendant's level of intoxication and failure to stop for a stop sign at an intersection he was familiar with are two such factors.

We also note that plaintiff's expert was not the only witness to testify as to the vehicle's speed. A resident of Columbia Highway testified that he personally viewed defendant's vehicle moments before the collision and opined that it was traveling between 80 and 90 miles per hour. Lay witnesses may testify regarding their opinion of the speed of a vehicle provided the opinion is "rationally based on the perception of the witness and . . . helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." MRE 701; see *Cole v Eckstein*, 202 Mich App 111, 113-114; 507 NW2d 792 (1993). Moreover, defendant has made no showing, below or on appeal, that a different expert witness would have refuted the conclusions of the prosecution's expert. Defendant merely asserts that his trial counsel failed to request an

expert for the defense; he does not even allege that such failure had a likely impact on the evidence presented by the prosecution's expert witness. Consequently, defense counsel's failure to request an expert was neither objectively unreasonable nor outcome determinative.

We also reject defendant's argument that trial counsel was ineffective for failing to object to a video demonstration of a vehicle traveling at 81 miles per hour through the intersection at Canal and Columbia without stopping at the stop sign. The video was introduced as demonstrative evidence. Demonstrative evidence is admissible when it aids the fact-finder in reaching a conclusion on a matter that is material to the case but "must satisfy traditional requirements for relevance and probative value in light of policy considerations for advancing the administration of justice." *People v Castillo*, 230 Mich App 442, 444; 584 NW2d 606 (1998). Nor are we persuaded by defendant's argument that the demonstration should have been excluded because a vehicle different from defendant's was used in the video. Demonstrative evidence that illustrates an expert's testimony is admissible even though it does not constitute a reenactment of the event at issue in a particular case. *People v Bulmer (After Remand)*, 256 Mich App 33, 35; 662 NW2d 117 (2003). Here, the video illustrated plaintiff's expert's testimony regarding the visual cues available when a vehicle is speeding as opposed to those available when a vehicle is traveling at the posted speed. This was a proper purpose and trial counsel was not required to object.

Defendant also challenges trial counsel's failure to object to the introduction of a photograph of defendant that allowed the jury to see his swastika tattoo. At the *Ginther* hearing, trial counsel testified that he thought the tattoo had been blurred out, as another one of defendant's tattoos had been. In light of this misconception, it does not appear that trial counsel could have had a reasonable trial strategy in failing to object to the jury's seeing the tattoo. But, even recognizing the negative connotations of the tattoo, we cannot conclude defendant has demonstrated that he was prejudiced by trial counsel's failure to act on this issue. The jury was instructed that it could not convict defendant unless it was satisfied that the prosecution had met its burden of proof on each of the elements. "Jurors are presumed to follow their instructions." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Defendant has offered no proof to rebut that presumption.

Defendant also argues that trial counsel was ineffective for failing to object to evidence establishing that defendant was familiar with the intersection where the accident occurred. Defendant argues that this evidence was purely speculative and should have been excluded. We disagree.

As noted above, the mother of Carolyn Merrill testified at trial that defendant had traveled to and from the intersection where the accident occurred several times in the weeks before the accident. Merrill's mother indicated that she had personally seen defendant driving from the direction of the intersection and that there was no other intersecting road between the intersection and her home. Thus, it was not speculative to argue that defendant had some familiarity with the intersection, even if Merrill's mother could not say for certain from which direction defendant had actually traveled to the intersection.

Moreover, even assuming this evidence was speculative, defendant's familiarity with intersection was only one factor among several that the prosecution used to establish the

necessary malice element of second-degree murder. Thus, defendant cannot establish that the admission of this evidence likely affected the outcome of the trial.

Defendant's final assertion of trial counsel's ineffectiveness relates to the trial court's jury instruction on intent. Defendant specifically argues that trial counsel improperly allowed an instruction that was skewed in the prosecution's favor. We disagree.

Jury instructions must fairly present the issues to be tried and sufficiently protect a defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "If the jury instructions, taken as a whole, sufficiently protect a defendant's rights, reversal is not required." *People v Huffman*, 266 Mich App 354, 371-372; 702 NW2d 621 (2005). In the instant case, the jury was instructed that it could consider several factors in determining if defendant had the requisite intent to sustain a conviction. Although several of the factors mentioned in the instruction were present in this case, defendant does not argue that any part of the instruction inaccurately stated the law. Thus, taken as a whole, we conclude that defendant's rights were sufficiently protected.

Finally, we reject defendant claim that he is entitled to a new trial as a result of the cumulative errors below. Cumulative error requires reversal only where several minor errors of consequence, when combined, had the effect of denying defendant a fair trial. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999). Only actual errors can be aggregated to establish cumulative error. *LeBlanc*, 465 Mich at 591-592, n 12.

As discussed above, among the numerous items asserted by trial counsel, only the failure to ensure that the jury did not see defendant's swastika tattoo was objectively unreasonable. Nevertheless, defendant has not established that this failure affected the outcome of the trial. Thus, defendant was not denied a fair trial.

We affirm.

/s/ Michael J. Kelly
/s/ Jane E. Markey
/s/ Donald S. Owens