

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN MARSHALL RESOR,

Defendant-Appellant.

UNPUBLISHED

July 15, 2010

No. 292290

Jackson Circuit Court

LC No. 08-004925-FH

Before: TALBOT, P.J., and FITZGERALD and DAVIS, JJ.

PER CURIAM.

A jury convicted defendant of manslaughter with a motor vehicle, MCL 750.321, and reckless driving, MCL 257.626. The trial court sentenced defendant to concurrent prison terms of 57 to 180 months for the vehicular manslaughter conviction and 93 days for the reckless driving conviction. Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred when it admitted expert testimony regarding the speed at which defendant's vehicle was traveling at the time of impact with the car in which the victim was a passenger. Defendant specifically contends that, in determining the admissibility of Michigan State Police traffic crash reconstructionist Sgt. Avery's testimony, the trial court failed to consider all of the factors required under MRE 702. This issue was waived, considering that defense counsel stipulated to Sgt. Avery's qualifications to testify as an expert. *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000); *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001). Defense counsel also expressly stated that he had no objection to the admission of plaintiff's exhibits 8 and 9, which contained Sgt. Avery's expert opinion regarding the speed at which the vehicles were traveling – the exhibits that defendant is now complaining about on appeal. Because defense counsel specifically stated that he did not object to the admission of the exhibits, any error was waived. A defendant's expression of approval regarding the admission of evidence waives any objection to the evidence and extinguishes any error. See *Carter*, 462 Mich at 215-216.

In the argument portion of his brief, defendant also frames this issue in the context of ineffective assistance of counsel for failure to object to the expert testimony. However, this issue has not been properly presented because defendant failed to identify it as an issue in his

statement of questions presented. Therefore, it is waived. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).¹

Defendant also argues that the trial court erred by assessing 50 points for Offense Variable 3. A trial court's findings of fact at sentencing are reviewed for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). This Court reviews a trial court's scoring decision under the sentencing guidelines "to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005), quoting *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). A trial court's scoring decision for which there is any evidence in support will be upheld. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). This Court reviews the interpretation of the statutory sentencing guidelines de novo. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). Our paramount task is to discern and give effect to the Legislature's intent as manifest in the plain, unambiguous language of its statutes. *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 157; 680 NW2d 840 (2004).

We must begin, as always, with the language of the governing statute. MCL 777.33 (OV 3), which scored physical injury to a victim. The statute provides:

(1) Offense Variable 3 is physical injury to a victim. Score Offense Variable 3 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) A victim was killed 100 points

(b) A victim was killed: 50 points

* * *

(f) No physical injury occurred to a victim 0 points

(2) All of the following apply to scoring offense variable 3:

* * *

¹ In addition, because defendant did not move for a new trial or request a *Ginther*¹ hearing based on ineffective assistance of counsel, *People v Mitchell*, 454 Mich 145, 168-171; 560 NW2d 600 (1997), review is limited to errors apparent in the lower court record. Defendant does not allege that trial counsel was ineffective for failing to challenge the general admissibility of Sgt. Avery's expert testimony. Instead, defendant presents the narrower allegation that his trial counsel was ineffective for failing to challenge the reliability of Sgt. Avery's techniques. Given Sgt. Avery's detailed testimony regarding his measurements and calculations, as well as the testimony that the calculation software is widely accepted in his field of expertise, there is no error apparent in the lower court record.

(c) Score 50 points if death results from the commission of a crime and the offense or attempted offense involves the operation of a vehicle, ORV, snowmobile, aircraft, or locomotive and any of the following apply:

(i) The offender was under the influence of or visibly impaired by the use of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance.

* * *

(iii) The offender's body contained any amount of a controlled substance listed in schedule 1 under section 7212 of the public health code, 1978 PA 368, MCL 333.7212, or a rule promulgated under that section, or a controlled substance described in section 7214(a)(iv) of the public health code, 1978 PA 368, MCL 333.7214.

The trial court scored OV 3 at 50 points due to the parties' stipulation that laboratory test results revealed that defendant had two controlled substances, Xanax and methadone, present in his body at the time of the accident.² There is no dispute that the test results revealed a therapeutic level of each drug, and that defendant did not have a prescription for the methadone. Defendant objected at sentencing to the scoring of 50 points for OV 3 on the ground that defendant had only a therapeutic amount of methadone in his system and the guidelines did not differentiate between a therapeutic level and an abuse level of the drug in the system. The prosecutor asserted that defendant did have a schedule one substance in his system at the time he caused the death of another person with a motor vehicle and therefore a score of 50 points was required under the instructions for OV 3. The trial court agreed with the prosecutor and scored OV 3 at 50 points.

On appeal, defense counsel raises an entirely new argument in support of his assertion that he should not be scored *any* points for OV 3. He maintains that methadone is not a schedule I controlled substance and, therefore, defendant could not be scored 50 points under subsection (c)(iii). The prosecutor concedes in his brief on appeal that methadone is a Schedule II controlled substance. Thus, the trial court erred by scoring 50 points under subsection (c)(iii).

The prosecutor asserts, however, that 50 points are appropriate under subsection (c)(i) because evidence was presented to support the inference that the combination of the two controlled substances in defendant's system visibly impaired defendant's driving or that he was under the influence of the controlled substances. Faithful application of the plain language of MCL 777.33 demonstrates that the prosecution is correct and that defendant was properly assessed 50 points for OV 3 in this case. Evidence was presented regarding defendant's high rate of speed, his crossing over the center line on more than one occasion, his looking forward

² The guidelines, as scored at 50 points for OV 3, resulted in a minimum guidelines range of 29 to 57 months. If OV 3 were scored at zero points, the minimum guidelines range would be 12-24 months.

“with an angry look” while running Kennewell off the road, and his failure to brake before then crashing into the Jeep. Another vehicle took evasive action to avoid contact with defendant’s truck. Additionally, defendant’s own testimony established that he was driving in the wrong lane, that he did not see the Jeep, that he did not brake, and that he did not see the Jeep even at the point of impact. The parties stipulated that laboratory tests revealed that defendant had Xanax and methadone in his system at the time of the accident. The record supports the inference that defendant was visibly impaired by, or under the influence of, controlled substances at the time of the accident. If the lower court reaches the right result for the wrong reasons, this Court will not reverse. *People v Bauder*, 269 Mich App 174, 187; 712 NW2d 506 (2005). Defendant was properly scored 50 points for OV 3.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Alton T. Davis