

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LORI JEAN KOSMALSKI,

Defendant-Appellant.

UNPUBLISHED

October 21, 2008

No. 278133

Ingham Circuit Court

LC No. 06-000134-FH

Before: Hoekstra, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right her jury conviction of manslaughter with a vehicle, MCL 750.321, for which she was sentenced to 6 to 15 years in prison. We affirm.

On December 2, 2005, Daryl Price was driving his vehicle southbound through an intersection on a green light when his vehicle was violently struck by an eastbound vehicle that ran a red light. Price was killed. Defendant was driving the vehicle that ran the red light. She was driving at a high rate of speed—well above the 35 mile per hour limit—when she struck Price’s vehicle. Just before the collision defendant was seen driving at a high rate of speed, running another red light, and driving erratically, including changing lanes numerous times without using her turn signal. After the collision, defendant’s blood was tested and found to contain three different prescription medications—Xanax, Methadone, and Citalopram—all of which effect one’s ability to drive, particularly when combined. Defendant had a long history of abusing prescription medications. She also had a history of driving erratically and had been ticketed twice—in February and July of the same year—for reckless driving. And then Price was killed. Defendant was convicted of manslaughter with a vehicle. This appeal followed.

Defendant first argues that the trial court abused its discretion when it denied her post-verdict motion for a *Ginther*¹ hearing to expand the record in support of a claim of ineffective assistance of counsel. We disagree. A trial court’s decision on whether to grant an evidentiary hearing is reviewed for an abuse of discretion. *People v Mischley*, 164 Mich App 478, 481-482; 417 NW2d 537 (1987).

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

The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. Where the issue is counsel's performance, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under professional norms, and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309, 312-313; 521 NW2d 797 (1994).

In her request for a *Ginther* hearing, defendant alleged that her trial counsel failed to meet with expert witnesses who could have testified that defendant lost control of her car because of a seizure condition. Further, defendant claimed, her civil attorney—Shelia McCoy—was unexpectedly required to argue two important pre-trial motions in the criminal matter involving the admission of evidence related to (1) her previous reckless driving, and (2) the THC found in the victim's blood. Defendant also asserted that her first criminal attorney promised a favorable plea deal with a reduced sentence that ultimately proved spurious, resulting in defendant firing him and hiring a new attorney when there was little time left for trial preparation.

The request for a *Ginther* hearing was denied. First, the trial court concluded that there was no “information, whatsoever, from any doctor that is in any valid form that would say that she actually did have seizures.” Second, the court concluded that defendant's counsel, McCoy, appropriately argued the issues related to the evidence of defendant's previous reckless driving and the THC issue. Third, the trial court noted that, before trial, defendant's attorneys indicated that they were diligently searching for witnesses and that two witnesses had actually been found. At the hearing, defendant also argued that her new criminal counsel was disadvantaged by the lack of pretrial preparation by her former attorneys, including their failure to have an accident reconstructionist examine the vehicles. The trial court refused to consider that issue because it had not been set forth in the filed motion. The court concluded that defendant had received “very effective representation” and that “there was nothing in the claims that [were] . . . presented in” the motion “that was not on the record that entitles Defendant to a *Ginther* hearing.”

Defendant argues that the trial court abused its discretion because it made a ruling based on the existing record when the problem was that the existing record was insufficient. We disagree. The trial court addressed all of the allegations raised in the motion and found that, even if the allegations were true, they either would not have changed the outcome of the trial or did not demonstrate a representation that fell below an objective standard of reasonableness. This conclusion was not erroneous. Although the trial court did not consider defendant's argument that her attorney should have arranged for an accident reconstructionist to examine the vehicles, defendant fails to show how this circumstance renders the result unfair or unreliable. Defendant's expert did get the opportunity to testify. In light of all of the evidence, including eyewitness testimony pertaining to the collision, we conclude that the trial court did not abuse its discretion when it denied defendant's request for a *Ginther* hearing.

Defendant next argues that the trial court abused its discretion when it denied her request for an adjournment after she obtained a new criminal attorney just two weeks before trial. A trial court's ruling on a motion to adjourn is reviewed for an abuse of discretion. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003).

[T]o invoke the trial court's discretion to grant a continuance or adjournment, a defendant must show both good cause and diligence. "Good cause" factors include "whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments." Even with good cause and due diligence, the trial court's denial of a request for an adjournment or continuance is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion. [*Id.* at 18-19 (citations omitted).]

Defendant requested an adjournment to allow her new attorney more time to prepare for trial. Defendant argued that this was necessary because her other attorney, McCoy, was not a criminal specialist. While this was not framed as a constitutional issue with the court below, an adjournment request related to new counsel does implicate a defendant's constitutional right to counsel. See *People v Williams*, 386 Mich 565, 575-576; 194 NW2d 337 (1972).

Requiring more time for a new attorney to prepare when a trial is imminent is, on its face, a legitimate reason to ask for an adjournment. That defendant had two attorneys does not automatically mean that either one would be sufficient to protect her right to counsel if the other had to be removed or replaced. See MRPC 1.1(a). Nonetheless, the trial court held, in part, that it would not adjourn the trial because there had been no prior indication that McCoy's representation was something less than joint. Given McCoy's involvement in the case from the beginning—which included being at the site of the collision—as well as the extent of that involvement, we cannot conclude that the trial court abused its discretion when it denied defendant's request for an adjournment.

Defendant next argues that the trial court abused its discretion when it allowed testimony regarding her two prior arrests for reckless driving. A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A preliminary question of law regarding the admissibility of evidence is reviewed de novo. *Id.*

MRE 404(b)(1) sets forth the standards for the admission of other acts evidence. It provides as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

For evidence to be admissible under MRE 404(b), it must be offered for a proper purpose, it must be relevant, and the probative value must not be substantially outweighed by the potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Evidence is considered unfairly prejudicial if admitting it would create a danger that marginally probative evidence would be given undue weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001).

Here, evidence was admitted that defendant was twice previously arrested for reckless driving. The evidence was admitted for the purpose of showing that defendant knew that her drug use would adversely affect her ability to drive. The first incident happened on February 13, 2005. Defendant was pulled over after she had a minor accident with another vehicle for which she received a citation. About an hour later she was observed driving in an erratic manner, eventually ending up in a ditch. Although she was “soiled” and “disheveled,” a Breathalyzer test was negative for alcohol. At that time, defendant was arrested for reckless driving. When the police officer asked her if she had taken any drugs, she admitted she had taken some the day before. However, defendant said that she was driving erratically because of loose dogs in her car, an excuse that the police officer found plausible.

The second incident happened on July 16, 2005. The vehicle that defendant was driving was seen swerving all over the road and she was pulled over. The police officer testified that defendant was drooling and her speech was slow and slurred. He thought she was drunk. Although defendant failed several field sobriety tests, a Breathalyzer test was negative for alcohol. Defendant admitted that she was taking medications and the officer discovered a bottle of medication in the vehicle. Defendant was again arrested for reckless driving.

It is clear that the evidence was offered for a proper purpose under MRE 404(b), i.e., to show that defendant knew that her drug use would adversely affect her ability to drive. And the evidence regarding the July 16, 2005, reckless driving incident was relevant to that purpose because defendant failed field sobriety tests and admitted to taking medications. The probative value of that evidence was also not substantially outweighed by the potential for unfair prejudice. Thus, the trial court did not abuse its discretion when it admitted the evidence related to the July 16, 2005, incident.

The relevance of the February 13, 2005, incident is not quite so clear. Although defendant admitted to taking a medication the day before, field sobriety tests were not conducted and she offered an explanation for her erratic driving, i.e., the loose dogs in her vehicle. However, her driving behavior—two vehicle incidents within about an hour—and her personal appearance—soiled and disheveled—indicated otherwise. Evidence is relevant if it has “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. The trial court concluded that the evidence was relevant, as well as probative. We agree but, even if this was a close evidentiary question, there was no abuse of discretion, i.e., it was not outside the range of reasonable and principled outcomes. See *People v Young*, 276 Mich App 446, 448; 740

NW2d 347 (2007); *People v Meshell*, 265 Mich App 616, 637; 696 NW2d 754 (2005). And, further, an evidentiary error does not merit reversal unless, if after considering the entire cause, it appears more probable than not that the error was outcome determinative. *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000). To the extent that this evidence was erroneously admitted, it was certainly not outcome determinative.

Finally, defendant argues that the trial court abused its discretion when it excluded the results of the victim's toxicology report which showed THC (tetrahydrocannabinol)² in his system at the time of the crash. We disagree. As noted above, a trial court's decision whether to admit evidence is reviewed for an abuse of discretion, while a preliminary question of law regarding the admissibility of evidence is reviewed de novo. *Lukity, supra* at 488.

Defendant argues that the toxicology report was relevant and should have been admitted into evidence. According to defendant, "[b]ecause the jury in this case was asked to decide whether [defendant] was grossly negligent or whether her conduct merely amounted to ordinary negligence, the conduct of both parties is relevant information that should have been presented to the jury before it could properly render a decision regarding [defendant's] guilt or innocence." While we agree that Price's conduct before his death as pertains to the circumstances of the collision is relevant, defendant has failed to establish the relevancy of the toxicology report.

As discussed above, evidence is relevant if it has "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. Defendant seems to claim that the evidence is relevant to the issue of whether she was grossly negligent when she ran a red light, at a high rate of speed, and crashed her vehicle into Price's vehicle. We disagree.

The elements to prove gross negligence are:

- (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 McCoy*, 223 Mich App 500, 503; 566 NW2d 667 (1997).]

It is unclear to us as to which element defendant is claiming the toxicology report is relevant. Because in her brief on appeal she states that it was up to the jury to determine "whether the victim in any way contributed to the accident," we assume she is referring to the second element. However, there is no evidence to support her theory that Price in any way caused or contributed to this collision. To the contrary, the evidence indisputably showed that he was traveling

² THC is "the proactive ingredient of marijuana." *People v Derror*, 475 Mich 316, 319; 715 NW2d 822 (2006).

through the intersection on a green light. Defendant, who had been driving very aggressively and erratically, ran the red light at that same intersection, at a high rate of speed, and collided with Price's vehicle, causing his fatal injuries. The trial court did not abuse its discretion when it refused to admit the report on the ground that it was irrelevant.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra