STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON FRANK BAUMGARTNER,

Defendant-Appellant.

UNPUBLISHED
June 7, 2007

No. 264795
Livingston Circuit Court
LC No. 02-012842-FH

Before: Zahra, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his March 31, 2004, conviction by jury for operating a motor vehicle while visibly impaired causing death, MCL 257.625(4)(a). Defendant claims the trial court violated his due process rights by admitting statements defendant made to police at the scene of the accident; failing to instruct the jury on a lesser included offense; and retroactively applying our Supreme Court's determination in *People v Schaefer*, 473 Mich 418; 703 NW2d 774 (2005); modified in part and clarified in part by *People v Derror*, 475 Mich 316, 333-334; 715 NW2d 822 (2006). Defendant also claims trial counsel's assistance was ineffective. We affirm.

A. Admission of Defendant's Statements Made at the Accident Scene

Defendant maintains that statements he made to police at the scene of the accident regarding his alcohol consumption immediately prior to the accident should not have been admitted in evidence because they were incriminating, he was in police custody, and he was not informed of his rights under *Miranda*.[1] We disagree.

This Court reviews for an abuse of discretion a trial court's admission of evidence; however, if the trial court's decision raises a question of due process, then review is de novo.

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 76 L Ed 2d 644 (1966).

People v Izarraras-Placante, 246 Mich App 490, 493; 633 NW2d 18 (2001), lv den 466 Mich 853 (2002).

Law enforcement officers must advise a suspect of his rights under *Miranda*, when the suspect "is in custody or otherwise deprived of freedom of action in any significant manner," *People v Roark*, 214 Mich App 421, 423; 543 NW2d 23 (1995), quoting *People v Mayes* (After Remand), 202 Mich App 181, 190; 508 NW2d 161 (1993). Whether a suspect is in custody or deprived of his freedom to leave requires reviewing courts to engage in a two-pronged analysis. First, the reviewing court must appreciate all of the circumstances surrounding the alleged custody and, second, determine whether "a reasonable person (would) have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v Keohane*, 516 US 99, 112; 116 S Ct 457; L Ed 2d 383 (1995).

Defendant claims that *Roark, supra,* is dispositive of the issue presented in this case. We disagree. In *Roark,* this Court suppressed incriminating statements made to police while the defendant was in the back of a police car following a traffic accident. The facts leading to the statement in *Roark* were as follows:

> [Defendant] was unable to produce a driver's license to the investigating police officer because her license had been suspended. The officer took defendant's name and ran a records check, discovering that there were outstanding arrest warrants. While the officer was waiting for confirmation of the validity of the warrants, defendant had approached the police cruiser. The officer asked her to sit in the rear seat of the cruiser. He advised her of the outstanding warrants and that she would be required to post a $ 330 bond. The officer heard defendant rummage through her purse for the money and decided to search the purse for weapons. While a search of the purse revealed no weapons, it did yield a plastic bag that had three rolled-up one dollar bills and the residue of a white powdery substance.
>
> The officer obtained consent to search defendant's vehicle and called in a canine unit. Defendant remained in the rear of the cruiser. Following the search by the canine unit, defendant was advised that upon posting the bond she would be free to leave. It was after the search by the canine unit but before defendant left the police cruiser that she was questioned by the officer and made an incriminating statement. *Id* at 422-423.

This Court in *Roark* determined that the defendant reasonably believed she was in police custody because she was asked to sit in the back of the police vehicle, informed of her arrest warrants and that her freedom depended on posting bond. *Id* at 424.

Here, the analogy to *Roark* ends with defendant being placed in the back of a law enforcement vehicle following a traffic accident. Nothing in the record before us indicates that Trooper Holme told defendant his freedom to leave the scene depended on some other action, e.g., posting bond. It is also undisputed that defendant was not questioned while in a police vehicle but, rather, questioned along a roadside before and during field sobriety exercises. After the roadside sobriety exercises were performed, defendant was taken to the troopers' vehicle and read his chemical test rights, and later taken to a hospital where he was given his *Miranda* warnings.

The law enforcement officers involved in this case did not inform defendant that he had any outstanding arrest warrants, as happened to the defendant in *Roark*. In sum, but for temporarily being placed in the back of a law enforcement vehicle, the dispositive facts here with regard to defendant's claim that his pre-arrest statements should not have been admissible, are entirely distinguishable from *Roark*.

Further, reviewing the totality of circumstances we conclude the roadside questioning here at issue is more like the questioning that occurred in *People v Burton*, 252 Mich App 130; 651 NW2d 143 (2002), where this Court held that roadside questioning to ascertain facts and field sobriety exercises to investigate a possible violation of traffic law do not rise to the level of subjecting a suspect to either stationhouse questioning or being in a police-dominated atmosphere. *Id* at 138-139. For these reasons, we conclude the trial court did not err by admitting in evidence defendant's statements to police made at the accident scene[2].

B. The Trial Court's Failure to Instruct the Jury on Lesser Included Offenses

Defendant also argues – and the prosecution agrees – that defendant was entitled to have the jury instructed on the lesser included offense of driving while impaired under our Supreme Court's decision in *People v Cornell*, 466 Mich 335; 646 NW 2d 127 (2002). The prosecution argues that the court's error was nonetheless harmless. We agree.

In *Schaefer*, *supra*, our Supreme Court, following its decision in *Cornell*, stated that the "miscarriage of justice standard" in MCL 769.26 requires a reviewing court to "classify the type of alleged instructional error as either constitutional or nonconstitutional, and as either preserved or unpreserved. The Supreme Court further determined that "instructional error based on the misapplication of a statute is generally considered nonconstitutional error." *Id* at 442.

Here, while defendant preserved the error by timely objecting to the court's decision not to instruct the jury of the lesser included offense, the error is non-constitutional and does not require automatic reversal. Reversal is warranted only if defendant demonstrates that a miscarriage of justice occurred. Only then will this Court disturb the jury's verdict.

In *Schaefer*, *supra*, our Supreme Court overruled its prior holding in *People v Lardie*, 452 Mich 231; 551 NW2d 656 (1996), "to the extent that *Lardie* held that the defendant's *intoxicated*

[2] Any error in the admission of this evidence was harmless in any event. Our Supreme Court adopted the harmless error analysis in *People v Mass*, 464 Mich 615 (2001), following the U.S. Supreme Court's decision in *Neder v United States*, 527 U.S. 1, 18; 119 S Ct 1827; 144 L Ed 2d 35 (1999), which held a constitutional error is harmless if "[it is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." In this case, Trooper Holme testified that defendant, after being given his *Miranda* warnings at the hospital and waiving them, made essentially the same statements with regard to his alcohol consumption in the few hours prior to the accident that he made when questioned at the scene of the accident. Therefore, the jury heard essentially the same statements made by defendant after he received and waived his *Miranda* warnings. As such, any error regarding this issue was harmless.

driving must be a substantial cause of the victim's death." *Schaefer* at 422. [Emphasis original.] Specifically, the Court in *Schaefer* concluded that the plain language of MCL 257.625(4) required that prosecutors prove an impaired defendant's operation of a motor vehicle, rather than defendant's impaired operation of a motor vehicle, cause a victim's death. "The defendant's status as "intoxicated" is a separate element of the offense of OUIL causing death. It specifies the class of persons subject to liability under § 625(4): intoxicated drivers." *Id* at 422.

Here, defendant claims the instructional error prejudiced defendant because there was a genuine factual dispute as to whether defendant's alleged visibly impaired operation of the truck was "a substantial cause" of the crash. Defendant recites testimony from the case and concludes that " . . .a properly instructed jury might have rationally concluded, based on the testimony of Nick Loridas, that it was not reasonably foreseeable the crash would have occurred, given the layout of the intersection and the speeding motorcyclist."

In essence, defendant is arguing that an instruction by the court on the lesser included offense of driving while impaired would have allowed the jury to convict defendant of driving while impaired without having to find that he caused the collision and the death. However, while such an outcome would be possible, the mere possibility of a different outcome is not sufficient for defendant to satisfy his burden on appeal of showing that a miscarriage of justice occurred as a result of the trial court's failure to instruct the jury on the lesser included offense. Stated differently, defendant must show how the outcome in this case would have been different but for the instruction. Defendant merely surmises what "a properly instructed jury *might* have rationally concluded . . . ." [Emphasis added.] Defendant does not otherwise explain how the jury would have viewed the facts differently had its members received an additional jury instruction on a lesser included offense. We therefore conclude the trial court's non-constitutional error was not a miscarriage of justice and, consequently, defendant's argument must fail.

C. Retroactive Application of *People v Schaefer*

Defendant further argues that the trial court erred in retroactively applying our Supreme Court's opinion in *People v Schaefer, supra*. Defendant admits that the basis for his relief is predicated on the dissenting opinion in *Schaefer*. Specifically, the dissent in *Schaefer* concluded that retroactive application of the majority's determination resulted in a violation of the defendant's due process rights as well as the *ex post facto* clauses of the federal and Michigan's constitutions. *Schaefer* at 452-456. Defendant acknowledges that the majority holding in *Schaefer* is binding authority on this Court. Accordingly, applying *Schaefer* we conclude there is no merit to defendant's claim.

D. Defendant's Claim of Ineffective Assistance of Counsel

Defendant next claims that his trial counsel was ineffective for failing to challenge a biased juror. This Court reviews a claim of ineffective assistance of counsel as a mixed question of fact and law. Questions of fact are reviewed for clear error, and determinations of law based upon those facts are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Further, "to find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the

representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

During the jury selection process, one juror indicated she would start with a presumption of guilt. Defense counsel spent some time questioning her on this presumption. In addition, the trial court went to great lengths to explain the law to this juror, and instructed this juror on her duty to presume the defendant not guilty. Thereafter, defense counsel and the juror in question, referred to as "Juror X" had the following exchange:

> *Q.* [S]o would you change your answer having answered the Judge's question like that, would you change your answer to me and say . . . I'm going to presume him innocent right now? Would you do that for me?
>
> *A.* I could.
>
> * * *
>
> *Q.* Do you think, do you think, did you understand what the Judge just said there?
>
> *A.* Yes, I did.
>
> *Q.* Okay. Do you think you'd be prejudiced in this case against the defendant?
>
> *A.* I might be.
>
> *Q.* Okay. (To all prospective jurors) Is there anybody else who would be prejudiced against the defendant?
>
> *Q.* (The Court addressing the juror in question): I want to go back to you for a second. Why do you think you might be prejudiced?
>
> *A.* Only for the fact that I probably go in thinking right off the bat guilty and you would have to prove innocent to me.
>
> *Q.* (The Court): Is that because of the questions that have been asked of you?
>
> *A.* No, it's not just because of the questions. [I]t's just, just from hearing that you, that he's had alcohol and marijuana and he was in a car and there was an accident involving, I'm assuming two cars and just from my point of view right now from what I know—
>
> *Q.* (The Court): Do you understand that there hasn't been anything proven at all yet?
>
> *A.* Yes, I do.
>
> *Q.* (The Court): There hasn't been anything proven. He's presumed to be innocent. And until there are proofs brought forward in the course of a trial, your verdict is not guilty.

A. Right.

Q. (The Court): Can you do that?

A. Yes.

Q. (The Court): Until you've heard proofs?

A. Yes.

Q. (The Court): One way or the other?

A. Yes.

Q. (The Court): And you can continue that presumption of innocence right back into the jury room and during your deliberations.

A. Yes.

Q. (The Court): Thank you.

Following several challenges by both prosecution and defense counsel, the final jury was sworn in. Defense counsel, who had at least one peremptory challenge remaining, did not challenge the juror whose responses are at issue on appeal.

After the trial, defendant moved for a new trial, raising among other things, a claim of ineffective trial counsel. At the evidentiary hearing on the motion, as to the issue of ineffective assistance of counsel, defendant's trial counsel testified about his trial strategy in not challenging the juror in question. Defendant's trial counsel stated:

> When [the juror in question] got up on the stand she was honest, brutally honest, and she exercised what I – what I believed was reticence on her part, not – not because she wanted necessarily to find the Defendant guilty, but she was being brutally honest about whether or not she could do that, whether or not she could set aside those problems. And I questioned her, and I was concerned, and then Judge Burress questioned her and I became less concerned. And then I questioned her again, and as you pointed out earlier, I was on my guard again. And then Judge Burress asked her some questions. And then finally Judge Burress turned to the jury and he asked several questions . . . and that juror was in agreement with all the rest of the jurors that yes, they could be fair. They could be impartial. And I think she said in the course of that cross-examination with me when I said, could you be fair, and she said, I could, or words to that effect, I believed her. And my strategy was very, very much geared to having an honest

jury.[3]

We conclude defendant's trial counsel was not ineffective for failing to remove the juror in question. Rather, defendant's trial counsel's decision not to remove this juror was a deliberate trial strategy. *People v Robinson*, 154 Mich App 92; 397 N.W.2d 229 (1986) "A lawyer's hunches, based on his observations, may be as valid as any method of choosing a jury." *Id* at 95. In this case, defendant's trial counsel also testified that he has been practicing law since 1976 and has been involved in "literally hundreds" of jury trials, of which more than 80 percent involved a driver who had been drinking alcohol. Based on defendant's trial counsel's experience, he believed he had a reasonable, fair and honest jury. Under *Robinson*, *supra*, we conclude that counsel's hunches, based on observations of the jurors in this case, put him in the best possible position to assess the bias of any prospective juror and to panel as a whole.

Affirmed.

/s/ Brian K. Zahra
/s/ Donald S. Owens

[3] Defendant's trial counsel also testified that this juror's body language and tone may have played a substantial role in his determination not to challenge her. Defendant's trial counsel pointed out that he used a peremptory challenge to excuse a retired state police trooper, even though the trooper stated during voir dire that he would be impartial. We also note that when initially contacted by defendant's appellate counsel, defendant's trial counsel stated that he "had no idea" why he did not challenge and excuse the juror in question. However, defendant's trial counsel explained at the evidentiary hearing that his statement was based on the fact that he was involved in a heavy caseload involving numerous jury trials and only later, after reading a transcript of the instant case, was counsel able to refresh his memory sufficiently to recollect his trial strategy.