STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 21, 2003
v	No. 242168 Oakland Circuit Court
DERRICK LAMAR BELL, Defendant-Appellant.	LC No. 2002-182636-FC

Before: Whitbeck, C.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant Derrick Lamar Bell appeals by right his jury conviction of second-degree murder,[1] operating under the influence of liquor and causing death (OUIL),[2] and operating with a suspended license and causing death.[3] The trial court initially sentenced Bell to 35 to 60 years' imprisonment for the second-degree murder conviction, 20 to 30 years' imprisonment for OUIL causing death, and 15 to 30 years' imprisonment for driving with a suspended license and causing death, to run concurrently. However, after a hearing, the trial court amended the sentence, retaining the 20 to 30 year murder sentence but changing both the other sentences to 6 to 22½ years' imprisonment. We affirm.

I. Basic Facts And Procedural History

This case arose out of a fatal two-car accident that occurred on Interstate 75 during rush hour on the evening of January 3, 2002, that resulted in the death of Tonya Anthony. Several drivers on the road that evening recalled seeing Bell's car driving erratically and aggressively before the accident happened.

Between 5:20 and 5:30 that evening, Wendy Kay Parrino drove onto I-75 at the Rochester Road entrance ramp and got into the far left lane. She suddenly saw Bell's car come up behind her and approach so close that she could not see its headlights in her rear view mirror. Parrino increased her speed to eighty-five miles an hour in an attempt to pull away from Bell's

[1] MCL 750.317.

[2] MCL 257.625(4).

[3] MCL 257.904(4).

car, but it remained within a foot of her rear bumper. The speed limit in this area was sixty-five miles an hour. As Parrino moved into the center lane to pass a slow-moving car in the left lane, Bell followed. Parrino testified that she got back in the left lane, hoping that Bell would pass her in the center lane, but instead he pulled right behind her, prompting her to increase her speed further to avoid being hit. Bell eventually moved into the center lane, but as he drew even with Parrino's car, Parrino saw that they were closing in on Anthony's SUV in the center lane. Parrino saw Bell begin moving into her lane, straddling the center and left lane, and forcing her onto the left shoulder to avoid being struck. After Parrino moved onto the shoulder, she saw Bell swerve into the SUV, causing both vehicles to flip and leave the roadway.

Oliver Romano was driving north in the middle lane of I-75 just before Fourteen Mile Road shortly after 5:15 p.m., approximately eight miles before the accident was to occur, when he was cut off by Bell's car. Romano estimated that Bell's car was approximately one foot in front of his own. Romano watched as Bell was aggressively weaving in and out of traffic, tailgating, and occasionally pulling into the emergency lane near the left shoulder. At one point, Romano saw Bell pull into the emergency lane and lose control of the back end of his car. Romano called the state police in hopes that they could intercept Bell before an accident occurred. However, Romano watched as Bell pulled from the left lane into the center lane, hitting the front driver's side of Anthony's SUV and causing both vehicles to flip off of the highway. Romano characterized Bell's driving as "consistently reckless" the entire time leading up to the accident, and that on a scale of zero to ten, zero being most cautious and ten showing no concern for lives and safety of others, Bell was "definitely a ten."

Jerry Hammarlund, who was also driving down I-75 that day, saw Bell tailgating within six inches of the car ahead of him and repeatedly try to pass on the narrow left shoulder of the highway. Hammarlund also rated Bell's driving at a ten, and agreed that Bell was "absolutely" creating a high risk of harm to other drivers.

Alexander Bien was driving north in the far left lane of I-75 between Rochester Road and Livernois Road, approximately six miles before the accident site, when Bell's car approached to within a foot of the back of his truck. Bien sped up slightly, but Bell attempted to pass him on the left shoulder. Bien saw debris and gravel flying up from the road and thought he saw the car hit the guardrail. When Bell was unable to pass on the shoulder, he returned to the far left lane, then passed Bien in the center lane, then cut left directly in front of Bien's truck. Bien estimated that the car came within inches of his truck, and stated that if he had not slammed on his brakes, he would have run into the car. Bien then saw the car speed up and begin tailgating the next car in the far left lane, then started weaving in and out of traffic, cutting cars off and signaling turns in one direction before going the opposite way. Bien attempted to call 911, but initially got no answer. After passing about a dozen cars in this manner, the car cut in front of Tonya Anthony's SUV, and Bien, who was approximately three car-lengths away, saw the car and the SUV fly off the road. Bien stopped his truck, saw Anthony on the ground, and again attempted to call 911. As he was doing so, Bell approached him and asked to use his cell phone "to call his woman."

Bien saw Bell wandering aimlessly around the scene, occasionally walking over to where Ron Cousineau, a volunteer, was performing CPR on Anthony, then walking away again. Cousineau testified that Anthony was not moving at all and was not breathing. Cousineau recalled that Bell interrupted the CPR by stating, "I'm the driver of the other vehicle, and I'm in good shape." Bell told Cousineau that Anthony did not need first aid, that "she's probably

okay," and that she "probably just has a few broken bones." Bien testified that Bell did not appear to show any concern for the victim. Witness John Szymanek recalled that Bell walked to where CPR was being performed and said "She's dead" in a way that seemed as though he were "proud."

When emergency personnel arrived, Cousineau heard an emergency medical technician refuse to aid Anthony until "that man" was removed from the scene. Police then took Bell into custody. Anthony was taken to a nearby hospital, where she was pronounced dead. An examination of Anthony's vehicle after the accident revealed no evidence of a mechanical malfunction that could have caused the accident. An examination of Bell's vehicle revealed an open forty-ounce bottle of beer with a small amount of beer inside it.

City of Troy police officer Joseph Morgan arrived at the scene and asked Bell if he had a driver's license. Bell told Officer Morgan that he did not, although he produced an identification card. The parties stipulated that Bell was aware that his driver's license was suspended. Respecting the accident, Bell told Officer Peter Pizzorni, who had arrived before Officer Morgan, that he was driving down I-75 talking to his girlfriend on a cell phone and "it just happened." Morgan smelled alcohol on Bell's breath, and Bell told Officer Morgan that he had drunk three forty-ounce beers, finishing the last one about a half-hour earlier. Bell refused to take a field sobriety test, stating, "I know I'm drunk. Just arrest me." Bell was handcuffed and placed in Officer Pizzorni's police car to be transported to the station, with Officer Morgan following.

At the station, Bell was "belligerent, loud," and profane to the personnel. The prosecutor sought to admit testimony of police service aid Jacalyn Sherwin-Wright that she heard Bell say that he "wanted to bend her over and that she ought to go with one of the brothers so they could stick it up her ass," ostensibly to show "a willful disregard for the lives and safety of others"; however, the trial court ruled that the statement was "highly prejudicial . . . more prejudicial than probative, and we don't need it." Sherwin-Wright was allowed to testify that, later that night, Bell "went from yelling and screaming to laughing and thinking he was going to a party or something."

Officer Morgan obtained a search warrant for Bell's blood, and Bell was taken to the hospital to have it tested. Officer Morgan recalled Bell saying that Anthony had been drinking also, and that she owed him an apology. In response to the prosecutor's question, Officer Morgan also testified that the first thing Bell said when he entered the hospital was, on seeing a nurse, "I want to do that white chick in the ass." Defense counsel did not object to this testimony. Bell had to be handcuffed to the gurney and physically restrained by several people for his blood to be drawn, and was made to wear a face mask after he threatened to spit on the officers and hospital staff. Bell's blood alcohol level was a .25, which is over three times the legal limit for driving in Michigan.

The prosecutor's opening statement began with the observation that the previous day was Mother's Day, but that Anthony's family and children were "not celebrating" because "their mother is no longer here, she was killed. She was killed by one person. She was killed by that person right there, Derrick Lamar Bell." The prosecutor stated that Bell "was the one who took away Tonya Anthony, he was the one who created the constant void for these individuals, family and friends."

Anthony's mother then testified that Anthony lived down the street with her three children, ages four, eleven, and twelve, and described Anthony's education and employment history. Anthony's mother explained that Anthony was going to night school to become a real estate agent while holding a job and remaining involved in her children's lives. She told the jurors that Anthony's daughters played basketball, and that her son was a "special needs child" who required frequent medical attention. Anthony's mother described the day of the accident in detail, including her reaction to hearing that Anthony was in the hospital, her discussion with the doctor, and her reaction to finding out that Anthony was dead. Anthony's mother then identified a picture of Anthony.

Dr. Valery Alexandrov, the medical examiner, testified that when he opened Anthony's body during the autopsy, he found "horrible, striking" chest injuries, and described how her sternum had broken off and pierced her heart, fourteen ribs had been broken, and some of the broken ribs had punctured her lungs, allowing over half the blood in her body to fill her chest cavity and prevent her from breathing. At this point in the testimony, the trial court interrupted to inquire whether the cause of death was an issue, and stated that the testimony was getting "a little too technical." However, the prosecutor continued the line of questioning, eliciting testimony that Anthony had suffered massive abdominal injuries, including a crushed liver. Defense counsel did not object to the opening statement, the mother's testimony, or the medical testimony.

The prosecutor introduced a video, which included audio, taken from inside the police car as Bell was taken to the station and then to the hospital. Before trial, defense counsel objected to introduction of the videotape, but the trial court ruled it admissible. The tape showed that, in transit, Bell talked continually, semi-coherently, and profanely to the police officers, sometimes calling them "nigger,"[4] sometimes insulting them specifically or the police in general, other times asking them to get him food or beer, and once suggesting that they stop at a large house they were passing so that they all could "party." Between such comments, Bell also expressed some concern for the victim:

> I just want to know if the lady, she all right . . . I don't mean nothin' to happen to her. Do you hear? . . . I'm just—I'm just glad it wasn't my family. You know? I didn't mean it. I don't mean shit like that. I didn't even know the car was going to be upside down. I just was going to get . . . my family, that's all . . . but I didn't mean nothin' to happen to nobody else. I just want her to be alive. You know? Hey, officer. Why don't you—would you get me some food, man?

After the tape had run for approximately thirty minutes, the trial court asked whether there was anything more significant to come or just more of Bell "acting-up." Defense counsel initially responded that it was "more prejudicial stuff," but then insisted that because the exhibit was admitted, the prosecutor "has to play the whole thing." The videotape continued for another minute or two before the trial court interrupted and again asked if there would be anything different on the remainder of the tape, and expressed a desire to allow the jury to view the rest of

[4] Both officers in the car were white.

the tape in the jury room if they wanted. However, when the prosecutor stated that he would play the remaining portions during his closing argument, the trial court allowed the remainder of the tape to play.

In closing arguments, defense counsel conceded that Bell was guilty of OUIL causing death and driving with a suspended license and causing death, but argued that Bell's conduct did not rise to the level of second-degree murder. The prosecutor reminded jurors of Bell's comment that Anthony should apologize because she had probably been drinking too, then stated:

> When she was on her way home from work to see her three children, no, she wasn't drinking, too. In regard to her apologizing to him, no, she can't do that, nor would she do that because she doesn't have a voice.
>
> Now you, as jurors, can act as a voice; you are her only voice to see that justice is done. And when I say that, I mean for you to apply the facts and the law in this case. Finding the defendant guilty of anything less than second degree, compromising your verdict, that's what he wants. I'm sure he'd be out toasting your verdict if you did.

The jury found Bell guilty of all three counts.

The trial court sentenced Bell as a habitual third offender to 35 to 60 years' imprisonment for the second-degree murder conviction, 20 to 30 years' imprisonment for OUIL causing death, and 15 to 30 years' imprisonment for driving with a suspended license and causing death, to run concurrently. After Bell withdrew the guilty plea in the unrelated pending case that supported his habitual third offender enhancement, the trial court heard a motion for resentencing. Defense counsel also pointed out that two offense variables had been improperly scored, although the original sentence would still have been within the guidelines after making the corrections, albeit at the upper end rather than the lower end. Defense counsel argued that Bell would be entitled to a full resentencing "unless the Court can honestly say that" these changes "wouldn't have changed the sentence you imposed by even a month."

Noting that it continued to believe that what Bell did was "senseless, irresponsible and dangerous," the trial court readopted the original second-degree murder sentence, stating that it "would have given that sentence even if I had seen these [corrected] guidelines." The trial court reduced both the other sentences to 6 to 22½ years' imprisonment.

II. Admission Of Evidence

A. Standard Of Review

We review the trial court's decision to admit or exclude evidence for an abuse of discretion.[5]

[5] *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

B. Evidence Of Decedent's Family Life And Her Injuries

Bell argues that the evidence regarding Anthony's family life and her injuries were irrelevant, and any probative value it may have had was substantially outweighed by the danger of unfair prejudice under MRE 403. Because Bell did not object to this testimony at trial, to avoid forfeiture of the issue, he bears the burden of establishing that plain error occurred that affected his substantial rights.[6] If he carries this burden, we must then determine whether the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings, thereby warranting reversal.[7]

Under MRE 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point."[8] To the extent Anthony's mother's testimony established Anthony's identity as the accident victim, the testimony was relevant and admissible. While much of the remaining testimony Anthony's mother offered was arguably irrelevant, particularly that describing her reaction to hearing of Anthony's death and Anthony's relationships with her children, we do not believe that admission of this background information resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the proceedings.[9] We therefore conclude that reversal is not warranted on this ground.

With respect to the testimony about Anthony's injuries, Bell argues that although death was an element of second-degree murder, neither the death itself nor the cause of death was disputed, and the descriptions of Anthony's injuries were therefore irrelevant. However, because Bell pleaded not guilty, all elements of the offense were in issue, and the prosecutor bore the burden of proving every element beyond a reasonable doubt regardless whether those elements were disputed.[10] These elements included a death caused by an act of the defendant.[11] The mere fact that the cause of death was undisputed does not, without more, render the evidence on that point inadmissible.[12]

While we agree that Anthony's cause of death could have been established through less graphic testimony than that which was presented here, we do not believe that the trial court

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[6] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 548-549; 520 NW2d 123 (1994).

[7] *Carines*, *supra* at 763.

[8] *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001).

[9] *Carines*, supra at 763.

[10] *People v Mills*, 450 Mich 61, 69-70; 537 NW2d 909, modified 450 Mich 1212 (1995).

[11] See *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998), citing *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996).

[12] See *Mills*, *supra* at 71.

abused its discretion in allowing it. First, the prosecutor was not required to use the least prejudicial evidence available to establish a fact at issue.[13] Second, there is a narrow test for an abuse of discretion.[14] We do not believe that this standard was met, particularly in light of the fact that testimony relating to a victim's cause of death, which is certainly admissible, is inherently unpleasant, and the trial court sua sponte admonished the prosecutor that the testimony by the medical examiner was becoming "too technical." Because Bell has not demonstrated that a clear error affecting his substantial rights occurred, reversal is not warranted.

C. Evidence Of Bell's Post-Offense Conduct

Bell next argues that his conviction must be reversed because evidence of his conduct after the accident should not have been admitted, particularly the videotape taken in the police car and his comment that he wanted to "do that white chick in the ass." We agree that admitting the evidence was error. Even accepting the dubious proposition that this evidence was relevant to show that Bell acted with reckless disregard for others' safety while driving, exposing the jury to a forty-five-minute video of Bell "acting up" was unnecessarily cumulative, and any probative value in introducing the extensive testimony of Bell's offensive post-arrest conduct, particularly his comment to the nurse, was clearly outweighed by the danger of unfair prejudice.[15]

However, we will not reverse a conviction unless, "after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice."[16] Stated another way, we will not reverse on the basis of an error that was harmless or not prejudicial.[17] When determining whether a preserved error is harmless, we "focus on the nature of the error in light of the weight and strength of the untainted evidence."[18] We presume the error to be harmless, and the defendant bears the burden of showing that the error resulted in a miscarriage of justice.[19] To the extent that the errors were unpreserved, Bell must show that the errors were clear or obvious and affected his substantial rights.[20]

In this case, while the prejudicial evidence was admitted, our conclusion is driven, as it must be, by the fact that the weight and strength of the untainted evidence was overwhelming. There was no question that Bell was heavily intoxicated and that the accident he caused resulted in Anthony's death. The only contested element of the second-degree murder charge was malice and, as we discuss in more detail below, testimony of the numerous eyewitnesses to his

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[13] See *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995).

[14] *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000).

[15] See *People v Albers*, ___ Mich App ___; ___ NW2d ___ (Docket No. 236882, issued September 23, 2003), slip op at 6.

[16] MCL 769.26.

[17] See *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996).

[18] *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001).

[19] *People v Lukity*, 460 Mich 484, 493-494; 596 NW2d 607 (1999).

[20] See *Carines*, *supra* at 752-753, 764.

frightening driving behavior amply established this element. In sum, although admitting the evidence of Bell's post-arrest conduct was prejudicial, in light of the abundant and convincing untainted testimony, it was not likely to have affected the outcome of the trial. Therefore, we conclude that reversal is not warranted.[21]

III. Prosecutorial Misconduct

A. Standard Of Review

We review de novo allegations of prosecutorial misconduct while reviewing the trial court's factual findings for clear error.[22] Bell objected only to admission of the videotape, and did not object to any of the other conduct complained of on appeal. To the extent this issue is unpreserved, we will reverse only for plain error, placing the burden on the defendant to show that error occurred, that the error was clear or obvious, and that the plain error affected his substantial rights.[23] Moreover, if a curative instruction could have alleviated the prejudicial effect of the challenged remarks, error requiring reversal did not occur.[24]

B. Appealing To Jurors' Sympathy

Bell argues that the prosecutor improperly appealed to the jurors' sympathy by eliciting facts relating to Anthony's family life and the extensive injuries she suffered. While a prosecutor may not appeal to the sympathies and emotions of the jurors,[25] the prosecutor was neither required to use the least prejudicial evidence available to establish a fact at issue, nor state the inferences arising from that evidence in the blandest possible terms.[26]

As the prosecutor points out, in *People v Siler*,[27] this Court refused to reverse where the prosecutor had described the victim as "a twenty-nine-year-old man who will never smell flowers, see his family, or do anything again because defendant snuffed out his life."[28] While acknowledging that the appeals to the jury's sympathy were improper, the Court's review of the entire closing argument revealed that the prosecutor had also "asked the jury to examine all of the evidence and convict only if the evidence indicated defendant's guilt beyond a reasonable

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[21] *Lukity*, *supra* at 493-494; *Whittaker*, *supra* at 427; *Albers*, *supra*, slip op at 6.

[22] *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

[23] *Aldrich*, *supra* at 110, citing *Carines*, *supra* at 752-753, 764.

[24] *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

[25] *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001).

[26] *Fisher*, *supra* at 452; *Aldrich*, *supra* at 112.

[27] *People v Siler*, 171 Mich App 246; 429 NW2d 865 (1988).

[28] *Id*. at 258.

doubt."[29] The trial court had instructed the jury not to allow sympathy to affect its judgment, and the Court concluded that the defendant therefore suffered no prejudice.[30]

In this case, although the prosecutor's particular references to Anthony's injuries and her family relationships appear to have been tailored to arouse the jury's sympathy, our review of the prosecutor's comments, in their entirety, show that he did not ask the jury to suspend their judgment and decide the case on that basis.[31] Rather, the prosecutor focused on the evidence of Bell's reckless driving, and reminded the jury that their job was only to apply the law to the facts. The prosecutor also told the jurors he was not asking for their sympathy, but was asking them for justice, which he defined as "an application of the law to the facts." Taken as a whole, we conclude that reversal is not warranted on this basis.

C. Introducing Evidence Of Bell's Post-Arrest Conduct

The prosecutor's fundamental obligation is "to seek justice, not merely to convict."[32] When the prosecutor interjects issues that are broader than the defendant's guilt or innocence, it can violate the defendant's right to a fair trial.[33] Although we will not premise a finding of misconduct on a prosecutor's good faith effort to admit evidence,[34] we also will not condone a prosecutor's introduction of evidence that is of limited relevance and highly prejudicial,[35] and will reverse on that basis if necessary.[36]

Rather clearly, the videotape and the testimony relating to Bell's post-arrest conduct has little to do with the malice element of second-degree murder and was probative only of the fact that Bell was behaving in an extremely offensive manner.[37] This is particularly true in light of

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[29] *Id*.

[30] *Id*. See also *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999) (refusing to reverse where the prosecutor stated that the victim's wife had lost a husband and a friend, and commented on the victim while showing the jury her picture).

[31] See *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994).

[32] *People v Pfaffle*, 246 Mich App 282, 291; 632 NW2d 162 (2001).

[33] See *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999).

[34] See *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

[35] See *People v Owens*, 108 Mich App 600, 610; 310 NW2d 819 (1981).

[36] See *People v Morgan*, 86 Mich App 226, 227; 272 NW2d 249 (1978).

[37] Regarding Bell's argument respecting the introduction of his racial comments, we do not believe that the admission of Bell's reference to others' race or use of racial epithets was improper, as such, in view of the fact that the person he referred to as "white" was neither a party nor a witness, and because it is entirely unclear whether Bell's use of the word "nigger" to refer to the two white officers was truly racial in nature. Further, the mere mention of race is not sufficient to require reversal. See *People v Bahoda*, 448 Mich 261, 271-273; 531 NW2d 659 (1995). To the extent this evidence was improper, it is because it was irrelevant and more prejudicial than probative.

Bell's offensive sexual comments, which the prosecutor attempted to introduce more than once. However, we will not reverse a conviction unless it affirmatively appears that the error resulted in a miscarriage of justice.[38] Because our review of the record indicates that the unchallenged evidence against Bell was overwhelming, specifically the abundant testimony respecting his egregiously reckless driving through rush-hour traffic, we conclude that reversal is not warranted on the basis of the prosecutor's misconduct.

IV. Ineffective Assistance Of Counsel

A. Standard Of Review

Whether a defendant was denied effective assistance of counsel presents a mixed question of fact and constitutional law.[39] This determination requires a judge first to find the facts, then determine "whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel."[40] We review the trial court's factual findings for clear error and review de novo its constitutional determination.[41]

Because Bell did not preserve this issue by moving for a new trial or a *Ginther*[42] hearing before the trial court, our review is limited to mistakes that are apparent on the record.[43]

B. Legal Standards

To establish ineffective assistance of counsel, defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that, but for counsel's error, it is reasonably probable that the outcome would have been different.[44] Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.[45] To show an objectively unreasonable performance, defendant must prove that counsel made "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[46] In so doing, defendant must overcome a

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[38] MCL 769.26; *Mateo*, *supra* at 215.

[39] *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

[40] *Id*. at 579.

[41] *Id*.

[42] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[43] *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

[44] *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 314, 318; 521 NW2d 797 (1994).

[45] *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

[46] *LeBlanc*, *supra* at 578, quoting *Strickland*, *supra* at 687.

strong presumption that the challenged conduct might be considered sound trial strategy.[47] Defendant must also show that the proceedings were "fundamentally unfair or unreliable."[48]

C. Failure To Object

Bell argues that his counsel was ineffective for failing to object to the evidence and prosecutorial misconduct addressed in the previous issues. Assuming for the sake of argument that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms for failing to object, Bell has not shown that it was reasonably probable that the outcome would otherwise have been different.[49] Even if counsel had been able to exclude all of the challenged evidence and prosecutorial comments, the abundant testimony relating to Bell's aggressive and reckless driving in the eight-mile stretch before the accident was ample for a reasonable jury to conclude that Bell acted "in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm,"[50] which is the state of mind necessary to establish second-degree murder. Accordingly, Bell's argument fails.

Bell also argues that, although counsel initially objected to admission of the videotape, he was ineffective for failing to renew the objection after it became clear that the trial court did not wish to present cumulative evidence regarding Bell's behavior. However, the following exchange reveals that the defense counsel's failure to object may have been a matter of trial strategy:

> *The Court*. What—what do you—for what purpose do we need more?
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> *Prosecutor*. I have to prove that he—a second degree murder, I have to—
>
> *The Court*. I think you—
>
> *Defense*. Yeah. But, Judge, the only problem is that—is that you admitted the exhibit. He's—I mean, he has to play the whole thing, that's the exhibit.
>
> *Prosecutor*. Right.
>
> *Defense*. I mean, they already know that he acted like a fool, he wasn't—
>
> *The Court*. Yes. But you know what? It's more helpful to you.
>
> *Defense*. That's right.
>
> *The Court*. It is.

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[47] *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

[48] *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2002).

[49] See *Pickens*, *supra* at 314, 318.

[50] *Id*. at 464, citing *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980).

Defense. Right.

Because we will not second-guess matters of trial strategy,[51] we decline to find that counsel was ineffective for failing to renew his objection.

V. Sufficiency Of The Evidence

A. Standard Of Review

We review de novo challenges to the sufficiency of the evidence, taking the evidence in the light most favorable to the prosecutor and determining whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.[52]

B. The Malice Element Of Second-Degree Murder

The elements of second-degree murder are (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.[53] To establish malice, the prosecution must show that the defendant had one of three states of mind: "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm."[54] The parties agree that only the third state of mind is at issue here.

C. Misconduct Beyond Drunk Driving

Bell argues that there was insufficient evidence that he acted with malice because the prosecutor did not establish any misconduct beyond the act of driving drunk. Our courts have recognized that "not every intoxicated driving case resulting in a fatality constitutes second-degree murder."[55] Rather, the prosecutor must provide evidence of "a level of misconduct that goes beyond that of drunk driving."[56] Here, Bell argues, unlike other defendants who had been convicted of second-degree murder for drunk driving, he "had not been told that he was too drunk to drive, had not hit parked cars, had not sped through red lights or stop signs, had not sped into intersections into the path of oncoming traffic," but had merely "clipped another vehicle while changing lanes" on an interstate highway where much of the other traffic was also going faster than the posted speed limit.

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[51] *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999).

[52] *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

[53] *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998), citing *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996).

[54] *Id*. at 464, citing *Aaron*, *supra* at 728.

[55] See *People v Werner*, 254 Mich App 528; 659 NW2d 688 (2002).

[56] *Goecke*, *supra* at 469.

To put it charitably, we find this characterization of Bell's driving unconvincing. For nearly eight miles before the accident, Bell's erratic and aggressive driving, which included speeding, tailgating, weaving in and out of traffic, and attempting to pass on the shoulder, was sufficiently frightening to his fellow motorists to prompt at least two of them to call the authorities. Several drivers were forced to speed up or slam on their brakes to avoid being struck by Bell's car, and one driver had to steer her car onto the shoulder at high speed to avoid a collision. Based on this evidence, we conclude that a rational fact-finder could find that Bell's sustained act of aggressive and reckless driving manifested a willful disregard for the safety of others beyond merely driving a vehicle while intoxicated, and that the malice element was proven beyond a reasonable doubt.[57]

D. Subjective Versus Objective Malice Standard

Next, Bell argues that there was insufficient evidence to prove the malice element of his second-degree murder conviction because he was too intoxicated to be subjectively aware of the risk his conduct created. The Michigan Supreme Court addressed the malice requirement of second-degree murder in the drunk driving context in *People v Goecke*,[58] three consolidated cases in which the defendants were charged with second-degree murder for drunk driving that resulted in fatalities. The Supreme Court held that it was unnecessary to decide whether to adopt an objective or subjective standard for malice because the requisite malice for second-degree murder would have been established under either standard in all three cases.[59] However, the Court noted in dicta that a "highly unusual case" involving a defendant that was "'more absent-minded, stupid or intoxicated than the reasonable man'" might "require a determination of the issue whether the defendant was subjectively aware of the risk created by his conduct."[60]

This Court addressed the subjective malice standard in *People v Werner*,[61] a drunk-driving case in which the defendant claimed, as Bell does, that his was "the type of unusual case requiring a determination that he was subjectively aware of the risk of his conduct." The *Werner* court disagreed, explaining that the dicta in *Goecke* did not support the idea that "the prosecution should have been held to a higher standard of proof of intent because defendant was so severely intoxicated."[62] Were that the case, the Court reasoned, "moderately intoxicated drivers could be tried for and convicted of second-degree murder while severely intoxicated drivers would be excused because they were too intoxicated to know what they were doing."[63] This result "would be contrary to the *Goecke* Court's statement that 'malice requires egregious circumstances,'"[64]

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[57] *Johnson*, *supra* at 723; *Herndon*, *supra* at 415.

[58] *Goecke*, *supra*.

[59] *Id*. at 465.

[60] *Id*. at 464-465 and n 25, quoting 2 LaFave & Scott, Substantive Criminal Law, § 7.4(b), p 205.

[61] *People v Werner*, 254 Mich App 528; 659 NW2d 688 (2002).

[62] *Id*. at 532.

[63] *Id*. at 532-533.

[64] *Id*. at 533, quoting *Goecke*, *supra* at 467.

and "also would effectively create for some defendants an intoxication defense to second-degree murder, which would be plainly contrary to the *Goecke* Court's holding that voluntary intoxication is not a defense to a second-degree murder charge."[65] For these reasons, the *Werner* court held that "an advanced state of voluntary intoxication is not sufficient to qualify as the sort of 'unusual case' that requires a subjective determination of awareness under *Goecke*."[66] We reject Bell's argument on this point.

VI. Sentencing

A. Standard Of Review

Whether Bell is entitled to a full resentencing presents a question of law. We review questions of law de novo.[67]

B. Necessity Of Full Resentencing

Bell argues that he is entitled to a full resentencing because his sentence was changed although he was not present, did not have an updated presentence report, and was not allowed to allocute or have counsel allocute on his behalf. Under MCR 6.429(A), "[t]he court may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as provided by law." In this case, we conclude that the sentence was invalid because it was based on inaccurate information regarding Bell's habitual offender status and improperly scored offense variables.[68] Therefore, we conclude the trial court had the authority to correct the sentence.

This presents the question whether the trial court could do so without a full resentencing hearing. While some modifications "require the due process protections of a resentencing hearing,"[69] the modifications at issue here served to decrease rather than increase Bell's sentences. Therefore, a full resentencing hearing was unnecessary.[70] We also note that the trial court did not correct the sentence without notice or a hearing; rather, a motion hearing was held and defense counsel argued on Bell's behalf. At the motion hearing, defense counsel argued that Bell would be entitled to a full resentencing "unless the Court can honestly say that" these changes "wouldn't have changed the sentence you imposed by even a month," to which the trial court responded that it "would have given that sentence even if I had seen these [corrected]

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[65] *Id.*, citing *Goecke*, *supra* at 464.

[66] *Id.*

[67] *People v Denio*, 454 Mich 691, 698; 564 NW2d 13 (1997).

[68] See *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997).

[69] *Miles*, *supra* at 98-99; see also *People v Thomas*, 223 Mich App 9; 566 NW2d 13 (1997).

[70] See *People v Alexander*, 234 Mich App 665, 678; 599 NW2d 749 (1999).

guidelines." Under these circumstances, we conclude that "a full resentencing would be unnecessary and would waste the resources of the courts."[71]

Affirmed.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Jane E. Markey

[71] *Alexander*, *supra* at 678.