

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH EDWARD NADEAU,

Defendant-Appellant.

UNPUBLISHED

December 20, 2007

No. 270090

St. Clair Circuit Court

LC No. 05-002809-FH

Before: Murray, P.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating a motor vehicle while intoxicated, third offense, MCL 257.625(1) and (9)(c). He was subsequently sentenced, as a second habitual offender, MCL 769.10, to serve a term of 2½ to 7½ years' imprisonment. Defendant appeals as of right. We affirm. This case is being decided without oral argument under MCR 7.214(E).

Defendant first argues that the trial court erred in denying his motion for a new trial based on claims of ineffective assistance of counsel, prosecutorial misconduct, and cumulative error. We disagree. We review a trial court's denial of a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

Defendant argues that trial counsel provided ineffective assistance by failing to interview potential witnesses, not attempting to contact the witnesses until the day of the trial, and failing to call one of these witnesses who did appear at trial. Defendant claims that these witnesses would have been able to testify that he was seen in the relevant car earlier on the day of the incident, and that a third party was driving. To establish a claim of ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was deficient, and (2) a reasonable probability exists that but for the deficient performance, the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Defendant has not shown a reasonable probability that different conduct by trial counsel with regard to the alleged potential witnesses would have changed the result of the trial. The testimony of Trooper Crisp and Jacob Holt indicating that they saw—in broad daylight—defendant driving the car with no passenger, together with the evidence of defendant's blood alcohol content level at the time, constituted overwhelming evidence of defendant's guilt. Further, defendant's version of events, involving another supposed driver who fled the scene and jumped into a nearby river, seems quite far-fetched. Moreover, even if potential witnesses had seen

defendant driving the relevant car earlier in the day, that would do little or nothing to undermine the testimony of Crisp and Holt that defendant was driving the car at the time of the incident. Accordingly, the trial court did not abuse its discretion by denying defendant's motion for a new trial with regard to his claim of ineffective assistance of counsel.

Defendant also advances unpreserved claims of prosecutorial misconduct with regard to the denial of his motion for a new trial. First, defendant argues that the assistant prosecutor at trial improperly prosecuted this case in violation of MRPC 1.9, because he was involved in defending defendant in an earlier criminal case. We disagree. The earlier case involved unrelated charges. Thus, the assistant prosecutor did not violate MRPC 1.9 by prosecuting defendant here, because this case does not involve "the same or a substantially related matter" as the prior case. MRPC 1.9(a) and (b).

Defendant also argues that the prosecutor improperly obtained agreement from potential jurors during voir dire that "it would literally be impossible to prove a case beyond a reasonable doubt." We assume for purposes of discussion that this remark constituted plain error affecting defendant's substantial rights, *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), due to its suggestion that the jury should not hold the prosecution to the standard of proving defendant's guilt beyond a reasonable doubt. Nevertheless, we conclude that reversal of defendant's conviction is unwarranted because any plain error did not result in the conviction of an actually innocent defendant or seriously affect the fairness, integrity, or public reputation of the judicial proceedings. *Id.* at 763-764. We base this conclusion on the overwhelming evidence of guilt, the fact that no potential juror expressed disagreement during voir dire when defense counsel subsequently asked if the potential jurors "would not convict a person unless the prosecutor proved each and every element beyond a reasonable doubt," and the trial court's instruction to the jury that it must find defendant not guilty if it found that the prosecutor had not proven every element of the charged crime beyond a reasonable doubt.

Defendant also argues that the prosecutor improperly referred in closing argument to defendant's refusal to make admissions, in violation of defendant's constitutional right to remain silent. However, the reference by the prosecutor to defendant's refusal to make admissions about his driving or drinking could reasonably be taken not as referring to mere silence by defendant, but to statements made by defendant according to Trooper testimony. Thus, defendant has not shown plain error in this regard. *Carines*, *supra* at 763.

Defendant's final unpreserved claim of prosecutorial misconduct is that the prosecutor referred to him as having had a blood alcohol content level of "more than twice the legal limit," when testimony presented at trial indicated that testing found defendant to have had a blood alcohol content level of 0.138 grams per 100 milliliters of blood, a number less than twice the legal limit. However, given that the relevant statute prohibits operating a motor vehicle with a blood alcohol content level of 0.08 grams or more per 100 milliliters of blood, MCL 257.625(1)(b), any error by the prosecutor in this regard did not affect defendant's substantial rights, *Carines*, *supra* at 763, given that defendant's blood alcohol content level was undisputedly above the legal limit. The critical issue at trial was whether it was proven beyond a reasonable doubt that defendant was driving at the time of the incident.

Defendant also argues that the trial court erred in denying his motion for a new trial because of the cumulative effect of his ineffective assistance of counsel and prosecutorial

misconduct claims. However, defendant has not established an ineffective assistance of counsel claim, and has not shown any plain error with regard to at least two of his four claims of prosecutorial misconduct. Further, given the insignificance of any error with regard to the prosecutor referring to defendant having a blood alcohol content level of more than twice the legal limit, even when combined with the more substantial claim of error in the prosecutor's remark regarding reasonable doubt during voir dire, reversal is unwarranted because the aggregate effect of these unpreserved errors did not result in the conviction of an actually innocent defendant or seriously affect the fairness, integrity, or public reputation of the judicial proceedings. *Carines, supra* at 763-764. In sum, the trial court did not abuse its discretion by denying defendant's motion for a new trial. *Cress, supra* at 691.

Defendant also argues that the trial court erred in its scoring of two offense variables (OVs) of the sentencing guidelines. We will uphold a trial court's scoring of a sentencing guidelines variable if there is any evidence to support it. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

First, defendant argues that the trial court erred in scoring ten points for OV 19 based on interference or attempted interference with the administration of justice. See MCL 777.49(c). We disagree. From the testimony of Crisp and Holt, it could be inferred that defendant, realizing that Crisp was about to attempt to stop him due to his improper driving, was attempting to flee. This evidence was sufficient to support scoring ten points for OV 19. See *People v Barbee*, 470 Mich 283, 287 n 4; 681 NW2d 348 (2004) (noting with apparent approval this Court's holding in *People v Cook*, 254 Mich App 635; 658 NW2d 184 (2003), "that it was proper for the trial court to score ten points under OV 19 for defendant's conduct in attempting to flee from the police").

Defendant also argues that OV 18 was improperly scored at 15 points, rather than ten points, because the trial transcript reflected that he had a blood alcohol content level of 0.138 grams per 100 milliliters of blood at the time of the incident. Again, we disagree. Fifteen points are properly scored for OV 18 if the bodily alcohol content of a defendant operating a vehicle was "0.15 grams or more but less than 0.20 grams per 100 milliliters of blood", MCL 777.48(1)(b), while ten points are properly scored for OV 18 if the defendant had a bodily alcohol content level of "0.08 grams or more but less than 0.15 grams per 100 milliliters of blood, MCL 777.48(1)(c). Regardless of the testimonial or other evidence reflected in the trial transcript, the presentence report notes that results of the relevant blood test showed defendant to have a bodily alcohol content of 0.18 grams per 100 milliliters of blood. A trial court may rely on a presentence report as accurate evidence in sentencing unless its contents are effectively challenged by the defendant. *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). Defendant did not challenge this aspect of the presentence report. Accordingly, the evidence that defendant had a blood alcohol content level of .18 grams per 100 milliliters of blood supported the trial court's scoring of OV 18.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder