STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 12, 2013
v	No. 306658 Midland Circuit Court
LEWIS CLIFTON HENDERSON, Defendant-Appellant.	LC No. 10-004389-FH

Before: WILDER, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of operating a motor vehicle while intoxicated or visibly impaired causing death and/or operating a motor vehicle with any amount of marijuana in his body causing death, MCL 257.625(4). Defendant was sentenced as a fourth-habitual offender, MCL 769.12, to 12 to 20 years. We affirm.

I. FACTUAL BACKGROUND

Defendant was driving with the victim in the evening around 7:00 p.m. when he suddenly left the roadway, drove over a curb, and crashed into a railroad crossing post. A firefighter responding to the scene observed a female victim in the front passenger seat who was unresponsive. The firefighter helped remove the victim from the car in order to transport her to the hospital. Despite attempts to render aid, the victim died from her injuries.

Police Officer William Eickhoff arrived soon after the accident and spoke with defendant. Defendant informed the office that he had taken 40 milligrams of OxyContin in the morning and a Xanax. Officer Eickhoff noticed that defendant's speech was slurred and that he was unsteady on his feet. Thus, the officer administered two field sobriety tests, asking defendant to recite the alphabet and to touch various fingers together. Defendant faltered during both tests. Defendant then consented to a voluntary blood draw. He had 1.2 nanograms/milliliter of THC in his system, which is the active ingredient in marijuana. Additionally, he had 59 nanograms/milliliter of Alprazolam (Xanax), 311 nanograms/milliliter of Methadone, and 7 nanograms/milliliter of Oxycodone in his system.

At trial, expert witnesses provided conflicting testimony regarding the effect these drugs would have had on defendant. Michele Glinn, a supervisor at the toxicology laboratory at the Michigan State Police Crime Laboratory, testified that although the individual levels of the drugs

in defendant's system were considered midrange to low, the combination of the drugs would have impaired his ability to drive. She also testified that this drug cocktail could cause a person to fall asleep, be confused, have slurred speech, be unable to maintain balance, and not be able to keep a car in a straight line. In response to a question posed by the jury, Glinn testified that the level of marijuana in defendant's system could not be caused by secondhand smoke.

In sharp contrast to Glinn's testimony, defendant presented an expert witness, Randall Commissaris, who testified that while theoretically Xanax, Oxycodone, and Methadone could affect a person's driving, it was unlikely. He also testified that the amount of marijuana in defendant's blood would not impair driving. Finally, he testified that a person could "get three nanograms per ML from passive marijuana exposure." The jury found defendant guilty of operating a motor vehicle while intoxicated or visibly impaired causing death and/or operating a motor vehicle with any amount of marijuana in his body causing death, MCL 257.625(4). Defendant now appeals.

II. JURY INSTRUCTIONS

A. Standard of Review

On appeal, defendant argues that he was denied due process of law because the trial court failed to properly instruct the jury. "This Court reviews claims of instructional error de novo." *People v Martin*, 271 Mich App 280, 353; 721 NW2d 815 (2006). "The defendant bears the burden of establishing that the asserted instructional error resulted in a miscarriage of justice." *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010). "Even if instructions are imperfect, reversal is not required if they fairly present the issues to be tried and sufficiently protect the defendant's rights." *People v Chapo*, 283 Mich App 360, 373; 770 NW2d 68 (2009).

B. Analysis

Defendant argues that the jury instruction for MCL 257.625(8) was erroneous because it failed to inform the jury that in order to be guilty, defendant had to know that he consumed marijuana.[1] MCL 257.625, in relevant part, states:

> (4) A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1), (3), or (8) and by the operation of that motor vehicle causes the death of another person is guilty of a crime as follows:

[1] The verdict form had one checked box for a violation of "section 625," described as "(a) operating while intoxicated or visibly impaired causing death; AND/OR (b) operating with any amount of marijuana in his body causing death." While option (b) corresponds with MCL 257.625(8), nothing in the jury's verdict indicates whether option (a) or (b), or both, was the basis for the verdict. Furthermore, while MCL 257.625(4) was the section cited on the judgment of sentence, it provides for liability based on subsection (1), (3), or (8). Thus, we will address defendant's argument relating to subsection (8), as we are unable to conclude that the jury's verdict was based on any other subsection of MCL 257.625.

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> (8) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person has in his or her body 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 of a controlled substance described in section 7214(a)(*iv*) of the public health code, 1978 PA 368, MCL 333.7214.

The trial court instructed the jury that in order to find defendant guilty of operating a motor vehicle with any amount of marijuana in his body causing the death of another person, the prosecutor had to prove the following elements beyond a reasonable doubt:

> First, that the Defendant was operating a motor vehicle on or about October 28th, 2009, in the County of Midland.
>
> Operating means driving or having actual physical control of the vehicle.
>
> Second, that the Defendant was operating the vehicle on a highway or other place that was open to the public.
>
> Third, that while operating the vehicle, the Defendant had any amount of marijuana in his body.
>
> THC is marijuana. THC-COOH/THC carboxy is not marijuana.
>
> Fourth, that the Defendant's operation of the vehicle caused the victim's death.

Defendant claims that the instruction is defective because it failed to inform the jury that it had to find beyond a reasonable doubt that defendant knew he had consumed marijuana. While defendant acknowledges that there is no specific *mens rea* requirement set forth in MCL 257.625(8), he contends that strict liability crimes are disfavored and this case justifies the imposition of a knowledge requirement.

Yet, in *People v Derror*, 475 Mich 316, 334; 715 NW2d 822 (2006),[2] the Court stated that "MCL 257.625(8) does not require intoxication, impairment, or knowledge that one might be intoxicated; it simply requires that the person have 'any amount' of a schedule 1 controlled substance in his or her body when operating a motor vehicle." In accordance with *Derror* and the statutory language of MCL 257.625(8), the trial court properly found that the prosecution only had to demonstrate that defendant had any amount of a schedule 1 controlled substance in

[2] *Derror* was overruled in part by *People v Feezel*, 486 Mich 184, 205-207; 783 NW2d 67 (2010). The Court overruled *Derror* to the extent that it was inconsistent with the Court's holding that "11–carboxy–THC is not a schedule 1 controlled substance[.]" *Id.* at 205. The Court did not overrule its finding in *Derror*, 475 Mich at 325-326, that THC, which was found in defendant's blood in the instant case, "is the main psychoactive substance found in the cannabis plant" and is a schedule 1 controlled substance.

his body. Defendant does not dispute that THC is a schedule 1 controlled substance or that it was found in his body. Furthermore, even if we read MCL 257.625(8) to require the prosecution to prove that defendant knowingly consumed marijuana, Glinn specifically testified that the level of marijuana in defendant's system could not be from secondhand smoke.[3] Thus, defendant has failed to demonstrate any error requiring reversal.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

Whether a defendant received effective assistance of counsel is a mixed question of fact and law, as a "trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). A trial court's factual findings are reviewed for clear error, and questions of constitutional law are reviewed de novo. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). When reviewing a claim of ineffective assistance of counsel that has not been preserved for appellate review, a reviewing court is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

B. Analysis

Defendant contends that he was denied the effective assistance of counsel when his counsel failed to ask Thomas Green, the man married to defendant's aunt, whether defendant's speech was normally slurred. "To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant also must demonstrate that "but for counsel's error, the result of the proceedings would have been different[.]" *Id.* "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Id.* Furthermore, "[d]ecisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy[.]" *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

Defendant argues that his counsel should have called Green to the stand to testify that defendant always spoke in a slurred speech. This argument is meritless. The evidence clearly demonstrated that several substances were found in defendant's blood following the accident, including THC, which is prohibited under the statute. Further, MCL 257.625 does not stipulate that the effects of the substance must be manifested in any particular way. Thus, the issue of defendant's slurred speech was not determinative. Furthermore, we have repeatedly held that "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of

[3] Even if the THC in his blood was from secondhand smoke, defendant does not contend that he inhaled the secondhand smoke against his will.

counsel regarding matters of trial strategy." *Davis*, 250 Mich App at 368. Defendant also has failed to demonstrate that counsel's decision not to recall Green would have altered the outcome of the trial, especially in light of the officer's testimony about defendant's behavior and the testimony about the cocktail of drugs found in defendant's blood. Therefore, he has failed to demonstrate that he was denied the effective assistance of counsel.

IV. Offense Variable 5

A. Standard of Review

Lastly, defendant argues that he is entitled to resentencing because the trial court improperly scored Offense Variable (OV) 5. "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). "Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) (quotation marks and citation omitted). Lastly, "we review de novo as a question of law the interpretation of the statutory sentencing guidelines." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

B. Analysis

MCL 777.35(1) permits a trial court to score OV 5 at 15 points when "[s]erious psychological injury requiring professional treatment occurred to a victim's family." However, "[i]n making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.35(2). The prosecution stated at sentencing that two family members had sought professional treatment. Attached to the presentence investigation report were letters from family members reflecting the type of injury contemplated by OV 5. The first letter was from the son of defendant and the victim. He informed the court that his daughter was supposed to be in the car with defendant and how close he came to losing not only his mother but his daughter as well. He also informed the court that the victim, his mother, had begged the court three years ago to send defendant to prison and now that she was dead, the court should honor her plea. The victim's sisters also submitted a letter informing the court that for 29 years, defendant threatened to kill the victim if she left him. The sisters stated that the victim finally left defendant and "he made good on the threats – he killed her." They concluded with "begging" the court to "consider the safety of [defendant's] granddaughters and this community" and sentence defendant to prison.

Upon a review of this evidence, it cannot be said that the trial court erred in scoring OV 5 at 15 points for serious psychological injury to the victim's family that could potentially require professional treatment. Not only did the prosecution communicate that family members had sought treatment, the letters from the victim's family support the trial court's finding that this was a case where severe psychological trauma resulted. The family members communicated that defendant had an ongoing history of violence with the victim spanning 29 years, which culminated in the victim's sudden and violent death. Considering this evidence, we find that

defendant has failed to demonstrate that there were any sentencing errors entitling him to resentencing.

V. CONCLUSION

There was no error requiring reversal in the jury instructions. Defendant also was not denied the effective assistance of counsel and he is not entitled to resentencing. We affirm.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Michael J. Riordan