STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 13, 2011
v	No. 301503 Kent Circuit Court
LEONEL FRANCO-AVINA, Defendant-Appellant.	LC No. 09-013306-FC

Before: MARKEY, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and operating a motor vehicle under the influence of alcohol (OUIL) causing death, MCL 257.625(4)(a). Defendant was sentenced to life in prison for his second-degree murder conviction, and 10 to 15 years' imprisonment for his OUIL causing death conviction. We affirm.

On appeal, defendant argues his trial counsel failed to present an insanity defense, or to at least have defendant's mental status evaluated, thereby depriving him of the effective assistance of counsel. Because defendant failed to move for a new trial or an evidentiary hearing, our review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). To establish his claim of ineffective assistance of counsel defendant must show: (1) that "counsel's representation fell below an objective standard of reasonableness," and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defense counsel's failure to properly prepare a meritorious insanity defense can constitute the denial of the effective assistance of counsel. *People v Hunt*, 170 Mich App 1, 13; 427 NW2d 907 (1988). But whether to present a particular defense is a question of trial strategy, and "[t]his Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant suggests counsel should have presented an involuntary intoxication which constitutes a defense if it puts defendant in a state of mind equivalent to insanity. *People v Wilkins*, 184 Mich App 443, 449; 459 NW2d 57 (1990). Specifically defendant suggests at the time of the accident he suffered from pathological intoxication, a subset of involuntary

intoxication that occurs when an individual ingests a substance knowing it to be an intoxicant but experiences an unusually severe reaction. See LaFave, Substantive Criminal Law (2d ed), § 9.5(g), p 56. The individual must be unaware ingesting the intoxicant would produce such an atypical reaction. *Id*. "The mere fact the defendant is an alcoholic or addict is not sufficient to put his intoxicated or drugged condition into the involuntary category." *Id*.

We find the record does not support defendant's claim to a pathological intoxication defense. First, defendant suggests pathological intoxication is a subset of involuntary intoxication, but he cites no Michigan law supporting his position. By definition, pathological intoxication involves the voluntary ingestion of a known intoxicant. Second-degree murder is a general intent crime to which voluntary intoxication is not a defense. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Nor does voluntary intoxication typically support an insanity defense. MCL 768.21a(2). Second, even assuming pathological intoxication constitutes a viable defense, defendant has not established the factual predicate of his claim. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Nothing on the record indicates defendant suffered an unusually severe reaction. On the contrary, rather than suffering an atypically severe reaction, it appears from the record that defendant fared better with a 0.33 blood alcohol content than would the average person. The record also suggests defendant had a high tolerance for alcohol, suggesting experience with alcohol, and making it far-fetched to suggest he did not know how alcohol would affect him. Nothing suggests that defendant was unable to appreciate the wrongfulness of his conduct or conform his conduct to the law as is required to support an involuntary intoxication defense. MCL 768.21a(1); *Wilkins*, 184 Mich App at 448-449.

Defendant also suggests that underlying his drinking there may have been another mental illness, drinking may have triggered insanity. Or, he may have been a chronic alcoholic to the degree that he was powerless to resist alcohol, or over time his drinking may have injured his mental capacity, robbing him of the ability to appreciate the wrongfulness of his actions. Again, defendant has not met the burden of establishing the factual predicate of these claims. *Carbin*, 463 Mich at 600. Defendant also cites no Michigan authority to support these theories. Factually, he has offered nothing to suggest that he suffers from a mental illness or impairment or that he was insane at the time of the accident. Contrary to defendant's insanity claims, defendant's presentence investigation report (PSIR) indicates his mental health is good. While defendant may have a history of substance abuse, generally the "continual voluntary ingestion of mind-altering drugs" does not provide evidence to support an insanity defense. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994).

In sum, defendant has failed to establish that counsel's performance fell below an objective standard of professional reasonableness by not pursuing the defense of involuntary intoxication. *Strickland*, 466 US at 688. Counsel is not required to pursue meritless positions. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). We also deny defendant's request to remand for an evidentiary hearing because he presents no facts warranting further development on the issue of ineffective assistance of counsel. *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007).

On appeal, defendant also challenges the sufficiency of the evidence to support his second-degree murder conviction. Defendant first claims there is no statutory authority for the conviction. He is mistaken. MCL 750.317 classifies common-law murder as second-degree

murder. *People v Wofford*, 196 Mich App 275, 277-278; 492 NW2d 747 (1992). Contrary to defendant's assertions, despite the existence of statutory offenses, he may be convicted of second-degree murder when the operation of a motor vehicle under the influence of intoxicating liquor causes a death and also satisfies the elements of common-law murder. See *Goecke*, 457 Mich at 463 n 22.

Defendant also argues there is insufficient evidence to prove intent. Second-degree murder requires proof of malice. *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009). Malice exists where there is "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior to cause death or great bodily harm." *Goecke*, 457 Mich at 464. Although drunk driving alone is insufficient to establish malice, misconduct that goes beyond that of simply driving while intoxicated is. *Id*. at 469. In *Goecke*, the Court found evidence of malice in the defendants' erratic driving, traffic violations, and other accidents leading up to the accident, from which it could be inferred the drivers had notice they should not be driving. *Id*. at 470-471.

Considering the evidence in the present case in a light most favorable to the prosecution, *Roper*, 286 Mich App at 83, there is sufficient evidence to support defendant's conviction. Defendant's behavior and driving leading up to the accident was such that it put defendant on notice that he presented a grave danger on the road. Despite a blood alcohol content of 0.33, defendant choose to get behind the wheel of a truck littered with empty beer bottles and a bottle of whiskey. Testimony established defendant could barely walk to his car. He drove erratically in the parking lot, even driving over a curbed median with plants. Tellingly, defendant then attempted to exit the parking lot via the entrance lane and could have crashed with a car properly trying to enter the parking lot. Faced with the knowledge that he was literally falling down drunk, running over medians, and driving on the wrong side of the road defendant should have recognized the danger he presented, and he should have stopped. His decision to continue driving showed a wanton disregard for the danger he presented. Additionally, defendant did not simply drive while intoxicated. He drove on a dark morning with his headlights off. He ignored obvious signage, driving on the wrong side of the road during the morning rush hour. Although the victim had his headlight on, giving warning to defendant that someone else was driving in the lane, defendant did not brake or attempt to give any warning such as honking. It is reasonable to conclude that the natural consequence of driving on the wrong side of the road, particularly without headlights, is a head on collision. Given the evidence of defendant's actions, the prosecution's case supported a finding that defendant did not commit a mere error in judgment, he engaged in misconduct so dangerous that it demonstrated a wanton disregard for human life.

Within his sufficiency argument, defendant suggests his level of intoxication would have prevented him from forming the requisite intent. Defendant incorrectly suggests voluntary intoxication could be used as a defense to second-degree murder. Second-degree murder is a general intent crime to which voluntary intoxication is not a defense. *Goecke*, 457 Mich at 464. To the extent defendant's argument suggests the prosecution was required to establish defendant was subjectively aware of the danger he presented, we note the *Goecke* Court declined to adopt a subjective standard for whether defendant knew his conduct created a danger, noting it might be applicable in some "highly unusual case." *Id.* at 465. We find defendant's advanced state of voluntary intoxication is not the type of 'highly unusual case' envisioned by our Supreme Court. See *People v Werner*, 254 Mich App 528, 532-533; 659 NW2d 688 (2002).

Next, we decline to review defendant's jury instruction claim because he waived the issue when his trial counsel expressly approved the instructions. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Waiver extinguishes any error and there is no claim for this Court to review. *Id*. at 219. Alternatively, defendant suggests this issue is one of ineffective assistance of counsel. Defendant did not raise this claim in his questions presented; he has therefore not properly presented the issue for appellate review. MCR 7.212(C)(5); *People v Anderson*, 284 Mich App 11, 16; 722 NW2d 792 (2009). Nevertheless, we briefly note the trial court's instructions to the jury were proper. See CJI2d 16.5; *People v Woods*, 416 Mich 581, 627; 331 NW2d 707 (1983).

Next, defendant challenges the scoring of offense variable (OV) 5. Defendant again failed to properly present his argument relating to his trial counsel's failure to object to the scoring of OV 5 for appellate review by failing to raise the issue in his question presented. MCR 7.212(C)(5); *Anderson*, 284 Mich App at 16. Additionally, because defendant failed to object to the scoring of OV 5 during sentencing the issue is unpreserved, and we review this claim for plain error. MCL 769.34(10); MCR 6.429(C); *People v Kimble*, 470 Mich 305, 309, 312; 684 NW2d 669 (2004). We find the trial court did not commit plain error. OV 5 should be scored 15 points when "[s]erious psychological injury requiring professional treatment occurred to a victim's family." MCL 777.35(1)(a). Fifteen points may be scored for psychological injury regardless of whether treatment has been sought at the time of sentencing. MCL 777.35(2). Here, the court found defendant had caused "incalculable damage to [the victim] and his family." The PSIR provided more than adequate evidence to support the trial court's scoring of 15 points for OV 5. *People v Ericksen*, 288 Mich App 192, 202-203; 793 NW2d 120 (2010). We also conclude defendant's claim under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), regarding the scoring of OV 5, is without merit. It is well-settled law that the *Blakely* principles do not impact Michigan's indeterminate sentencing system. *People v Drohan*, 475 Mich 140, 159-160; 715 NW2d 778 (2006).

Finally, defendant challenges the length of the sentences imposed. Again, defendant suggests he was denied the effective assistance of counsel because trial counsel did not present information to the trial court and did not object to the length of the sentence. Again, because this argument regarding trial counsel was not properly presented in the statement of question presented, we decline to review it on appeal. MCR 7.212(C)(5); *Anderson*, 284 Mich App at 16.

We also decline to consider defendant's proportionality argument involving mitigating circumstances. This Court may not consider challenges relating exclusively to proportionality if the sentence falls within the recommended minimum range under the legislative guidelines. *People v Pratt*, 254 Mich App 425, 429-430; 656 NW2d 866 (2002). Review of a sentence within the guideline range is limited to errors in scoring the sentencing variables and inaccuracies in the information relied upon in determining the sentence. MCL 769.34(10). Here, defendant was convicted of second-degree murder, which is classified as M2, MCL 777.16p, and the minimum sentence is determined under MCL 777.61. Based upon defendant's OV score of 90 points and PRV score of ten points, a minimum sentence range of 180 to 300 months or life was appropriate. *Id*. Accordingly, defendant's life sentence falls within the appropriate legislative range. Defendant incorrectly asserts he was entitled to an assessment of his rehabilitation potential. Defendant cites MCR 6.425(A)(5), an apparent reference to MCR 6.425(A)(1)(e) that only requires the PSIR include information relating to the defendant's

medical and substance abuse history; it does not guarantee an assessment. To the extent defendant challenges the scoring of the offense variables as a violation of *Blakely*, his claim is without merit as explained above. Because defendant's sentence is within the properly calculated recommended minimum guideline range and he offers no viable challenge to the accuracy of the information relied on in the scoring of the offense variables, we must affirm his sentence. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003).

To the extent defendant seeks to challenge the proportionality of his sentence as cruel and unusual, MCL 769.34(10) does not preclude review of his constitutional claim. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). But a sentence within the guideline range is presumed proportionate, and a proportionate sentence cannot be called cruel and unusual. *Id.* Defendant has not offered any evidence to overcome the presumption of proportionality.

We affirm.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello