STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 6, 2004
v	No. 241582 Wayne Circuit Court
EUGENE PAUL SIWIK, Defendant-Appellant.	LC No. 01-010303

Before: Schuette, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree felony murder, MCL 750.316(1)(b). We affirm.

On June 25, 2000, Leposava Filipovska did not return home from work and her car was found on the side of the road, still running. The car's rear bumper was damaged, and white paint appeared to have been transferred as the result of a low impact collision. Filipovska's body was found nearly two miles away in a field behind a gas station she was known to frequent. The Wayne County deputy chief medical examiner performed an autopsy which revealed no external evidence of injury, but an enlarged heart and fluid in her lungs indicating that she did not die instantly. The medical examiner listed the death as "unknown" or "indeterminate" because it was unclear how her body had been found so far away from her car. Filipovska was known to have had recent chest pain and difficulty breathing.

Detectives conducting an investigation near the location where Filipovska's body was found encountered defendant in the parking lot of a nearby motel at which he apparently was staying. They told defendant that they were investigating a "situation" across the street, and defendant asked one of them "how did that lady die over there?" Detectives testified that they did not tell defendant that a lady had died, and claimed not to have released any details to defendant prior to questioning him. Defendant told the detective that one of his friends had been at the gas station and had been told about it.

The case remained unsolved until July 2001, when members of the Calhoun County Sheriff's Department contacted Canton police officers and indicated that two of their inmates, where defendant was also incarcerated at the time, had information regarding the case. The two inmates told the officers that defendant had told them that he and another man, possibly his uncle, had seen an older woman with a lot of money in line at a fast food restaurant located across from defendant's house and decided to follow her in a stolen white car, bumped the rear bumper of the woman's car, and, when the parties pulled over and got out of their car, defendant tried to grab her purse. The two inmates continued that defendant told them the woman tried to stop defendant, at which time his companion, grabbed her by the hair and pushed her against the car. She then grabbed at her chest and collapsed. Defendant and his companion then pushed the woman into the stolen car, with defendant holding her down as she continued to gasp and choke. Defendant then told the two inmates that the woman died as they were driving away; they then left her body in a field behind a gas station and drove away. Defendant told the inmates that he took between $700 and $1200 from the woman.

As a result of the statements from the two inmates, police questioned defendant, who said he had made up a story about being involved in Filipovska's death after reading about it because he wanted to make the other inmates think he was a hardened killer to impress or intimidate them. A detective told the medical examiner about these statements, and on the basis of the information he received from the detective, the medical examiner revised his report to conclude that Filipovska had died as the result of homicide—the stress from the robbery had triggered her heart attack. Defendant was charged and convicted of the crime.

Defendant first argues that the trial court erred in admitting his inculpatory statements because the prosecution failed to establish the corpus delicti of felony murder independent of his statements. We disagree. Defendant failed to preserve this issue for appeal by objecting at trial; therefore, our review is for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-763; 597 NW2d 130 (1999).

The corpus delicti rule is satisfied and a defendant's confession may be admitted into evidence when the prosecutor presents direct or circumstantial evidence establishing a specific injury that was caused by some criminal agency. *People v Konrad*, 449 Mich 263, 269-270; 536 NW2d 517 (1995). The corpus delicti of murder is death caused by criminal agency. *People v McMahan*, 451 Mich 543, 548-549; 548 NW2d 199 (1996). Once this showing is made, by a preponderance of the evidence, a defendant's inculpatory statements may be used to establish identity, intent, or aggravating circumstances. *Konrad*, *supra*; *People v Burns*, 250 Mich App 436, 438; 647 NW2d 515 (2002).

Here, we agree with the prosecution that there was sufficient circumstantial evidence independent of defendant's inculpatory statements to establish that Filipovska's death was caused by a criminal agency. The evidence presented at trial included that sixty-three year old Filipovska, a known creature of habit, did not arrive home after her afternoon shift of work that ended at about 2:30 a.m., but instead her car was found on the side of the road, running, with obvious rear-end damage, and with her open purse and cashless wallet in the area of the front seat. The evidence also included that Filipovska, who had recently been experiencing difficulty breathing, was found dead in a field about 1.8 miles from her car, which was a couple of hundred yards from the hotel that defendant was living in at the time. When defendant was questioned by

police during their canvassing of the immediate area, before the death became public information, defendant asked something to the effect of "How'd that lady die over there?"

The medical examiner testified that Filipovska died of a heart attack, but death was not immediate, and he listed the manner of death as unknown or indeterminate because little or nothing was known about how her body ended up some distance from her car and the circumstances "did not fit the profile of a natural death." This evidence and associated inferences were sufficient to establish by a preponderance that Filipovska died during and as a consequence of a robbery while she was on her way home from work and after she exited her vehicle that had been rear-ended. See *People v Brasic*, 171 Mich App 222, 227; 429 NW2d 860 (1988). The corpus delicti rule, which is designed to avoid the use of a defendant's confession to a crime that never occurred, was satisfied and defendant's inculpatory statements were properly admitted. See *Konrad, supra* at 269. Therefore, defendant has failed to establish plain error warranting reversal. Further, defendant's claim of ineffective assistance of counsel premised on this issue is without merit. *People v Sabin (On Sec Rem)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

Defendant next argues that the trial court erred in allowing the medical examiner to testify that Filipovska's death was a homicide because such testimony was beyond his expertise and improperly bolstered the prosecution's theory of the case. We disagree. Defendant failed to preserve this issue for appeal by objecting at trial; therefore, our review is for plain error affecting defendant's substantial rights. *Carines, supra*.

Expert testimony is admissible under MRE 702 if (1) the witness is qualified, (2) the testimony is relevant in that it assists the trier of fact to understand the evidence or determine a fact in issue, and (3) the testimony is derived from recognized scientific, technical, or other specialized knowledge. *People v Beckley*, 434 Mich 691, 710-719; 456 NW2d 391 (1990). In accord with the relevancy and reliability requirements, the expert's testimony should be directly related to and within the scope of the witness' expertise and should not include comment or opinion on the credibility of other witnesses. *People v Buckey*, 424 Mich 1, 16-17; 378 NW2d 432 (1985); *Franzel v Kerr Mfg Co*, 234 Mich App 600, 621; 600 NW2d 66 (1999).

Here, defendant claims that the medical examiner's testimony was impermissible because it included that the manner of death was a homicide; specifically, that Filipovska's heart attack was precipitated by "intense stress that being assaulted implies, the term scared to death is what comes to mind." Defendant relies on *People v Smith*, 425 Mich 98; 387 NW2d 814 (1986), in support of his argument that the medical examiner's testimony was improper. In *Smith*, our Supreme Court reversed a criminal sexual conduct conviction where the prosecution's medical expert based his opinion that the victim had been sexually assaulted not on objective medical findings within the realm of his expertise as a gynecologist, but, rather, on the victim's emotional state and information given him by the victim. *Smith, supra* at 112-113. The *Smith* Court relied heavily upon its previous decision in *People v McGillen #2*, 392 Mich 278; 220 NW2d 689 (1974), in reaching this conclusion. In *McGillen #2*, the Court reversed a rape conviction after concluding that the physician testifying for the prosecution was not testifying based on medical evidence, but rather on what he had been told by the victim. *McGillen #2, supra* at 286.

These cases are inapposite. Medical examiners are charged by law with the duty to investigate the cause and manner of death in all cases of persons whose death was unexpected or caused by violence. MCL 52.202; 52.205(3). Attendant with that responsibility is the duty to actually formulate an opinion as to the cause and manner of death in light of known facts and circumstances. See *id*. In this case, the medical examiner testified that he determined that Filipovska had an enlarged heart due to sustained high blood pressure which placed her at high risk for sudden death and, indeed, the cause of her death was a heart attack. He further testified that, because he did not know how her body ended up some distance from her car, i.e., the circumstances in which the death occurred, he could not determine the manner of her death but did know "that this did not fit the particular profile of a natural death." He clarified that to determine "the manner of death," a medical examiner needs some kind of factual account of the circumstances surrounding the death. The medical examiner also indicated that after receiving additional information from the police that Filipovska was the victim of a robbery, he was able to determine that such facts were consistent with the scenario presented – that she had an enlarged heart which had not caused severe, obvious consequences until the "right trigger" came along, an extremely stressful event like an assault involving a struggle and being held down. He testified that these kinds of stress-induced heart attacks were well-documented in forensic pathology literature and that he saw at least a couple cases a year.

Contrary to the situation presented in *Smith*, *supra*, here, the physician was a medical examiner and an expert in forensic pathology, as stipulated by the parties, which is the specific branch of medicine that specializes in investigating and interpreting evidence dealing with diseases and disorders of the body, especially those that cause death. See Black's Law Dictionary (7^{th} ed). Accordingly, the scope of his expertise includes determining the cause and manner of deaths. As he testified, the manner of death, i.e., whether it is natural, homicide, suicide, accidental, or indeterminate is determined by the objective facts and circumstances surrounding the death. A medical examiner, by law, must make a manner of death determination in every case. MCL 52.202. Accordingly, such expert opinion testimony is "directly related to and within the immediate scope of the witness' expertise" and, thus, is permissible. See *Franzel, supra*. Further, the issue whether the fatal heart attack was the result of natural causes or homicide was not within the knowledge of the common juror, i.e., a specialized understanding of the heart and its functioning as related its preexisting condition is necessary. However, as with any other expert testimony, it may be challenged on cross-examination. Here, during cross-examination, defense counsel challenged the factual basis of the medical examiner's opinion specifically questioning whether some other hypothetical stressful event could have caused Filipovska's fatal heart attack. In response, the medical examiner testified that the stressful event would have had to be of an extreme nature to trigger the heart attack, such as that associated with an assault and struggle. It was clear that the medical examiner based his conclusions regarding there being a homicide on the assumption that Filipovska was robbed as described to him by the police officer. It was for the jury to determine the weight of the testimony. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Givans*, 227 Mich App 113, 123-124; 575 NW2d 84 (1997). Accordingly, defendant's counsel was not ineffective for failing to object to the testimony and defendant has failed to establish plain error warranting reversal with regard to the admission of the testimony.

Defendant next argues that the trial court pierced the veil of judicial impartiality when it interrupted defense counsel's cross-examination of the medical examiner. We disagree. Because defendant failed to preserve this issue by objecting at trial, our review is for plain error affecting defendant's substantial rights. See *Carines*, *supra*.

A trial court is authorized to interrogate witnesses at trial. MRE 614(b). However, the court's discretion is not unlimited. *People v Hartsuff*, 213 Mich App 338, 349; 539 NW2d 781 (1995), quoting *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). The trial court may question witnesses to clarify testimony or elicit additional relevant information, but such questions may not be intimidating, argumentative, prejudicial, unfair, or partial. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). The test is whether the trial court's questions and comments may have unjustifiably aroused the jury's suspicion regarding witness credibility and whether partiality quite possibly could have influenced the jury against defendant's case. *People v Conyers*, 194 Mich App 395, 405; 487 NW2d 787 (1992). Generally, critical, disapproving, and hostile remarks toward counsel, the parties, or their cases do not support a challenge for partiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996).

Here, the trial court ruled on objections, attempted to control the proceedings in an orderly fashion, and responded to an incorrect characterization of the court's comments by defense counsel. The court was not discourteous to defense counsel, nor did it belittle counsel. Despite ruling in favor of the prosecution's objection to a line of questioning, the court allowed defense counsel to ask the questions anyway. Because the trial court's remarks did not pierce the veil of judicial impartiality, plain error warranting reversal has not been demonstrated and defendant was not denied the effective assistance of counsel for failing to object on this ground.

Finally, defendant argues that the trial court committed instructional error and the prosecution engaged in prosecutorial misconduct in making misstatements of the law related to felony murder during opening and closing statements. Again, defendant failed to preserve this issue for appeal by objecting at trial; therefore, we will review the issue for plain error affecting defendant's substantial rights. See *Carines*, *supra*.

In reviewing claims of error in jury instructions, we examine the instructions in their entirety. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Aldrich*, *supra*. When reviewing allegations of prosecutorial misconduct, we examine the pertinent portion of the record and evaluate a prosecutor's remarks in context to determine whether the defendant received a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

Here, defendant concedes in his brief that the trial court and the prosecution, in addition to making inaccurate statements of the law, also made accurate statements of the law. Viewed as a whole, we conclude that the jury instructions accurately conveyed the law of felony murder to the jury. On the whole, we also conclude that the prosecution's remarks on the law of felony murder were accurate. Even if they were not, the trial court's instructions included a cautionary

instruction that the arguments and statements of counsel were not evidence, and the prosecutor herself counseled that the trial court's statements of the law, and not any statements she made, constituted the law the jury was required to apply. Juries are presumed to follow the court's instructions, and "instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 278-279; 662 NW2d 836 (2003). Accordingly, we conclude that the trial court's and the prosecution's remarks regarding the law of felony murder did not constitute plain errors requiring reversal. Further, defense counsel's failure to object on this ground did not constitute ineffective assistance of counsel.

Affirmed.

/s/ Bill Schuette
/s/ Mark J. Cavanagh
/s/ Helene N. White