STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 27, 2012
v	No. 306298 Kent Circuit Court
RONALD LEE ALLEN, Defendant-Appellant.	LC No. 10-012714-FH

Before: SERVITTO, P.J., and MARKEY and MURRAY, JJ.

PER CURIAM.

Defendant appeals by right his conviction of operating a vehicle with license suspended causing death, MCL 257.904(4). He was sentenced as an habitual offender, second offense, MCL 769.10, to 8 to 22 years' imprisonment. We affirm.

Defendant first argues that the trial court erred by not adequately instructing the jury regarding determining whether defendant caused the victim's death. Defendant argues that the trial court erred in failing to instruct the jury about whether Officer Gregory Bauer's act of speeding could constitute an intervening and superseding cause of the crash that resulted in the victim's death. But defendant waived this issue when defense counsel told the trial court that she had no objection to the jury instructions as given. Counsel's affirmative statement that she has no objections to the jury instructions constitutes express approval of the instructions, which waives appellate review. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004).

Defendant argues that this issue is not waived because defense counsel "qualified" her answer by adding: "I'd like to say for the record, Mr. Benison and myself had – did propose some additional instructions regarding definition of causation, the Court deciding that any additional definition would be provided if the jury so requests." In context, we find that defense counsel merely explained *why* she gave the trial court her express approval of the jury instructions, including waiting to see if the jury expressed confusion regarding causation.

Defendant also asserts that proper instructions on every element of the charged offense is so crucial to a fair trial that it should not be waived except by the clear, unequivocal waiver of the defendant himself. But defendant cites no authority that directly supports this proposition, and Michigan courts have repeatedly held that a defense counsel's express approval of jury instructions may waive instructional error. See *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011); *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

In the alternative, defendant also argues that he was denied his right to the effective assistance of counsel by his trial counsel's failure to object to the trial court's instructions in regard to proximate cause. To establish ineffective assistance of counsel, a defendant must "show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To show prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 302-303 (citation omitted).

The record indicates that both the prosecutor and defense counsel proposed additional instructions regarding causation, but the trial court decided not to provide the jury with those instructions unless the jury asked for clarification in regard to the issue of causation. Based on this record, we find defense counsel's decision not to object was a matter of trial strategy. See *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). Defense counsel could reasonably have agreed with the trial court because providing additional instructions at the outset regarding proximate cause might have unnecessarily confused the jury, or worse, affected the defense proximate causation argument. Moreover, the trial court accurately instructed the jury as to causation, and defense counsel argued that Officer Bauer's act was the proximate cause of the victim's death. We will not substitute our judgment for that of counsel regarding matters of trial strategy, or assess counsel's competence with the benefit of hindsight. *Id*. at 445. Defendant has failed to show that defense counsel's representation fell below an objective standard of reasonableness. *Toma*, 462 Mich at 302. Moreover, as discussed below, the evidence showed that Bauer's speeding was merely a negligent act and, as such, reasonably foreseeable, and that defendant's conduct was the proximate cause of the victim's death. Defendant has not demonstrated a reasonable probability that the result of the proceeding would have been different had the trial court provided the requested instruction. *Id*. at 302-303.

Defendant next argues that the evidence presented at trial was insufficient to sustain the guilty verdict because it did not prove, beyond a reasonable doubt, that the victim's death was caused by defendant's conduct. "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

The elements of operating a vehicle with a suspended license causing death are: (1) the defendant operated a motor vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles; (2) while the defendant's operator's or chauffeur's license has been suspended or revoked, and defendant has been notified of the suspension or revocation as required by law, or the defendant never applied for a license, or the defendant's application was denied, and (3) the defendant's operation of the vehicle caused the death of another person. MCL 257.904(4). To establish causation as an element of a criminal offense generally requires proving both factual cause and proximate cause. *People v Schaefer*, 473 Mich 418, 435; 703 NW2d 774 (2005), clarified on other grounds by *People v Derror*, 475 Mich 316, 320, 334; 715

NW2d 822 (2006); *People v Feezel*, 486 Mich 184, 194-195, 217; 783 NW2d 67 (2010).[1] Defendant only disputes that his actions were the proximate cause of the victim's death. Proximate cause exists if the victim's injury is a "direct and natural result" of the defendant's actions. *Schaefer*, 473 Mich at 436, citing *People v Barnes*, 182 Mich 179, 198; 148 NW 400 (1914). But the defendant's conduct will not be deemed a proximate cause when an intervening cause supersedes to break the causal link between the defendant's conduct and the victim's injury. *Id*. at 436-437. "Whether an intervening cause supersedes a defendant's conduct is a question of reasonable foreseeability." *Feezel*, 486 Mich at 195. "Ordinary negligence is considered reasonably foreseeable, and it is thus not a superseding cause that would sever proximate causation." *Id*. On the other hand, gross negligence or intentional misconduct is not reasonably foreseeable and would sever the causal link between a defendant's conduct and a victim's injury or death. *Id*. at 195-196; *Schaefer*, 473 Mich at 437-438. For purposes of criminal culpability, "gross negligence 'means wantonness and disregard of the consequences which may ensue, and indifference to the rights of others . . . .'" *Schaefer*, 473 Mich at 438, quoting *Barnes*, 182 Mich at 198. In this case, defendant claims that Bauer's action of exceeding the speed limit in a high-traffic area was a grossly negligent act that superseded defendant's act of failing to stop for a stop sign and a flashing red light before entering the intersection.

In *People v McCoy*, 223 Mich App 500, 504; 566 NW2d 667 (1997), this Court recognized that the "violation of the speed limit, by itself, is not adequate to establish the element of gross negligence." But "under certain circumstances, a violation of the speed limit can be gross negligence." *Id*. Thus, "the appropriate consideration is not whether defendant was exceeding the speed limit, but rather, whether defendant acted with gross negligence under the totality of the circumstances, including defendant's actual speed and the posted speed limit." *Id*.

Here, evidence indicated Bauer was exceeding the 25 mph speed limit before the crash occurred. But the road conditions were clear and dry on the night of the accident, and contrary to defendant's claim, traffic was not heavy. Bauer's testimony also indicated that he was preparing to enter a highway on ramp at the time of the crash. During the eight seconds before the crash, Bauer sped up from 22 mph [under the speed limit] to 44 mph. And, as Bauer approached the intersection located immediately before the highway on ramp, he had a flashing yellow light that did not require him to stop. Bauer's speeding, under the totality of the circumstances, did not show a wantonness or disregard of the possible consequences or an indifference to the rights of others. *Schaefer*, 473 Mich at 438. Accordingly, when viewed in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that the evidence showed that Bauer's conduct amounted to mere negligence that was reasonably foreseeable so that it did not break the causal link between defendant's conduct and the victim's death. Moreover, other evidence substantially supported that defendant's conduct was the proximate cause of the victim's death because there was evidence that defendant was driving and not paying attention; he was intoxicated at the time of the crash, and he drove through a blinking red traffic light and a stop sign before colliding with the police car.

[1] *Feezel*, 486 Mich at 188, overruled *Derror*.

Defendant also argues that the trial court erroneously admitted testimony that defendant used the "N word" during a confrontation before the crash. Defendant did not object to the challenged testimony and the issue is unpreserved. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). We review unpreserved claims for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, a clear or obvious error must have affected defendant's substantial rights, i.e., the error must have affected the outcome of the lower court proceedings. *Id*. Moreover, reversal is warranted only when plain error results in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of the judicial proceedings, independent of defendant's guilt or innocence. *Id*.

In general, all relevant evidence, defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," MRE 401, is admissible, MRE 402. We agree that the challenged testimony was not relevant. And even if relevant, because of the danger for unfair prejudice, the testimony could have been excluded under MRE 403. Although, the admission of the challenged testimony was plain error, defendant has not shown that reversal is warranted because the admission of the challenged evidence did not affect the outcome defendant's trial. *Carines*, 460 Mich at 763. The evidence against defendant was overwhelming. Defendant only disputed whether his conduct caused the victim's death. Two witnesses testified that defendant was driving the vehicle when the crash occurred. The evidence also showed that defendant's failure to stop at a blinking red traffic light and a stop sign was a proximate cause of the victim's death. Thus, the plain error did not result in the conviction of an actually innocent defendant or seriously affect the fairness, integrity or public reputation of the proceedings. *Id*.

Defendant argues in the alternative that he was also denied his right to the effective assistance of counsel by his trial counsel's failure to object to Parker's testimony that defendant used the "N word." Assuming, without finding, that counsel's conduct fell below professional norms, for the reasons just discussed, defendant fails to show a reasonable probability that, but for counsel's failure to object to the challenged testimony, the result of defendant's trial would have been different. *Toma*, 462 Mich at 302-303.

Finally, defendant argues that the trial court erred in scoring offense variable (OV) 3, MCL 777.33 (physical injury to victim), at 50 points; OV 8, MCL 777.38 (victim asportation or captivity), at 15 points; and OV 18, MCL 777.48 (operator ability affected by alcohol or drugs), at ten points. Because defendant did not preserve these issues by raising them at sentencing, in a motion for resentencing, or in a motion to remand, MCL 769.34(10), our review is limited to plain error affecting substantial rights, *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). Generally, we will uphold scoring decisions for which there is any supporting evidence. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

OV 3 may be scored at 50 points if "[a] victim was killed" and the "death results from the commission of a crime and the offense . . . involves the operation of a vehicle . . . and . . . [t]he offender had an alcohol content of 0.08 grams or more per 100 milliliters of blood[.]" MCL 777.33(1)(b), (c)(ii). Defendant admitted that he consumed 9 to 11 beers on the night of the crash and admitted that he was intoxicated when he left a bar with the victim shortly before the crash. Also, defendant's blood alcohol content was 0.05 grams per 100 milliliters of blood

approximately four hours after the crash. Because evidence supported the trial court's scoring of OV 3 at 50 points, *Hornsby*, 251 Mich App at 468, there was no plain error.

OV 8 may be scored at 15 points if a "victim was asported to . . . a situation of greater danger . . . ." MCL 777.38(1)(a). Asportation requires some movement of the victim beyond that incidental to the commission of the underlying offense. *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). Here, two witnesses testified that defendant grabbed the victim and "pushed" her into a vehicle, which defendant proceeded to drive. This movement of the victim was not incidental to the underlying offense. Moreover, defendant was intoxicated when he drove the vehicle, making the vehicle a "situation of greater danger." There was no plain error in the trial court's scoring of OV 8 at 15 points. *Kimble*, 470 Mich at 312.

OV 18 may be scored at ten points if the "offender operated a vehicle . . . while the offender was under the influence of alcoholic or intoxicating liquor . . . ." MCL 777.48(1)(c). As discussed already, there was ample evidence that defendant operated the vehicle while under the influence of alcohol. *Hornsby*, 251 Mich App at 468. There was no plain error in the trial court's scoring of OV 18 at ten points. *Kimble*, 470 Mich at 312. Because defense counsel is not required to advocate meritless objections, counsel's failure to object to the scoring of the challenged offense variables was not ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

We affirm.

/s/ Deborah A. Servitto
/s/ Jane E. Markey
/s/ Christopher M. Murray