

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY RICHARDS,

Defendant-Appellant.

UNPUBLISHED

June 8, 2004

No. 245264

Wayne Circuit Court

LC No. 02-002753-01

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

PER CURIAM.

Defendant appeals by right his jury convictions for OUIL causing death, MCL 247.625(4), and two counts of OUIL causing serious injury, MCL 257.625(5). We affirm.

Defendant argues that he was denied the effective assistance of trial counsel where his attorney effectively conceded guilt as to a number of the charges. To establish an ineffective assistance of counsel claim, defendant first must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. Defendant must overcome a strong presumption that counsel's actions constituted sound trial strategy. Second, defendant must show a reasonable probability exists that but for counsel's error the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Arguing that a defendant is guilty of a lesser offense is not necessarily ineffective assistance of counsel. *People v Savoie*, 419 Mich 118, 134-135; 349 NW2d 139 (1984). Where the evidence obviously points to the defendant's guilt, it can be better tactically to admit guilt and argue that the crime constitutes a lesser offense. *People v Wise*, 134 Mich App 82, 98; 351 NW2d 255 (1984).

Here, counsel employed this tactic successfully. Defendant avoided being convicted second-degree murder and the fleeing and eluding charges. There is no indication that any other trial strategy would have had a reasonable likelihood of success given the facts of the case.

Defendant also argues that the court erred in scoring the sentencing guidelines. Offense variable 6 concerns the offender's intent to kill or injure another individual. MCL 777.36(2)(a) requires the sentencing judge to score the variable consistent with a jury verdict unless the judge

has information that was not presented to the jury. Defendant was scored ten points under MCL 777.36(1)(c). Defendant did not receive the higher score consistent with second-degree murder.

Scoring decisions are not clearly erroneous when there is any evidence supporting the decision. *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003). The court could readily find that driving a vehicle at 70 miles per hour on the wrong side of a freeway and having a blood alcohol level of .18 qualifies as gross negligence amounting to an unreasonable disregard for life.

Offense variable 17 concerns the degree of negligence exhibited. MCL 777.47(2) provides that 10 points should not be scored if points are given in OV 6. Ten points are assessed under OV 17 if the offender showed a wanton or reckless disregard for the life or property of another person.

While the trial court erred in scoring ten points, OV 17 also allows for the scoring of 5 points if the offender failed to show the degree of care that a person of ordinary prudence in a similar situation would have shown. MCL 777.47(1)(b). The statute does not preclude this scoring. Defendant's conduct did not show ordinary prudence. Where the change in scoring would not affect the applicable guidelines range, the error was harmless. *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003).

Defendant's sentence was within the guidelines and is not subject to further proportionality review. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003).

We affirm.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter