

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REBECCA MAUREEN SMITH,

Defendant-Appellant.

UNPUBLISHED

August 6, 2009

No. 282546

Oakland Circuit Court

LC No. 2007-215078-FC

Before: Zahra, P.J., and O’Connell, and K.F. Kelly, JJ.

PER CURIAM.

A jury convicted of second-degree murder, MCL 750.317. Defendant was sentenced to thirty to sixty years’ imprisonment. Defendant appeals of right. We affirm defendant’s conviction but remand for resentencing.

I. Officer’s Expert Testimony

Defendant’s first argument on appeal is that one of the investigating officers in this case improperly testified at trial regarding defendant’s credibility. We disagree.

A. Standard of Review

Defendant did not preserve this issue for appellate review because she failed to raise the issue and have it addressed by the trial court. *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006). An unpreserved issue is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The error must result in the conviction of an actually innocent defendant or seriously affect the fairness, integrity or public reputation of judicial proceedings to require reversal. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Reversal is only warranted if curative instructions would not have eliminated prejudice to defendant. *People v Hall*, 396 Mich 650, 655; 242 NW2d 377 (1976); *Unger, supra* at 235.

B. Analysis

Oakland County Sheriff’s Deputy Christopher Lanfear was qualified as an expert witness in interviewing and interrogating. He participated in the police interrogation of defendant. He testified that during the multiple interrogations, it became clear that defendant was lying about

the last time that she saw the victim in this case, her husband. When pressed, defendant admitted that she had lied and offered the explanation that she was merely continuing a lie that she had made to her grandparents to avoid their disapproval. Lanfear testified that, irrespective of defendant's explanation, defendant had lied to him and he did not find her trustworthy.

Defendant argues that this constitutes improper opinion testimony regarding the credibility of another witness. Though Lanfear was qualified as an expert, this testimony was the product of his personal observation and did not bring to bear any specialized knowledge or methods.¹ MRE 702; *People v Yost*, 278 Mich App 341, 392; 749 NW2d 753 (2008) (expert testimony requires application of specialized knowledge). Thus, it should be evaluated as lay opinion testimony. Under MRE 701, a lay witness may offer an opinion that is rationally based on her perceptions. It is improper for a witness to opine simply about the credibility of another witness as credibility determinations are the province of the jury. *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007).

In this case, Lanfear was not opining about defendant's credibility generally. Lanfear specifically stated that defendant was no longer trustworthy *to him*. He was explaining the investigation and the effect of defendant's deception on the conduct of the investigation. After defendant admitted to Lanfear that she was lying, Lanfear merely reported what effect this admission would have on his investigation. To the extent that this was opinion testimony at all, it was proper.

II. Evidence Relating to Officers' Qualifications and Competence

Defendant next argues that the prosecutor improperly elicited testimony from one witness regarding the qualifications and competence of the investigating officers in this case. We disagree.

A. Standard of Review

This issue is unpreserved because defendant failed to contemporaneously object or request a curative instruction. *Unger, supra* at 235. An unpreserved claim of prosecutorial misconduct is reviewed for plain error affecting defendant's substantial rights. *Carines, supra* at 763; *Unger, supra* at 235. "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). "Further, [this Court] cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *Id.* at 329-330.

¹ Defendant argues that Lanfear's testimony did not satisfy the requirements of MRE 702 and MRE 703, the rules governing expert witness testimony. Because we conclude that Lanfear's testimony in this regard was lay opinion testimony, we need not consider this argument.

B. Analysis

During the investigation of this case, defendant hired a private investigator, Robert Quisenberry, to pursue alternative suspects and theories. Quisenberry was a recently retired police investigator who had worked with many of the investigating officers in this case. The prosecutor called Quisenberry as a witness at trial. On cross-examination, defense counsel questioned Quisenberry regarding the methods of the police in this case and how, hypothetically, he would have pursued the evidence in this case. Quisenberry answered that he could not answer specific questions regarding the evidence in this case because he was not privy to the same information as the police. Defense counsel also asked Quisenberry if he thought that defendant had hired him because she was unsatisfied with the conduct of the police investigation; Quisenberry responded that he thought she hired him because she was a suspect.

On redirect-examination, the prosecutor elicited evidence that Quisenberry knew two of the officers in this case. The prosecutor also asked if Quisenberry believed the officers were competent and conducted investigations competently. Quisenberry responded that, *in a general sense*, he believed that they were competent investigators. He emphasized that he had no knowledge of the officers' work in this case.

Defendant argues that the prosecutor's sole motive in asking Quisenberry these questions was to bolster the reputation of the officers in the minds of the jurors. Quisenberry's testimony did not vouch for the officers' credibility or truthfulness, only to their competence at their occupations. On appeal, defendant does not explain how this testimony is improper, only that it "improperly" bolstered the reputation of the officers. This questioning did not constitute plain error.

III. Evidence of Letter

Defendant next argues that the trial court erred in admitting into evidence a letter defendant sent from her jail cell, imploring a friend to write an anonymous letter of confession to defense counsel, the press, and the trial court. Defendant argues that the letter was not relevant and introduced merely for the purpose of portraying defendant in a negative light to the jury. We disagree.

A. Standard of Review

This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007). Preliminary questions of law are reviewed de novo. *Id.* A court abuses its discretion when it selects a course outside the range of principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). Nevertheless, an erroneous evidentiary ruling does not require reversal unless it "affirmatively appear[s] that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 488, 495-496; 596 NW2d 607 (1999); MCL 769.26; MCR 2.613(A); MRE 103.

B. Analysis

Evidence of “other crimes, wrongs, or acts” is inadmissible unless it is logically relevant under MRE 402, legally relevant under MRE 404(b), and its probative value is not substantially outweighed by unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *People v VanderVliet*, 444 Mich 52, 61-64; 508 NW2d 114 (1993).

At trial, the prosecutor presented evidence that the letter was relevant because it provided details about the crime that were consistent with the forensic evidence but not contained in public police reports. For example, the police had not considered the possibility that the killer removed the victim’s pants after the murder because the killer vomited on the pants. Also, defendant indicated in her letter that the body was wrapped in a tarp, but the police theory at that time was that the body had been wrapped in linens. Further, an investigating officer testified that the police found significant the level of detail provided in the letter about acts such as loading the body into a vehicle. It is for the jury to evaluate this testimony and determine whether it establishes that the letter is evidence of defendant’s guilt. *Unger, supra* at 222.

Further, any prejudice introduced by the letter does not outweigh its probative value. Unfair prejudice exists where there is a “tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence.” *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002). The possibility of prejudice introduced by this evidence is interwoven with the jury’s determination of defendant’s guilt. As defendant notes, the letter could be the work of a desperate, innocent mother. On the other hand, the letter could be part of a larger scheme to lead the police away from the murderer. Not all evidence damaging to a defendant is unfairly prejudicial. Further, there is no indication that the jury would have convicted defendant of murder on the basis of her attempts to manipulate the judicial system rather than the substantive evidence against her, including the contents of the letter. *Id.* at 521-522.²

IV. Sentencing

Defendant last argues that the trial court erred in scoring offense variable (OV) 19 at 25 points and then compounding the error by upwardly departing from defendant’s minimum sentencing guidelines range.

A. Standard of Review

This Court reviews a sentencing court’s determination of the number of OV points scored to ensure that evidence of record adequately supports the particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A trial court’s reasons for a sentencing

² Defendant also argues on appeal that the prosecutor made an improper civic duty argument in his closing argument with respect to defendant’s attempted manipulation of the criminal justice system. This issue is not properly before this Court because defendant failed to list it in her statement of questions presented. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

departure are reviewed for clear error. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). Whether a given reason is objective and verifiable is a question of law, reviewed de novo. *Id.* Whether the reasons are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion. *Id.* Likewise, the magnitude of the departure is reviewed for an abuse of discretion. *Id.*

B. Analysis

Under OV 19, a sentencing court may score an offender 25 points if “his or her conduct threatened the security of a penal institution or court,” 20 points if “[t]he offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services,” or 15 points if the offender “otherwise interfered with or attempted to interfere with the administration of justice.”

Here, defendant was scored 25 points for OV 19 because her conduct “threatened the security of a penal institution or court.” MCL 777.49(a). The court cited defendant’s attempts to undermine the criminal justice system by having her sister and friend create an anonymous letter confessing to the instant offenses and forwarding it to the court, the press and attorneys of record. While we agree with the trial court that defendant’s actions clearly interfered with the administration of justice, there is no evidence to support the conclusion that the letter threatened the security of a penal institution or the court. The sentencing court did not mention the word “threatening” at sentencing, and scored OV 19 at 25 points “for the interference with the administration of justice.” Further, this error impacts defendant’s minimum sentencing guidelines, lowering them from 162 to 270 months to 144 to 240 months. Thus, resentencing is required.

Accordingly, we need not reach the question and express no view on whether the sentencing court erred in upwardly departing from the minimum sentencing guidelines. We remand to the trial court for resentencing. We otherwise affirm defendant’s conviction. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Peter D. O’Connell
/s/ Kirsten Frank Kelly