STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDDIE DAMOND BOWENS,

Defendant-Appellant.

UNPUBLISHED
October 14, 2021

No. 352764
Saginaw Circuit Court
LC No. 19-045877-FC

Before: SWARTZLE, P.J., and CAVANAGH and GADOLA, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316, and sentenced as a second-offense habitual offender, MCL 769.10, to serve life in prison without parole for the death of Veris Thompson, who was crushed between defendant's Chrysler 300 and a tree. Defendant appeals by right and argues that the trial court erred by failing to instruct the jury on the offense of reckless driving causing death, which defendant argues is a lesser-included offense of second-degree murder. He also argues that the prosecutor's comments regarding his pre-arrest and post-arrest silence violated his right to a fair trial and his trial counsel was ineffective for failing to object. We affirm.

I. BACKGROUND

Defendant had been romantically involved with Thompson for approximately 6 years and had one child with her. Although they had some issues involving defendant's relationships with other women, defendant testified that there were no major problems in their relationship. On the day of Thompson's death, she and defendant attended two different parties for defendant's family members. Defendant testified that he drove Thompson and another passenger home in his car—a red Chrysler 300. Thompson's 10-year-old son testified that he was at home when he heard a "skirrr, boom" outside. He ran to his living room and recognized defendant running from a crashed car. Police found defendant's Chrysler 300 smashed into a tree in front of Thompson's apartment complex. Several feet away, Thompson lay face-down on the ground, moaning. She had a severe injury to her leg, and later died at the hospital. The medical examiner concluded that Thompson died from crushing injuries to her leg and abdomen and classified the manner of death as a

homicide. Records from the Chrysler's black box showed that in the two seconds before the crash, the accelerator was pressed down 100%, and let up only .3 seconds before impact.

Defendant claimed that Thompson's death was an accident. He testified that after he dropped Thompson off at her apartment, she came around to the driver's side window and talked with him about coming back to spend the night. Defendant testified that as he started to pull out into the road, Thompson "slid booty first" onto the hood of his car. He then saw a car approaching and veered to avoid it, crashed, and pinned Thompson between his car and the tree. He testified that he did not hit the brake because he was worried that Thompson would be thrown into the street. Defendant testified that he pulled the car off Thompson and she assured him that she was fine, so he fled the scene because he was worried about his bond being revoked. The other passenger also fled. Defendant called 911, but did not report Thompson's injuries. Instead, he reported that his car had been stolen from a nearby motel, that he had been chasing it, and that his sister had been in an accident. He then called his sister to give him a ride. Defendant fled from the scene and evaded police for 15 months before he was captured.

Defendant was charged with open murder. At the trial, the prosecutor questioned defendant about his failure to come forward during his 15 months of evading police and his failure to report Thompson's injuries during the 911 call. In his closing argument, the prosecutor argued that this conduct suggested that defendant's testimony was not true and was evidence of defendant's intent to commit murder:

> [D]efendant did not call 911 to say there was a victim dying face first near that street . . . . Nope. He called 911 to say his car was stolen and that he was running after it and that it was involved in a crash with his sister. None of which was true. Other than the fact that it was involved in the crash. The consistent pattern here is selfishness. The defendant's selfishness in want [sic] to kill Miss Thompson. His selfishness to run from the scene because he knew what he did was wrong. And his selfishness to be on the run for 15 additional months. Selfishness. He only cared about himself.
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> * * *
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> Hindsight is beneficial. But the defendant had 15 months of hindsight to do the right thing and he did not in those 15 months. Intent, intent, intent. The facts and evidence, not through what I say or what I said during this trial, but from this witness stand and from the exhibits, show intent.

The prosecutor also noted that defendant's trial testimony was the only time he had made any statement about the case:

> Now again, up until this morning, we did not know who that front passenger was. . . . We had no idea. [The detective] tried and tried as he may, we could not establish who that front passenger was until today, the first time the defendant made any statements about this case at all.

* * *

> I wish I would have known what they [defendant and Thompson] were talking about. I wish [the other passenger] would have come forward and told us what they were talking about. But we don't know. The victim had absolutely no reason to jump on the hood of that vehicle. They were talking about baby food in the defendant's own testimony, formula, and that he was going to go get that and possibly come back to spend the night. What would the purpose of her jumping on the hood of that vehicle be? Again, the defendant's story is inconsistent.

Defense counsel did not object to these statements.

Defense counsel requested that the court instruct the jury on the charge of reckless driving causing death, which defense counsel argued was a lesser included offense of murder. The trial court disagreed, finding that reckless driving causing death was not a lesser included offense. Alternatively, defense counsel requested that the court give an instruction for involuntary manslaughter, which the court agreed was a lesser included offense. The jury was instructed on first-degree murder, second-degree murder, and involuntary manslaughter. The jury found defendant guilty of first-degree murder.

II. ANALYSIS

A. JURY INSTRUCTION

Defendant argues that reckless driving causing death is a lesser included offense of second-degree murder and the trial court erred by failing to provide the instruction to the jury. We disagree.

Whether an offense is a lesser included offense is a question of law that we review de novo. *People v Heft*, 299 Mich App 69, 73; 829 NW2d 266 (2012). We review de novo a trial court's determination whether a jury instruction is applicable to the facts of the case. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

"The trier of fact may find a defendant guilty of a lesser offense if the lesser offense is necessarily included in a greater offense." *Heft*, 299 Mich App at 73. The trial court may instruct the jury on the lesser included offense "if the evidence at trial clearly supported the instruction," but "[t]he trier of fact may not consider cognate offenses." *Id.* at 74. "[C]ognate offenses share with the higher offense several elements and are of the same class or category, but they contain elements not found in the higher offense." *People v Mendoza*, 468 Mich 527, 543; 664 NW2d 685 (2003). "To be a lesser included offense, the elements necessary for commission of the greater offense must subsume the elements necessary for commission of the lesser offense. The elements of the lesser offense are subsumed when all the elements of the lesser offense are included in the greater offense." *Heft*, 299 Mich App at 74 (quotation marks and citation omitted).

To convict a defendant of second-degree murder, the prosecution must establish the following elements: "(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for

causing the death." *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). Reckless driving causing death is established with evidence that the defendant (1) "operate[d] a vehicle upon a highway or a frozen public lake, stream, or pond or other place open to the general public, including, but not limited to, an area designated for the parking of motor vehicles," (2) "in willful or wanton disregard for the safety of persons or property," and (3) "by the operation of that vehicle cause[d] the death of another person." MCL 257.626(2), (4). The elements of reckless driving causing death are clearly not subsumed by the greater offense of second-degree murder. It is entirely possible to commit the greater offense of second-degree murder without committing the lesser offense of reckless driving causing death. Second-degree murder does not require driving a vehicle in a public space or using a motor vehicle as the instrument of the killing. Therefore, reckless driving causing death is not a lesser included offense of second-degree murder and the trial court did not err by failing to instruct the jury on the cognate offense.

B. DEFENDANT'S SILENCE

Defendant argues that the prosecutor violated his right to due process and a fair trial by commenting on his pre-arrest and post-arrest, post-*Miranda*[1] silence. Generally, "[f]or an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Defense counsel did not object to the prosecutor's references to defendant's silence during cross-examination or closing arguments. Therefore, this issue is unpreserved. We review unpreserved errors for plain error affecting substantial rights. *People v Jones*, 468 Mich 345, 356; 622 NW2d 376 (2003). To avoid forfeiture of the claim, a defendant must show that "(1) [an] error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights." *Id.* at 355. "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

1. DEFENDANT'S PRE-ARREST SILENCE

Defendant first argues that the prosecutor improperly referenced his pre-arrest silence to show defendant's guilt. "The Fifth Amendment guarantees an accused the right to remain silent during his criminal trial and prevents the prosecution for commenting on the silence of a defendant who asserts the right." *Jenkins v Anderson*, 447 US 231, 235; 100 S Ct 2124; 65 L Ed 2d 86 (1980). A "defendant's right to due process is implicated only where his silence is attributable to either an invocation of his Fifth Amendment right or his reliance on the *Miranda* warnings." *People v Solmonson*, 261 Mich App 657, 664-665; 683 NW2d 761 (2004). Therefore, "[a] defendant's constitutional right to remain silent is not violated by the prosecutor's comment on his silence before custodial interrogation and before *Miranda* warnings have been given." *People v McGhee*, 268 Mich App 600, 634; 709 NW2d 595 (2005).

In this case, most of the prosecutor's references were about defendant's pre-arrest conduct of evading police and not reporting Thompson's injuries to the 911 dispatcher. Therefore,

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

defendant's silence did not involve an implication of his Fifth Amendment right or reliance on *Miranda* warnings. Defendant's pre-arrest and pre-*Miranda* silence was not constitutionally protected, *McGhee*, 268 Mich App at 634, and defendant's constitutional rights were not violated when the prosecutor discussed defendant's silence as substantive evidence of defendant's intent, *Schollaert*, 194 Mich App at 167.

The prosecutor's arguments regarding defendant's silence were also permissible to impeach defendant's testimony. In *People v Cetlinski*, 435 Mich 742, 760; 460 NW2d 534 (1990), citing *People v Collier*, 426 Mich 23, 34-36; 393 NW2d 346 (1986), the Michigan Supreme Court "adopted the evidentiary rule that nonverbal conduct by a defendant, a failure to come forward, is relevant and probative for impeachment purposes when the court determines that it would have been 'natural' for the person to have come forward with the exculpatory information under the circumstances." For example, in *Collier*, 426 Mich at 33-36, the Michigan Supreme Court held that the prosecutor's use of defendant's silence for impeachment was permissible to cast doubt on the defendant's testimony that he stabbed the victim in self-defense, because it would be natural for someone to report an altercation involving potentially deadly self-defense to police. Similarly, in this case, the evidence that defendant evaded police for 15 months and did not report Thompson's injuries to 911 was relevant to impeach defendant's testimony that the crash was an accident and that he did not intend to hurt Thompson. Like in *Collier*, *id.* at 34-36, it is reasonable to expect the defendant to have come forward with his side of the story to clear his name, rather than trying to cover up his involvement with the 911 dispatcher and fleeing the scene. Therefore, the prosecutor's comments regarding defendant's 15-month evasion did not deny defendant due process or a fair trial.

2. DEFENDANT'S POST-ARREST SILENCE

Defendant also argues that the prosecutor improperly commented on his post-arrest, post-*Miranda* silence. "[A] defendant's post-arrest, post-*Miranda* silence cannot be used to impeach a defendant's exculpatory testimony, or as direct evidence of defendant's guilt in the prosecutor's case-in-chief" because "*Miranda* warnings provide an implicit promise that a defendant will not be punished for remaining silent." *People v Shafier*, 483 Mich 205, 213-214; 768 NW2d 305 (2009). In this case, the only statement by the prosecutor that could be considered as a reference to defendant's post-arrest, post-*Miranda* statements would be that "the first time defendant made any statements about this case at all" was during the trial. Although the prosecutor later stated that defendant's avoidance of police was evidence of his selfishness, this comment does not imply defendant's guilt. The prosecutor was referencing the fact that police were not able to establish who the front passenger was during the crash. Therefore, the prosecutor did not improperly use evidence of defendant's post-arrest, post-*Miranda* silence as direct evidence of his guilt.

Moreover, even assuming for the sake of argument that references to defendant's silence were made in error, any error was harmless. The jury was specifically instructed that nothing the attorneys said could be considered evidence, and "[j]urors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). The prosecutor is also "entitled to argue the evidence and reasonable inferences from the evidence." *People v Comella*, 296 Mich App 643, 654; 823 NW2d 138 (2012). It was reasonable for the prosecutor to argue that defendant's flight from the scene, evasion of police, and failure to report Thompson's injuries could infer defendant's guilt. Further,

there is no indication that the prosecutor's questions on cross-examination affected the outcome of the trial because defendant had already admitted on direct examination that he did not turn himself in to the police. The prosecutor also presented substantial circumstantial evidence that suggested defendant's guilt, such as evidence that the accelerator was depressed 100% when Thompson was hit and that defendant reported to the 911 dispatcher that his car was stolen instead of reporting Thompson's injuries. Overall, the prosecutor's emphasis on defendant's pre-arrest and post-arrest silence did not affect his substantial rights.

Defendant also argues that the cumulative effect of the trial court's failure to instruct the jury on reckless driving causing death and the prosecutor's comments regarding defendant's silence denied him a fair trial. Although we have recognized that "[t]he cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal," *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546, 577 (2007), defendant has not shown that the trial court made any errors or that he suffered sufficient prejudice.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that his counsel was ineffective for failing to object to the prosecutor's arguments regarding defendant's silence. Defendant preserved his argument by filing in this Court a motion for remand to the trial court for an evidentiary hearing. See *People v Abcumby-Blair*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 347369), slip op at 8. Ineffective-assistance claims are mixed questions of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact for clear error and review de novo questions of law. *Id.*

To prove counsel was ineffective, this Court relies on the test set out in *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984):

> First, the defendant must show that counsel's performance fell below an objective standard of reasonableness. In doing so, the defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy. Second, the defendant must show that, but for counsel's deficient performance, a different result would have been reasonably probable. [*People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011) (citations omitted).]

This Court will not second-guess tactics of trial strategy, such as decisions concerning what evidence to present and which witnesses to call. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

In this case, the prosecutor's impeachment of defendant using his pre-arrest silence was proper because it would have been natural and expected for defendant to come forward with his version of events prior to trial. *Cetlinski*, 435 Mich at 760. Therefore, defense counsel was not ineffective for failing to raise a futile objection. *Ericksen*, 288 Mich App at 201. Similarly, defense counsel was not ineffective for failing to raise a futile objection to the prosecutor's

arguable reference to defendant's post-arrest silence because the reference did not imply defendant's guilt. Further, our Supreme Court has recognized that it can be a reasonable trial strategy for defense counsel not to object and draw attention to an improper comment. *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). Even if defense counsel could have objected to the prosecutor's comments, he may have intentionally chosen not to draw further attention to the fact that defendant evaded police for months. Therefore, defendant has not rebutted the presumption that his trial counsel's failure to object was reasonable trial strategy. Further, defendant has not shown that had defense counsel objected, a different result would have been reasonably probable. Even if defense counsel had objected to the prosecutor's closing arguments, defendant testified on direct examination that he evaded police for 15 months and did not report Thompson's injuries when he called 911. The jurors could form their own conclusions about defendant's silence and evasion of police. Therefore, defendant has not established that his trial counsel was ineffective.

Affirmed.

/s/ Brock A. Swartzle
/s/ Mark J. Cavanagh
/s/ Michael F. Gadola