STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 16, 2000
v	No. 211820 Calhoun Circuit Court
NATHANIEL PAUL ROWLAND, Defendant-Appellant.	LC No. 97-002781-FH

Before: Meter, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of involuntary manslaughter, MCL 750.321; MSA 28.553, and sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to a term of 8 to 22-1/2 years of imprisonment. He appeals as of right. We affirm.

Defendant's conviction arises from the death of Beth Winget, who was struck by defendant's motorcycle. The prosecution presented evidence that defendant was driving his motorcycle at a speed in excess of a hundred miles per hour on a hilly, curvy road with a posted speed limit of forty-five miles per hour when he struck and killed Winget with his motorcycle.

I

First, defendant claims there was insufficient evidence of gross negligence to support his conviction of involuntary manslaughter. Defendant argues that a reasonable motorist would not expect it to be likely that a pedestrian would be present on the hilly rural road. Defendant contends that, at most, he was negligent, not grossly negligent, in driving his motorcycle at an excessive speed.

In reviewing defendant's claim, we conduct a de novo review in which we 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 Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

To prove involuntary manslaughter, the prosecution had to prove defendant committed an unlawful act with the intent to injure or in a grossly negligent manner that proximately caused the victim's death. *People v Datema,* 448 Mich 585, 606; 533 NW2d 272 (1995); *People v McCoy,* 223 Mich App 500, 502; 566 NW2d 667 (1997). In *McCoy, supra* at 503, this Court reaffirmed long-standing case law that, to show gross negligence, the prosecution must establish the defendant had:

> (1) Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another.
>
> (2) Ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand.
>
> (3) The omission to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another. [*People v Lardie,* 452 Mich 231, 251-252; 551 NW2d 656 (1996); *People v Orr,* 243 Mich 300, 307; 220 NW 777 (1928).]

The instant case, as in *McCoy*, involved circumstances where the defendant used excessive speed while driving and hit and killed a pedestrian standing in the roadway. In the instant case, as in *McCoy,* there was no question that, under the circumstances, a jury could properly infer that the act of driving requires the exercise of ordinary care and diligence to avert injury to others and that, under the facts, defendant had the ability to exercise ordinary care and diligence to avoid the harm that occurred, but failed to do so. See *McCoy, supra* at 503. Also, here the primary question was whether, to the ordinary mind, it must have been apparent that the result was likely to prove disastrous to another. A violation of the speed limit, by itself, it not sufficient to establish gross negligence, but a violation of the speed limit can be gross negligence under certain circumstances. *Id.* at 504. It was for the jury to decide whether defendant acted with gross negligence under the totality of the circumstances, including the posted speed limit and defendant's actual speed. *Id.*

Viewing the evidence in a light most favorable to the prosecution, *Hampton, supra,* we conclude a reasonable jury could find that defendant was grossly negligent under the totality of the circumstances present here, where the hilly, curvy road had a limited sight distance and a posted speed limit of forty-five miles per hour, there was no sidewalk or shoulder on the road, pedestrians and cyclists were often on the road, and evidence indicated defendant was traveling at speeds of over a hundred miles an hour when his motorcycle struck the victim. Even assuming that the victim was partially negligent because she was on the roadway and walking with, as opposed to facing, the traffic, her negligence is not a defense to defendant's culpability—it is only a factor to be considered. *People v Tims,* 449 Mich 83, 97-98; 534 NW2d 675 (1995). Defendant's conduct needed only to be "a" proximate cause of the victim's death. *Id.* at 99. The jury considered, and rejected, the lesser charge of negligent homicide, which defendant asserts is the appropriate offense for which he should have been convicted. We do not find fault with the jury's determination of guilt.

II

Next, defendant asserts he was deprived of his personal right to testify in his own defense because he did not waive that right on the record and defense counsel did not call him to testify at trial. Defendant claims he was denied the effective assistance of counsel on this, and other, bases.

Defendant urges this Court to adopt the position held by a minority of other jurisdictions, enunciated in *People v Curtis,* 681 P2d 504 (Colo, 1984), that a defendant must make an on-the-record waiver of his right to testify. We decline to do so. This Court has aligned itself with the majority of jurisdictions and held there is no requirement in Michigan that there be an on-the-record waiver of a defendant's right to testify. See *People v Harris,* 190 Mich App 652, 661-662; 476 NW2d 767 (1991); *People v Simmons,* 140 Mich App 681; 364 NW2d 783 (1985). We believe the wisdom of this Court's holdings still hold true today.

As to defendant's claims of ineffective assistance of counsel, this Court's review is limited to the facts apparent on the record. *People v Ginther,* 390 Mich 436, 442-443; 212 NW2d 922 (1973). Defense counsel's decision not to put defendant on the stand is presumed to be a matter of trial strategy for which this Court will not substitute its judgment. *People v Mitchell,* 454 Mich 145, 163; 560 NW2d 600 (1997); *People v Avant,* 235 Mich App 499, 508; 597 NW2d 864 (1999). Defendant has not shown there is a reasonable probability that the result of the proceeding would have been different if he had testified, *People v Pickens,* 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Although defendant argues that defense counsel should have moved for a directed verdict, any motion for directed verdict would have been unsuccessful. Defense counsel is not required to bring a futile motion for directed verdict. *People v Darden,* 230 Mich App 597; 585 NW2d 27 (1998). As to the remaining claims of ineffective assistance of counsel, defendant makes bare, general assertions based on mere speculation and unsupported contentions and has, therefore, failed to overcome the strong presumption that his counsel provided effective assistance at trial. *People v Stanaway,* 446 Mich 643, 687; 521 NW2d 557 (1994). Defendant has not demonstrated that his counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced him and deprived him of a fair trial. *Pickens, supra.*

III

Finally, defendant claims he is entitled to resentencing because the sentence imposed on him is unduly severe, violates the principle of proportionality, and is cruel and unusual.

We disagree and hold defendant's sentence is proportionate both to this offender and to this offense, in which defendant engaged in extremely reckless conduct, resulting in the death of a young mother in front of her young daughter, niece, and nephew, who were also put at risk by his grossly negligent conduct. *People v Milbourn,* 435 Mich 630; 461 NW2d 1 (1990). See also, *People v Hansford (After Remand),* 454 Mich 320; 562 NW2d 460 (1997). Because defendant's sentence is proportionate, it is deemed to be neither cruel nor unusual. *People v Bullock,* 440 Mich 15, 40-41; 485 NW2d 866 (1992); *People v Terry,* 224 Mich App 447, 456; 569 NW2d 641 (1997).

Affirmed.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Michael J. Talbot