

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 12, 2017

v

STEVEN MARK KELTY,

Defendant-Appellant.

No. 334295
Livingston Circuit Court
LC No. 15-022779-FH

Before: O'CONNELL, P.J., and BECKERING and STEPHENS, JJ.

PER CURIAM.

A jury convicted defendant, Steven Mark Kelty, of operating a motor vehicle while license suspended or revoked causing death, MCL 257.904(4), and operating a motor vehicle with the presence of a controlled substance [THC (marijuana)] causing death, MCL 257.625(4). The trial court sentenced Kelty as a third-offense habitual offender, MCL 769.11, to a prison term of 15 to 30 years for each conviction. Kelty appeals as of right. We affirm.

I. BACKGROUND

Kelty's convictions arose from a collision between a motorcycle and Kelty's Chevrolet Blazer on an early morning in September 2014. According to an eyewitness, the motorcycle turned right from Figurski Road into a northbound lane of Latson Road. Kelty was driving his Blazer southbound on Latson Road, intending to make a left turn onto Figurski Road, when he turned too early and collided nearly head-on with the motorcycle. The motorcyclist was killed.

Kelty conceded at trial that he was operating the vehicle with a suspended or revoked license and that he had THC in his system at the time of the collision. Whether Kelty's conduct was a proximate cause of the motorcyclist's death was a principal issue at trial. The parties do not dispute that the charged offenses did not involve an element of intoxication.

II. DISCUSSION

On appeal, Kelty challenges the prosecution's references to two medications, Flexeril and Valium, in his system and their clinical effects. Kelty also argues that defense counsel was ineffective for failing to move to exclude mention of the presence of these medications and a THC metabolite in Kelty's system. Next, Kelty argues that the trial court abused its discretion by permitting an eyewitness, who was a former police officer, to testify about his lay opinion of

the cause of the collision. Finally, Kelty argues that the the trial court's upward departure sentence was unreasonable. We conclude that Kelty has identified no errors requiring reversal.

A. EVIDENTIARY ERROR

Kelty first argues that the trial court erred by allowing the prosecution to comment during the opening statement that blood test results revealed that defendant had THC, Flexeril, and Valium in his system at the time of the accident, to comment on the effect of these drugs on the body, and to elicit testimony that blood test results showed the presence of Flexeril and Valium in his system at the time of the accident. To preserve a claim of error for appeal, the party asserting the error must raise the issue before the trial court. *People v Danto*, 294 Mich App 596, 605; 822 NW2d 600 (2011). Although Kelty objected to a juror's question about signs of intoxication, Kelty did not object to the prosecution's reference to Flexeril and Valium in the opening statement or to the trooper's testimony about the results of his blood tests. Therefore, this claim of error is unpreserved. This Court reviews unpreserved claims of evidentiary error for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). An unpreserved error affects a defendant's substantial rights when it is prejudicial, i.e., when it affects the outcome of the trial court proceedings. *Id.* at 763.

Even assuming that Kelty could establish plain error with respect to the prosecution's opening statement and the admission of the evidence concerning the presence of Flexeril and Valium in his system, Kelty has not demonstrated that the error affected his substantial rights. To obtain convictions for operating a motor vehicle with a suspended or revoked license causing death, MCL 257.904(4), and operating a motor vehicle with the presence of a controlled substance causing death, MCL 257.625(4), the prosecution must establish causation. To prove causation, the prosecution must prove both factual and proximate cause. *People v Feezel*, 486 Mich 184, 194; 783 NW2d 67 (2010). "Factual causation exists if a finder of fact determines that 'but for' defendant's conduct the result would not have occurred." *Id.* at 194-195. "Proximate causation is a legal construct designed to prevent criminal liability from attaching when the result of the defendant's conduct is viewed as too remote or unnatural." *Id.* at 195 (quotation marks and citation omitted). The "victim's injury must be a direct and natural result of the defendant's actions." *People v Schaefer*, 473 Mich 418, 436; 703 NW2d 774 (2005) (quotation marks and citation omitted), overruled in part on other grounds by *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006), overruled in part on other grounds by *Feezel*, 486 Mich 184. Therefore, the question was whether Kelty's operation of the vehicle proximately caused the motorcyclist's death, not whether a reason explained how Kelty was operating his vehicle.

Several witnesses testified about the cause of the collision. An eyewitness testified that Kelty's Blazer turned too early, causing the collision. The Michigan State Police trooper who responded to the scene testified that the Blazer was in the oncoming traffic lane at the time of the collision. An accident investigator at the scene testified that the Blazer was traveling on the wrong side of the road before reaching the intersection. The prosecution's accident reconstruction expert testified that the Blazer was traveling in the wrong lane of traffic and caused the collision. Kelty's accident reconstruction expert agreed with the results of the prosecution's expert's investigation and conclusions. Thus, the evidence overwhelmingly indicated that Kelty was driving his Blazer southbound in the northbound lane of Latson Road when the motorcycle legally turned into the northbound lane of Latson Road and collided head-

on with Kelty's Blazer, thereby demonstrating that Kelty's operation of the motor vehicle directly and naturally caused the motorcyclist's death. Therefore, the evidence concerning the presence of Flexeril and Valium in Kelty's body did not affect Kelty's substantial rights.

Kelty also argues that defense counsel was ineffective for failing to file a motion in limine before trial to exclude evidence of Flexeril or Valium in Kelty's system or the effect of those drugs on Kelty's body. Because Kelty did not raise an ineffective assistance of counsel claim in an appropriate motion in the trial court, "our review is limited to mistakes apparent from the record." *People v Lane*, 308 Mich App 38, 68; 862 NW2d 446 (2014). To establish ineffective assistance of counsel, "the defendant must show that (1) defense counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that counsel's deficient performance prejudiced the defendant." *Id.* Prejudicial error occurred if "the result of the proceeding would have been different." *Id.*

We are not persuaded that defense counsel was ineffective for failing to file a motion in limine because there was no indication that the challenged information would be presented at trial. Further, Kelty fails to explain how preclusion of the evidence would have probably changed the outcome of the trial. Intoxication is not an element of the offenses, and several witnesses testified that Kelty was driving his vehicle in the wrong lane of traffic at the time of the collision. The jury did not have to determine *why* defendant operated a motor vehicle in a manner that caused the death of another person, but only whether Kelty proximately caused the death of another person by his operation of a motor vehicle. Kelty has not shown a reasonable probability that the result of the trial would have been different if defense counsel had moved to preclude mention of the presence of Flexeril and Valium in Kelty's system.

B. LAY WITNESS TESTIMONY

Kelty next argues that the trial court erred by allowing an eyewitness, a former police officer, to offer a lay opinion regarding the cause of the collision. We review this preserved evidentiary claim for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id.* at 217.

A lay witness may testify about his opinion, but he must limit his testimony "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. In *Miller v Hensley*, 244 Mich App 528, 531; 624 NW2d 582 (2001), this Court noted the admission of "lay opinion testimony from investigating police officers regarding fault in traffic accidents when the testimony was the result of direct observations and analysis of the accident scene." The officers' testimony in *Miller* was inadmissible under MRE 701 because the officers based their opinions on other witnesses' statements, not direct observations of the collision for which the officers were not present. *Id.*

By contrast, in the present case, the witness was testifying as an eyewitness to the collision, not as a former police officer. Although the witness was a former police officer with training in accident investigation, he based his opinion regarding the cause of the collision on his own view of the vehicles and his observations of the point of impact. His opinion testimony was

admissible under MRE 701 because it was rationally based on his perceptions of the vehicles and the collision and his opinions were helpful to a clear understanding of his testimony and the determination of facts in issue.

Further, the prosecution did not improperly elicit testimony regarding the witness's training and experience as a police officer because that testimony was probative of the witness's ability to perceive and assess details of an event as it was happening, so it was relevant to the weight to be accorded to the witness's observations and inferences drawn from those observations. In addition, the fact that the witness's testimony provided an opinion on an ultimate question in dispute was not a basis for excluding his testimony because MRE 704 provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Accordingly, the trial court did not abuse its discretion by allowing the witness to offer a lay opinion regarding the cause of the accident.

C. REASONABLENESS OF SENTENCE

Finally, Kelty argues that the trial court unreasonably departed from the sentencing guidelines range of 50 to 150 months and imposed minimum sentences of 180 months for each of his convictions. We review a departure sentence for reasonableness. *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015). A sentence is reasonable and not an abuse of discretion if it does not violate the principle of proportionality. *People v Steanhouse*, 500 Mich 453, 471; 902 NW2d 327 (2017). Proportionality depends on the seriousness of the offense, not the recommended guidelines range. *Id.* at 472. The sentencing court should "take into account the nature of the offense and the background of the offender." *Id.* (quotation marks and citation omitted). Other factors "include (1) whether the guidelines accurately reflect the seriousness of the crime, (2) factors not considered by the guidelines, and (3) factors considered by the guidelines but given inadequate weight." *People v Dixon-Bey*, ___ Mich App ___; ___ NW2d ___ (2017) (Docket No. 331499); slip op at 18-19 (citations omitted).

In this case, the trial court recognized that the sentencing guidelines were advisory and acknowledged the applicable guidelines range as 50 to 150 months before sentencing Kelty to a minimum term of 15 years. Kelty does not challenge the individual prior record variable (PRV) scores but responds by asserting that the PRV scores fully account for the factors justifying the upward departure. Although the trial court recognized that the current offense did not involve intoxication and that the PRVs quantify Kelty's criminal history, the trial court was reasonably concerned that the PRVs did not adequately consider Kelty's seven prior convictions for driving-related offenses. A defendant's persistent struggle with a particular type of offense justifies a departure from the sentencing guidelines range. See, e.g., *People v Solmonson*, 261 Mich App 657, 671-672; 683 NW2d 761 (2004). The PRVs do not take into consideration that Kelty has repeatedly engaged in the same type of criminal behavior that caused a death in this case. Likewise, the trial court reasonably considered Kelty's continued disregard for the law by driving for 12 years after the suspension or revocation of his license, in addition to his continued driving while using controlled substances that placed the community at risk. The trial court's consideration of these factors justified its departure sentence and the reasonableness of the 2½ year departure, so Kelty's sentences do not violate the principle of proportionality.

We affirm.

/s/ Peter D. O'Connell

/s/ Jane M. Beckering

/s/ Cynthia Diane Stephens