STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD JOSEPH PRESTIA,

Defendant-Appellant.

UNPUBLISHED
July 25, 2000

No. 215971
Montcalm Circuit Court
LC No. 97-000258-FH

Before: McDonald, P.J., and Neff and Zahra, JJ.

PER CURIAM.

Defendant appeals by right his convictions following a jury trial of manslaughter with a motor vehicle, MCL 750.321; MSA 28.553, and operating a vehicle with a suspended or revoked license, MCL 257.904(1)(a); MSA 9.2604(1)(a). Defendant received a 7½year minimum to a 22½year maximum sentence for the manslaughter conviction as a second habitual offender, MCL 769.10; MSA 28.1082, and a thirty-eight day sentence for the driving while license revoked conviction. He appeals as of right. We affirm.

The dispositive issue at trial was whether defendant was the driver of a car that lost control on a curve and struck a tree, killing the car's other occupant, sixteen-year-old Kenneth Magoon. Defendant first argues that the trial court abused its discretion by allowing several lay witnesses to give their opinions as to who was operating the vehicle when it crashed. Defendant's objection to Deputy Benjamin Frye's opinion is unpreserved because at trial he objected on other grounds. MRE 103(a)(1). Defendant also did not object when Gerald Payne and Melonie Jones were subsequently asked their opinions of who was driving the car. These issues are not preserved. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

When, as here, an issue is unpreserved, a reversal will be ordered only if plain error resulted in the conviction of an actually innocent defendant, or where the error seriously affected the fairness, integrity, or reputation of judicial proceedings. *Grant*, *supra* at 550-551. Three requirements must be met to withstand forfeiture under the plain error rule "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460

Mich 750, 763; 597 NW2d 130 (1999), citing *United States v Olano*, 507 US 725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

MRE 701, the rule governing the admission of lay opinion, provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions of inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. [MRE 701.]

This Court has found no abuse of discretion in allowing a police officer to offer lay opinion that a defendant was selling crack cocaine based on the officer's observations that he saw the defendant run to different vehicles and lean inside the window for ten to fifteen seconds. *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994). The *Daniel* Court held that the officer was not qualified to give an expert opinion, but that the requirements of MRE 701 were met because the testimony was based on the officer's perceptions and assisted the jurors in determining whether the defendant was trafficking in narcotics. *Id.*

This Court also held as proper lay opinion the testimony of two police officers who believed that dents in the complainant's car could have been caused by bullets. *People v Oliver*, 170 Mich App 38, 49; 427 NW2d 898 (1988). The defendant in *Oliver* was convicted of assault with intent to do great bodily harm less than murder. *Id.* at 40. The Court noted that "[r]ecent panels have liberally applied MRE 701 in order to help develop a clearer understanding of facts for the trier of facts." *Id.* at 50; see also *Heyler v Dixon*,160 Mich App 130, 148-149; 408 NW2d 121 (1987) (allowing the several lay witnesses to testify that a driver appeared intoxicated). Moreover, lay opinion testimony is not rendered inadmissible merely because it establishes circumstantial as opposed to direct evidence of a fact at issue, even where the offered opinion goes to the ultimate issue of the case. *People v Daniel*, 207 Mich App 47, 57; 523 NW3d 830 (1994).

Here, all the witnesses offered conclusions reasonably premised on facts that they observed. Any reasonable and rational person who observes a vehicle and its contents after an accident can conclude that the occupant seated in the driver seat was the operator of the vehicle at the time of the accident and any occupant located in a spot other than the driver seat was not the operator of the vehicle at the time of the accident. The testimony at issue was not overly dependent upon scientific, technical or other specialized knowledge. *Oliver, supra* at 50, quoting *Mitchell v Steward Oldford & Sons, Inc*, 163 Mich App 622, 630; 415 NW2d 224 (1987). Moreover, the lay opinions at issue were helpful to clarify the testimony of each witness. The opinion testimony was therefore properly admitted pursuant to MRE 701 to establish circumstantially that defendant was the driver of the accident vehicle.

Defendant also argues that the trial court committed error when it excluded blood and hair samples taken from the car as evidence. The evidence was offered to prove that Magoon was the driver. Admissibility of evidence is reviewed for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). An abuse of discretion exists only when an unprejudiced person,

considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

Due to the difficulty in removing defendant and Magoon from the car, the trial court found any blood or hair sampling irrelevant to determining defendant's position before the accident. We agree and find no abuse of discretion. Melonie Jones and Gerald Payne testified that defendant had to be moved over Magoon's body to get him out of the car so that the body fluids and tissue of the two occupants of the vehicle were transposed. Under the circumstances, the evidence totally lacked probative value.

Defendant next contends that defense counsel was ineffective because he failed to adequately cross-examine accident reconstrutionist Gary McDonald. Where, as here, a *Ginther*[1] hearing has not been held, the standard of review for a claim of ineffective assistance of counsel is de novo.

In order to establish ineffective assistance of counsel, defendant must prove that: (1) trial counsel's performance fell below on objective standard of reasonableness; and (2) but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* Regarding the first element, competent counsel is presumed as a matter of law. *People v Toma,* ____Mich____; ____NW2d ____ (Docket No. 112860, issued 6/28/00), slip op p 24; *People v Wilson*, 180 Mich App 12; 446 NW2d 571 (1989). A reviewing court starts with a strong presumption that any challenged conduct was sound trial strategy. *Toma*, *supra*. Appellate courts must remain ever mindful of the stress, intensity and rapid pace of a trial. An appellate court should refrain from substituting its collective judgment reached with the benefit of hindsight, for that of trial counsel, whose judgment was exercised in the heat of trial. As our Supreme Court warned, "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *People v Reed*, 449 Mich 375, 396; 535 NW2d 496 (1995).

The second element of an ineffective assistance of counsel claim requires proof from defendant that as a direct consequence of his trial counsel's substandard performance there is "a reasonable probability that, absent [trial counsel's] errors, the fact finder would have had a reasonable doubt respecting guilt." *People v Pickens*, 446 Mich 298, 313; 521 NW2d 797 (1994), quoting *Strickland v Washington*, 446 US 668, 695; 104 S Ct 2052; 80 L Ed 2d 674 (1984); see *Toma, supra*. Black's Law Dictionary, (6th ed), defines "probability" as:

> Likelihood; appearance of reality or truth; reasonable ground for presumption; … A condition or state created when there is more evidence in favor of the existence of a given proposition than there is against it.

Thus, it is not enough to sustain the high burden placed upon a defendant claiming ineffective assistance of counsel that there exists a possibility that had trial counsel's performance not fallen below minimal

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[1] *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

professional standards defendant would not have been convicted. Defendant must establish that it is more likely than not that but for counsel's unprofessional errors, he would have been acquitted. It is with this standard in mind that we review defendant's claims of ineffective assistance of counsel.

Defendant in this case suffered no prejudice when his counsel failed to get McDonald to admit that he changed his position on the car's angle of impact with the tree. At trial, defense counsel specifically asked McDonald what would happen if the car hit the tree at a ninety degree angle, the angle of impact originally used by McDonald. McDonald denied that a ninety degree angle of impact would shift the driver to the rear seat where Magoon was found. We therefore cannot conclude that this line of questioning would have supported defendant's theory and made the outcome of the proceedings any different. Further, since there was no abuse of discretion in excluding the blood and hair samples extracted from the car, counsel was not ineffective for failing to secure its admission. Counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; ___ NW2d ___ (2000); *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant also claims that his sentence was disproportionate and that he should be resentenced, taking into account the newly enacted legislative sentencing guidelines. Matters of sentencing are reviewed for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 654; 461 NW2d 1 (1990). Here, defendant was sentenced as an habitual offender. It is well recognized that judicial sentencing guidelines do not apply to habitual offenders, *People v Gatewood*, 450 Mich 1025; 546 NW2d 252, on remand 216 Mich App 559; 550 NW2d 265 (1996), and thus we cannot consider them on appeal. *Id.* Moreover, even if defendant were not an habitual offender, this Court is not bound by the legislative sentencing guidelines because this offense occurred before January 1, 1999. MCL 769.34(1); MSA 28.1097(3.4)(1); *People v Reynolds*, 240 Mich App 250, 254; ___ NW2d ___ (2000).

The offense in the instant case was serious. As a result of his gross negligence, defendant took a life. Defendant also had a history of escalating criminal offenses. We conclude that his sentence was proportionate to the seriousness of the offense and defendant's status as an habitual offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

In his supplemental brief, defendant argues that there was insufficient evidence to convict him of manslaughter. When reviewing a sufficiency of the evidence claim, this Court views the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the elements of the crime charged were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-516; 489 NW2d 748, amended 441 Mich 1201 (1992).

Defendant contends that there was insufficient evidence to prove beyond a reasonable doubt that he was the car's driver. We disagree. The prosecutor introduced the testimony of Deputy Bruce Trebian, Deputy Frye, Melonie Jones, Carolyn Chase, and Gerald Payne, that when they discovered the car, defendant was firmly positioned in the driver's seat. Deputy Trebian testified that defendant's wife told him that defendant was drinking and should not have been driving. According to Officer Chase, defendant's wife also told her that defendant was the driver. Gary McDonald, the expert accident reconstructionist, believed that, on impact, a passenger would be moved to the back seat, which is where Magoon was found. Proof of the elements of a crime can stem from circumstantial

evidence and reasonable inferences that arise therefrom. *Carines*, *supra* at 757. In light of these facts, and when looked at in the light most favorable to the prosecution, we must conclude that there was sufficient evidence to find, beyond a reasonable doubt, that defendant was the driver.

Finally, defendant argues that the trial court committed error requiring reversal when statements from Regina Prestia, defendant's wife, were admitted under MRE 803(2), the "excited utterance" exception to the rule against hearsay. The excited utterance exception applies where (1) there was a startling event, and (2) the resulting statement was made while still under the excitement caused by the event. *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988); MRE 803(2). Here, the startling event was that Regina Prestia saw her husband at the scene of the fatal accident and then accompanied him to the hospital.

As for the second element, trial courts are given wide discretion in their determination of whether a declarant was still under the stress of the event. *People v Smith*, 456 Mich 543, 552; 581 NW2d 654 (1998). "[I]t is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule." *Id.* at 551. There is no express time limitation for excited utterances. *Id.* at 551-552. In the present case, we conclude that there was no abuse of discretion in finding that Prestia was still under the stress of the event when she accompanied her husband to the hospital. As evidenced by testimony from Deputy Trebian, Jesse Knutson, Carolyn Chase, and David Martin, Prestia was still clearly under the stress of discovering her husband unconscious in a car after a massive car crash.

The fact that the statements were elicited in response to Chase's questioning does not remove them from the reach of the excited utterance exception. *Id*. at 553-554. Like any other inquiry into an excited utterance, we must look into the circumstances of the questioning and whether the statement was the result of reflective thought. *Id.* at 553. Circumstance disfavoring admission of the statement are when the questioning is suggestive, persistent or insistent. *Id.* As in *Smith*, *supra*, there were no circumstances here to indicate that Prestia's statement resulted from the "stress" of the questioning, rather than the car accident. *Id.* at 554. Accordingly, reversal on this ground is not warranted.

Affirmed.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ Brian K. Zahra