

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 11, 2012

v

ROBERT MICHAEL RUH,

Defendant-Appellant.

No. 303409
Calhoun Circuit Court
LC No. 2010-001264-FH

Before: O'CONNELL, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

Following a jury trial, defendant appeals by right his convictions of manslaughter with a motor vehicle, MCL 750.321, and operating a motor vehicle under the influence of alcohol with an occupant under age 16, MCL 257.625(7)(a)(i).¹ The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 96 to 240 months in prison for manslaughter and to 365 days in jail for operating a motor vehicle under the influence with an occupant under age 16. The court ordered that these sentences be served concurrently to each other and consecutively to a sentence for which defendant was on parole at the time he committed the vehicle offenses. We affirm.

Defendant's convictions arose out of a fatal automobile crash. Defendant was driving his truck with two of his young children as passengers when he encountered an icy patch on the road. His truck slid, rolled onto its side, and hit a tree. One of the children died at the scene. Defendant consented to preliminary breath tests (PBTs) and to a subsequent blood test; the blood test, taken approximately two and one-half hours after the crash, showed a blood alcohol content of .07. A retrograde extrapolation expert estimated that at the time of the crash, defendant's blood alcohol content was between .08 and .10.

On appeal, defendant first argues that his trial counsel was ineffective. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below

¹ The jury acquitted defendant of operating a motor vehicle while intoxicated causing death, MCL 257.625(4).

an objective standard of reasonableness under prevailing professional norms. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Counsel must have “made errors so serious that he was not performing as the ‘counsel’ guaranteed by the federal and state constitutions.” *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), quoting *Strickland*, 466 US at 687. In addition, counsel’s deficient performance must have resulted in prejudice. *Carbin*, 463 Mich at 600. To demonstrate prejudice, a defendant must show a reasonable probability that but for counsel’s error, the result of the proceedings would have been different, *id.*, and that the result that did occur was fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). We presume that counsel provided effective assistance, and defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant argues that his counsel was ineffective for disclosing inadmissible evidence of PBT results, including two tests that were inconclusive, one with a result of .085, and one with a result of .065. The prosecutor objected to defense counsel’s questions regarding PBTs. Defense counsel responded that he was attempting to clarify the number of tests given to defendant. The trial court sustained the objection and instructed the jury that the attorneys’ questions and statements were not evidence.

Defense counsel’s actions and comments demonstrate that he had an intentional strategy to inform the jury that one of the PBTs had a result below the legal limit. We do not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The fact that a strategy does not succeed does not render its use ineffective assistance. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008). In this case, defendant has not overcome the presumption that counsel rendered effective assistance. See *Rockey*, 237 Mich App at 76.

Defendant next argues that his trial counsel was ineffective for failing to request a jury instruction on negligent homicide. A defense attorney’s decision regarding whether to request or reject a particular jury instruction may be a matter of trial strategy. *People v Gonzalez*, 468 Mich 636, 644-645; 664 NW2d 159 (2003). In this case, the record indicates that defense counsel’s decision regarding the jury instructions was part of the trial strategy. In opening statement and in closing argument, defense counsel contended that the sole cause of the accident was the icy road condition. Specifically, counsel stated “but for that patch of ice this accident wouldn’t have happened.” A jury instruction on negligent homicide would have been inconsistent with defense counsel’s tactics in this case. Defendant has presented nothing to suggest that the lack of a negligent homicide instruction was due to anything other than defense counsel’s trial strategy. Accordingly, we find nothing to indicate that defense counsel was ineffective with regard to the jury instructions.

Defendant next argues that the jury verdicts were inconsistent. We review de novo a challenge to the consistency of jury verdicts. *People v Russell*, ___ Mich App ___; ___ NW2d ___ (Docket No. 304159, September 4, 2012.), slip op at 8. “Under Michigan law, each count of an indictment is regarded as if it was a separate indictment and consistency in jury verdicts is not necessary. Also, it is possible for a jury to reach separate conclusions on an identical element of two different offenses.” *Russell*, slip op at 8 (internal quotation and citations omitted).

We assume for purposes of this appeal that there is an inconsistency between the jury's not guilty verdict on Count 1 (operating a vehicle while intoxicated causing the death of another person) and the jury's guilty verdict on Count 3 (operating a vehicle while under the influence, with an occupant less than 16 years old). Even assuming the verdicts are inconsistent, reversal of the convictions is unwarranted. Consistency is not necessary in criminal jury verdicts. *Russell*, slip op at 8.

Lastly, defendant argues that his sentence for operating a motor vehicle while under the influence of alcohol with an occupant under age 16 should be concurrent to his sentence for the paroled offense. More specifically, defendant appears to argue that he should receive a jail credit of 254 days on the operating under the influence sentence. We disagree.

Defendant correctly points out that in this case, his conviction for operating under the influence is a misdemeanor. MCL 257.625(7)(a)(i)(A) (sentence of one year or less). Defendant is wrong, however, in his assertion that he is entitled to jail credit on the misdemeanor sentence. Defendant was on parole at the time the events of this case occurred. When a parolee commits an offense, any jail time served before sentencing on the new offense is credited against the sentence on the paroled offense, not the new offense. *People v Armisted*, 295 Mich App 32, 49-51; 811 NW2d 47 (2011).

Because defendant had not completed the sentence on the paroled offense, the trial court was required to order that defendant's sentence for the felony manslaughter conviction run consecutive to the sentence on the paroled offense. MCL 768.7a(2). Regarding whether the misdemeanor sentence should run concurrently to the sentence on the paroled offense or to the felony manslaughter sentence, defendant has not specified how the distinction would affect his time served, other than his incorrect assertion regarding jail credit. Accordingly, we find no error requiring reversal in the trial court's order that defendant serve the misdemeanor sentence concurrently to the felony manslaughter sentence.

Affirmed.

/s/ Peter D. O'Connell

/s/ Mark J. Cavanagh

/s/ Pat M. Donofrio