STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 21, 2013
v	No. 305660 Kent Circuit Court
ROBERT EARL TAYLOR, Defendant-Appellant.	LC No. 10-008302-FH

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

PER CURIAM.

Defendant, Robert Earl Taylor, appeals as of right from his jury trial conviction of failing to stop at the scene of a serious personal injury accident, MCL 257.617.[1] He was sentenced as a fourth habitual offender, MCL 769.12, to 3 to 30 years' imprisonment. We affirm.

I. BACKGROUND

This case arises from a vehicular accident that occurred on November 28, 2009, at around 10:49 p.m. in Grand Rapids. At trial, it was undisputed that a silver Pontiac Sunfire was travelling south on Eastern Avenue when it crashed into a Ford Expedition SUV, which was travelling west on Oakdale Road. The speed limit on Eastern was 30 mph, but the Sunfire was travelling at a speed of approximately 65 mph. The traffic on Eastern had the right of way because the traffic signal had a blinking yellow light for those on Eastern and a blinking red light for those on Oakdale. The force of the crash caused the Expedition to get knocked over onto its side and slide into another vehicle. A child in the Expedition suffered a non-displaced skull fracture.

The driver of the Sunfire ran away from the scene. But there was evidence that linked defendant to being the driver. The owner of the Sunfire testified that he had given the vehicle to defendant a few days before the accident because it was not running well and he wanted defendant to check it out. Further, inside the Sunfire, the police recovered over a dozen personal

[1] Defendant was also acquitted of operating a motor vehicle with a suspended license causing a serious impairment of another's body function, MCL 257.904(5).

items that were associated with defendant, including his cell phone. Plus, cell phone records indicated that defendant had made several calls to his girlfriend approximately 10 minutes before the accident occurred.

The jury returned a not guilty verdict on the count of driving with a suspended license causing serious injury but returned a guilty verdict for leaving the scene of an accident resulting in a serious injury.

Afterward, defendant moved for a new trial, arguing that his trial counsel was ineffective for failing to investigate and produce an alibi witness, defendant's cousin, Harmon Marshall. The trial court held a *Ginther* hearing on the matter.

At the hearing, defense counsel, Christopher Dennie, testified that at some point, defendant had mentioned Marshall as a potential witness. Defendant purportedly told Dennie that he was at Billy's Bar with Marshall on the night of the car accident. But Dennie testified that defendant indicated that Marshall actually left the bar at 10:00 p.m., with defendant remaining behind. Even though this timing did not help as an actual alibi, Dennie still wanted to talk with Marshall and asked defendant for the contact information. Dennie stated that he asked for this contact information on multiple occasions and that defendant finally provided the information on Thursday, February 10, 2011, which was only four days before the trial date of Monday, February 14, 2011. Knowing that this was beyond the time permitted to file an alibi defense and knowing that defendant indicated that Marshall had left the bar at 10:00 p.m., Dennie did not prioritize following up with Marshall and could not recall if he had attempted to call the number provided or not.

Defendant testified that he mentioned Marshall as a potential alibi witness multiple times. When asked why it took so long for him to supply Dennie with Marshall's contact information, defendant indicated that Marshall at that time was hard to get a hold of because "he moved around a lot during that time" and they "kind of lost contact." Defendant also asserted that Marshall also "ended up getting his [phone] number changed." Regarding when he finally provided Marshall's number to Dennie, defendant first indicated that it occurred two weeks before trial. But then later on cross-examination, he claimed that it occurred "at least three weeks" before trial.

Marshall testified at the hearing that he arrived at the bar at 10:30 p.m. and that defendant was already there. Marshall further stated that he left the bar at 1:45 a.m., leaving before defendant. Regarding contact with defendant, Marshall's testimony differed greatly from defendant's testimony. First, Marshall stated that his phone number had not changed between the time of the accident and the time of trial. Second, Marshall stated that he had regular contact with defendant, and that the two would meet or talk twice a week.

The trial court denied the motion for a new trial and found that defendant was not denied the effective assistance of counsel. The trial court found that, with respect to defendant and Marshall, there were "serious questions of credibility as to one or both of them." The trial court noted that defendant's claim that he had a hard time reaching Marshall after the accident was in stark contrast to Marshall's testimony that the two of them regularly spoke or met twice a week.

The trial court concluded that Dennie acted capably and necessarily relied upon defendant to provide the contact information for Marshall:

> [Dennie] quickly ascertained that he had to talk to Mr. Marshall, and importuned his client to get Mr. Marshall in touch with him or to get him Mr. Marshall's contact information so he could talk to him directly. But he also discerned early on that it appeared Mr. Marshall would not be a good alibi witness because of the timing of which [defendant] informed him concerning Mr. Marshall having let the bar by ten o'clock.
>
> Now the fact that Mr. Marshall now has a whole different time frame doesn't really answer the question of whether Mr. Dennie operated in a proper fashion in how he approached the defense.

After filing his claim of appeal with this Court, defendant then moved to remand to the trial court to conduct another *Ginther* hearing. This time, defendant alleged that he was denied the effective assistance of counsel when he was misadvised about the prosecution's plea offer. The plea offer was that in exchange for pleading guilty to the two charged counts, the prosecution would drop the habitual offender enhancement. But defendant claimed that he was informed that the habitual offender enhancement only affected the possible maximum sentence and not also the possible minimum sentence. This Court granted defendant motion to remand. *People v Taylor*, unpublished order of the Court of Appeals, entered May 3, 2012 (Docket No. 305660).

At this second *Ginther* hearing, defendant testified that he would have accepted the plea offer if he had known that the habitual offender status would have affected his minimum sentence. He claims that both Dennie and Norman Miller, who substituted for Dennie at one pretrial appearance, never explained that the guidelines affected the minimum sentence. He admitted that he was provided a piece of paper that reflected two ranges, 14 to 29 months and 14 to 58 months, but contends he thought that those ranges affected his actual sentence, i.e. that the 14 months would be his minimum sentence and his maximum would be either 29 or 58 months. However, defendant also explained that he understood that the maximum sentence under the habitual offender enhancement was life imprisonment, which was higher than the maximum of five years' imprisonment without the enhancement. The two attorneys testified that they explained to defendant that the two guidelines ranges were only for the minimum sentence. The trial court concluded from the evidence that defendant was told that his maximum sentence under the enhancement was "life" in prison and that the guidelines only affected the minimum sentence, and that as such defendant was not denied the effective assistance of counsel.

II. ANALYSIS

Defendant first argues that he was denied the effective assistance of counsel based on counsel's failure to investigate a proposed witness, Marshall. We disagree.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The 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. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

Defendants have the guaranteed right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, 465 Mich at 578. Generally, to establish an ineffective assistance of counsel claim, a defendant must show that (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008). However, such performance must be measured without the benefit of hindsight. *Bell*, 535 US at 698; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Dennie's performance did not fall below an objective standard of reasonableness. Here, he testified with certainty that defendant only provided Marshall's contact information four days before trial. On the other hand, defendant initially testified that he provided the information two weeks before trial and then later he asserted that he provided the information "at least three weeks" before trial. The trial court made note of this inconsistency and commented, on the whole, how defendant's and Marshall's testimony raised "serious questions of credibility." Further adding to credibility issues, defendant testified that he had a hard time tracking Marshall down because Marshall had allegedly changed his phone number. But Marshall testified that not only did he have the same phone number during this period, he also met with defendant regularly, approximately twice a week, throughout this period. Even though the trial court did not expressly find that defendant provided the information four days before trial, we ascertain that this was the trial court's implicit finding based on its questioning of defendant's credibility and its determination that "defendant was less than deligent [sic] about getting [Marshall's] contact information." And because arriving at this finding necessarily involved weighing the credibility of both Dennie and defendant, this finding is afforded special deference. MCR 2.613(C); *People v Dendel*, 481 Mich 114, 130; 748 NW2d 859 (2008). Given the vast discrepancy between defendant's and Marshall's testimony regarding their closeness after the accident, there was no clear error in this credibility determination. Moreover, the trial court found that defendant had told Dennie initially that Marshall had left the bar at 10:00 p.m. that night,[2] reasonably making the value of Marshall's testimony, in Dennie's mind, questionable. Again, this finding is not clearly erroneous. Therefore, Dennie's failure to investigate a supposed "alibi" witness who was not actually with defendant at the time the crime was committed did not fall below the objective standard of reasonableness, and defendant has failed to overcome his heavy burden of proving otherwise.

[2] This finding was implicit also as evidenced by the trial court's comment, "*Now*, the fact that Mr. Marshall *now* has a whole *different* time frame doesn't really answer the question of whether Mr. Dennie operated in a proper fashion in how he approached the defense." (Emphasis added.)

Moreover, raising an alibi defense has special requirements. MCL 768.20(1) requires a defendant to disclose an alibi defense *at arraignment or 15 days thereafter*, but not less than 10 days before trial. *People v Seals*, 285 Mich App 1, 20; 776 NW2d 314 (2009). Here, whether defendant supplied the information four days or three weeks before trial is immaterial because defendant was arraigned in August 2010. Thus, even under defendant's version of events, he provided Marshall's contact information to Dennie in January 2011, which was still over four months past the 15-day deadline. Because the earliest that Dennie reasonably could have talked to Marshall and filed the alibi notice was in January 2011, it would not have been timely. Consequently, even if Dennie's performance were somehow considered deficient by failing to contact Marshall once he got Marshall's phone number, defendant cannot establish that he was prejudiced because Marshall's alibi testimony would have been nonetheless excluded at trial under MCL 768.21(1). *Id.*

Defendant next argues that the instruction given to the jury by the trial court on the afternoon of the last day of trial impermissibly coerced the jury to reach a verdict. We disagree.

Generally, claims of coerced verdicts are reviewed de novo and are reviewed on a case-by-case basis, while considering all the facts and circumstances. See *People v Vettese*, 195 Mich App 235, 244; 489 NW2d 514 (1992). But, being unpreserved, we review the issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant must show that the error was clear or obvious and that it was outcome determinative. See *id.*

While a trial court may impress upon the jury the propriety and importance of coming to an agreement, a trial court "should not give instructions having a tendency to coerce the jury into agreeing on a verdict." *People v Malone*, 180 Mich App 347, 352-353; 447 NW2d 157 (1989). "Even if imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Further, jury instructions are reviewed in their entirety to determine whether the trial court committed error requiring reversal. *Id.*

Defendant takes exception to the following exchange between the trial judge and a juror after two juror alternates were selected on Friday, February 18, 2011:

> JUROR LACHNIET: I did talk earlier [during voir dire] about that I have to leave tomorrow. How does this affect to, like, an alternate?
>
> THE COURT: That means that we need to have a verdict by the end of the day. Thank you, ladies and gentlemen.

Defendant claims that the trial court's comment coerced the jury to come to an agreement by the end of the day, Friday. We agree that this statement considered in isolation is problematic. However, reviewing the instructions in their entirety, while a close question, we conclude that the trial court's instructions were not coercive. Later in the afternoon, the trial court received an additional question from the jury, wondering "[w]hat's next if we can't come to an agreement that the defendant was behind the wheel or not?" The trial court instructed the jury:

> What I must say is that the jury has certainly correctly identified the principal issue in the case, that is, whether the evidence establishes that the defendant was driving the vehicle, that is, the Pontiac [Sunfire] vehicle, at the time of the collision.
>
> If the jury unanimously agrees that the evidence established that the defendant was driving the vehicle beyond a reasonable doubt, then, of course, the verdict should be that the defendant is guilty. If the jury has a reasonable doubt as to whether the defendant was behind the wheel, presumably the verdict is not guilty.
>
> If there's a dispute and the jury is divided and cannot come to an agreement, then what happens is we mistry the case, meaning we discharge this jury. We start all over again with new jury, which will presumably be neither measurably smarter nor measurably dumber than this one, and we'll do the whole thing again. We'll have another week's trial, present all of the evidence again in front of another group of people, and they will have to come [to] the decision. So, that's basically the way it works.
>
> And I would suggest that certainly you should try to come to agreement, if you possibly can do so without doing violence to your own conscience. You want to discuss the issues and the evidence, and each other's viewpoints and the basis for those viewpoints, and see if you can come to unanimity one way or the other on the question.
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> But ultimately, those are the options. As I said, the jury would need to unanimously conclude that the evidence establishes beyond a reasonable doubt that the defendant was the driver to find him guilty. If the jury agrees that the evidence does not establish that, then the verdict would be not guilty. And if the jury is divided and hopelessly deadlocked, then we mistry the case and start over again.

Therefore, it is clear that to the extent the trial court gave the impression with its challenged instruction that the jury must come to a unanimous verdict by the end of the day Friday, that impression was corrected with its subsequent instruction in which the trial court made it abundantly clear that the jury should attempt to reach a unanimous verdict only if that did cause "violence to your own conscience."

Defendant also argues that the trial court's response to the jury's question impermissibly reduced the elements that the prosecution needed to establish beyond a reasonable doubt to a single element. This argument lacks merit as well.

As noted earlier, this Court reviews a trial court's instructions to the jury in their entirety. *Id.* Elsewhere in its instructions to the jury, the trial court provided all of the elements for the two counts that defendant was facing. Regarding the first count, the jury was instructed:

The first count charges him with operating a vehicle while license suspended, revoked, or denied, causing serious injury. To prove this charge, the prosecutor must prove *each of the following elements* beyond a reasonable doubt:

First, that the defendant was operating a motor vehicle on or about November 28th, 2009, in the city of Grand Rapids, county of Kent, state of Michigan. As used in the context of this case, "operating" means driving the vehicle in question.

Second, that the defendant was operating the motor vehicle on a highway or other place that was open to the general public.

Third, that at the time the defendant's driving privileges were suspended, revoked, or denied.

Fourth, that the defendant's operation of the motor vehicle caused a serious impairment of a body function . . . .

* * *

Now, if the jury is satisfied that *all* of the elements of the crime, as explained by the Court in this instruction, have been proved by evidence beyond a reasonable doubt, then the verdict of the jury should be that the defendant is guilty of operating a vehicle while license suspended, revoked, or denied causing serious injury.

If the jury has a reasonable doubt as to *any* of those elements, the verdict of the jury should be that the defendant is not guilty. [Emphasis added.]

The trial court then instructed the jury on the elements for the second count of failing to stop at the scene of an accident resulting in serious impairment or death:

To prove this charge, the prosecutor must *prove the following elements* beyond a reasonable doubt.

First, that the defendant was the driver of a motor vehicle.

Second, that the motor vehicle driven by the defendant was involved in an accident.

Third, that the defendant knew or had reason to know he had been involved in an accident on a public road or any property open to public travel.

Fourth, that the accident resulted in a serious impairment of a body function or death. . . .

> Fifth, that the defendant failed to immediately stop his vehicle at the scene of the accident in order to render assistance and give information required by law. . . .
>
> If the jury is satisfied that *all* of those elements have been established by evidence beyond a reasonable doubt, the verdict of the jury should be, as to the second count, that the defendant is guilty of failing to stop at the scene of an accident resulting in serious impairment or death.
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> If the jury has a reasonable doubt as to *any* of those elements, the verdict of the jury should be that the defendant is not guilty. [Emphasis added.]

Additionally, the trial court instructed the jury that it was to "take all of my instructions about the law. You must take all of my instructions together as a connected series constituting the law you are to apply and follow. You should not pay attention to one or some of the instructions and ignore or disregard others." Therefore, because the trial court's instructions as a whole described all of the necessary elements for each of the crimes and because jurors are presumed to follow the trial court's instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), defendant has failed to establish any plain error. The trial court's comments on Friday afternoon were in the context of the *specific element that the jurors had a question regarding* and cannot be construed as completely redefining the provable elements for both charges.

We further note that defendant's argument that the trial court reduced each of the charged crimes down to a single element is undermined by the fact that the jury acquitted defendant of one count and convicted him of the other. If the jury really was instructed that there was only a single element for each count, then it would have come to the same conclusion regarding each count. As it is, the main difference between the two counts involved whether defendant *caused* the serious impairment of a bodily function. The first count required a conclusion that defendant caused the injury, while the second count did not require causation – only that such an injury occurred. With evidence presented that the Sunfire had the right of way and not the Expedition, it simply appears that the jury did not believe that causation was proven beyond a reasonable doubt.

Defendant next argues that he was denied the effective assistance of counsel related to the plea-offer stage of the proceedings. We disagree.

A defendant's Sixth Amendment right to the effective assistance of counsel extends to the plea-bargaining process. *Lafler v Cooper*, ___ US ___; 132 S Ct 1376, 1384; 182 L Ed 2d 392 (2012). To succeed on an ineffective assistance of counsel claim in a plea-bargain context,

> a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances, that the court would have accepted its terms, and that the conviction or sentence, or both, under the

> offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. [*Id.* at 1385.]

The plea deal that was offered to defendant was that he would plead guilty to the two charged crimes and, in exchange, the prosecution would drop the habitual offender enhancement. Defendant testified at the second *Ginther* hearing that his trial counsel failed to inform him that the habitual offender enhancement affected his *minimum* sentence. Defendant acknowledged being presented with two guidelines ranges, one associated with taking the plea and one that would apply if he went to trial and was found guilty. The two ranges were 14 to 29 months (with the plea deal) and 14 to 58 months (without the plea deal). Both Dennie and Norman Miller, who substituted for Dennie for one court appearance, testified that they explained to defendant that these guidelines ranges only set the scope for any potential minimum sentence.[3] In fact, related to a maximum sentence, they stated that they told defendant that his charged, five-year felonies could be elevated to "life" maximums with the habitual offender enhancement. Defendant acknowledged to the trial court at the status conference held on September 22, 2010, that he understood that accepting the plea would limit any sentence to five years maximum but going to trial and being convicted would expose him to a potential life sentence. Consistent with this, defendant admitted on cross-examination at the second *Ginther* hearing, "I wasn't confused about the tail. I knew what the tail was. It carried life."[4] The trial court ultimately found that defendant was not credible, that he was fully and thoroughly advised, and that he understood that the guidelines were related to the minimum sentence.

The trial court's findings were not clearly erroneous. Defendant put forth an unsustainable position. He claimed that he was never informed that the guidelines ranges affected his minimum sentence (thereby implying that they necessarily must have addressed his maximum sentence). But on the other hand, defendant admitted that he knew that the maximum possible sentence was going from five years without the habitual offender status to life imprisonment with the habitual offender status. These two positions are irreconcilable. As a result, the trial court was within its discretion to find defendant not credible.

Therefore, because the trial court's finding that defendant was properly informed of the impact of how pleading guilty would affect both his minimum *and* maximum sentences was not clearly erroneous, we are left with the inescapable conclusion that trial counsel properly advised defendant, and defendant's claim of pretrial ineffective assistance of counsel fails.

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[3] In Miller's case, he actually had no independent memory of speaking with defendant, but he testified that it was his habit and practice to discuss the guidelines in the context of a minimum sentence.

[4] Defendant accurately knew that the "tail" was the sentence maximum.

Affirmed.

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