STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUSTIN MICHAEL WHITE,

Defendant-Appellant.

UNPUBLISHED
February 18, 2021

No. 351017
Oakland Circuit Court
LC No. 2018-269236-FH

Before: FORT HOOD, P.J., and GADOLA and LETICA, JJ.

PER CURIAM.

A jury convicted defendant, Justin Michael White, of operating a motor vehicle while intoxicated (OWI) causing death, MCL 257.625(4), and OWI causing serious impairment of a body function, MCL 257.625(5)(a). The trial court sentenced defendant to serve 6 to 15 years' imprisonment for his conviction of OWI causing death and 2 to 5 years' imprisonment for his conviction of OWI causing serious impairment. Defendant appeals as of right. We affirm.

I. FACTS

Defendant's convictions arise from a motor vehicle accident that occurred after midnight on February 18, 2018. At that time, defendant was driving a Ford Edge in the eastbound lane of Lakeville Road, a two-lane road separated by a double yellow line that becomes a solid yellow with a dash at the point where the accident took place. As defendant approached a curve, he lost control of his car, crossed the centerline into the westbound lane, and collided head-on with a Ford Fiesta driven by John Considine. Misty Considine was seated in the front passenger seat at the moment of impact. The stretch of road where the collision happened was dark and covered by a dusting of snow.

The vehicles sustained significant damage and came to rest in the middle of the westbound lane without working lights. In addition, the Considines' Fiesta was severely compressed and, because of this damage, its doors could not open. As a result, the Considines were trapped inside the Fiesta. Around that same time, Ralph Gilles and his wife were traveling eastbound on Lakeville Road in their Jeep Wrangler towards the collision damage involving defendant and the Considines. Eventually, Gilles and his wife came upon the scene, and noticed that the vehicles sustained heavy

damage and that the area around the collision was very dark. Gilles, who stopped to help, also observed that Misty was unconscious and "just laying there," while John was "rocking a little bit and moaning asking for help."

Meanwhile, Racheal Slezak was driving home from work in her Buick LeSabre in the westbound lane unknowingly approaching the accident scene. About a quarter mile away, Slezak saw hazard lights from Gilles's Jeep parked on the shoulder of the eastbound lane, and what she thought was "fog" typical for the area. However, it was very dark and the disabled vehicles were stopped in her lane of traffic without any lights and emitting smoke or steam.

Slezak's Buick collided with the rear bumper or tire area of the passenger side of the Considines' Fiesta, spun sideways, and "side-slapped" the right rear passenger door of the Fiesta. Slezak did not see the vehicles until she was only 20 to 30 feet away and "hit the brake" a "split second" before the collision. The Fiesta spun around and its driver's side rear bumper struck defendant's Edge, which caught fire. Fearing that the Considines' Fiesta would catch fire given its close proximity to defendant's Edge, Gilles used his Jeep to push the Edge away from the Fiesta.

Firefighters arrived shortly thereafter, put out the car fire, and removed John and Misty from the Fiesta. John and Misty were then transported to the hospital. Later that morning, Misty died from her multiple and extensive accident-related injuries. John survived, but his feet were "totally crushed" and he required multiple surgeries.

Defendant, who admittedly drank alcohol before the accident, was taken into custody at the scene on suspicion of OWI. Almost three hours after the accident defendant provided a blood sample. Testing of the sample by the Michigan State Police (MSP) laboratory revealed that defendant's blood alcohol content (BAC) was .130 grams of alcohol per 100 milliliters of blood.

A jury convicted defendant of OWI causing death and OWI causing serious impairment. Defendant now appeals to this Court.

II. ANALYSIS

On appeal, defendant contends that the trial court erred when it denied his request for a clarifying instruction on intervening causes, which he maintains denied him the right to a fair trial. Defendant also contends that he was denied a fair trial because the prosecutor shifted the burden of proof by arguing that defendant could have sought an independent test of one of his blood samples. In addition, defendant argues that trial counsel was ineffective for failing to examine the need for an expert witness to establish his defense.

A. JURY INSTRUCTION ON INTERVENING CAUSATION

Defendant's first argument focuses on the second collision involving Slezak. Defendant claims that the evidence regarding this second collision supported a jury instruction on intervening and superseding causation, and that the trial court abused its discretion in denying his request for such an instruction. We disagree.

"To preserve an instructional error for review, a defendant must object to the instruction before the jury deliberates." *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003),

citing MCR 2.515(C). Here, defendant requested a supplemental instruction on intervening and superseding causation after the presentation of evidence, which the trial court denied. Defendant objected to the denial of his request and, thus, preserved this issue for appeal.

" 'A criminal defendant has the right to have a properly instructed jury consider the evidence against him.' " *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000), quoting *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995). This Court has explained:

> It is the function of the trial court to clearly present the case to the jury and instruct on the applicable law. Accordingly, jury instructions must include all the elements of the charged offenses and any material issues, defenses, and theories that are supported by the evidence. The determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court.
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> A defendant's request for a jury instruction on a theory or defense must be granted if supported by the evidence. However, if an applicable instruction was not given, the defendant bears the burden of establishing that the trial court's failure to give the requested instruction resulted in a miscarriage of justice. Reversal for failure to provide a jury instruction is unwarranted unless it appears that it is more probable than not that the error was outcome determinative. [*People v McKinney*, 258 Mich App 157, 162-163; 670 NW2d 254 (2003) (quotation marks and citations omitted).][1]

Both OWI offenses with which defendant was charged "contain an element of causation, so the prosecution was required to prove causation beyond a reasonable doubt for each offense." *People v Feezel*, 486 Mich 184, 193; 783 NW2d 67 (2010). See also *People v Schaefer*, 473 Mich 418, 438, 446; 703 NW2d 774 (2005), modified in part on other grounds by *People v Derror*, 475 Mich 316, 334; 715 NW2d 822 (2006), overruled in part on other grounds by *Feezel*, 486 Mich at 204-217. "In criminal jurisprudence, the causation element of an offense is generally comprised of two components: factual cause and proximate cause." *Schaefer*, 473 Mich at 435. "Factual causation exists if a finder of fact determines that 'but for' defendant's conduct the result would not have occurred." *Feezel*, 486 Mich at 194-195.

However, to hold an individual criminally responsible, "[t]he prosecution must also establish that the defendant's conduct was a proximate cause" of the accident or the victim's harm. *Id*. at 195. "Proximate causation 'is a legal construct designed to prevent criminal liability from

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[1] Further, MCL 769.26 provides:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

attaching when the result of the defendant's conduct is viewed as too remote or unnatural.' " *Id*., quoting *Schaefer*, 473 Mich at 436. In *Schaefer*, our Supreme Court explained the concept of proximate causation:

> For a defendant's conduct to be regarded as a proximate cause, the victim's injury must be a "direct and natural result" of the defendant's actions. In making this determination, it is necessary to examine whether there was an intervening cause that superseded the defendant's conduct such that the causal link between the defendant's conduct and the victim's injury was broken. If an intervening cause did indeed *supersede* the defendant's act as a legally significant causal factor, then the defendant's conduct will not be deemed a proximate cause of the victim's injury. [*Schaefer*, 473 Mich at 436-437 (citations omitted).]

Accordingly, "[t]he standard by which to gauge whether an intervening cause supersedes, and thus severs the causal link, is generally one of reasonable foreseeability." *Id*. at 437. See also *Feezel*, 486 Mich at 195.

In this case, the trial court instructed the jury, pursuant to the standard instructions, on the elements of OWI causing death, M Crim JI 15.11, and OWI causing serious impairment, M Crim JI 15.12, which explained the concepts of factual and proximate cause. Defendant argues that these instructions were inadequate because Slezak's subsequent collision with the Considines' vehicle was an intervening cause of Misty's death and John's impairment that superseded his criminal conduct, and thus that he was entitled to have the jury further instructed that "[y]ou may find that a superseding act, not the defendant's operation, was the cause of the victims[']death/serious injury only if there is gross negligence or intentional misconduct." To warrant this instruction, there must be evidentiary support from which the trier of fact could reasonably conclude that Slezak's subsequent collision broke the causal link between defendant's collision and the Considines' harm. *Schaefer*, 473 Mich at 436-437. We find such evidence lacking in this case.

Instructive is *People v Bailey*, 451 Mich 657, 676; 549 NW2d 325 (1996), amended in part on other grounds 453 Mich 1204 (1996), where our Supreme Court, in addressing the concepts of proximate and intervening cause, explained:

> In assessing criminal liability for some harm, it is not necessary that the party convicted of a crime be the sole cause of that harm, only that he be a contributory cause that was a substantial factor in producing the harm. The criminal law does not require that there be but one proximate cause of harm found. Quite the contrary, all acts that proximately cause the harm are recognized by the law.
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> "If a certain act was a substantial factor in bringing about the loss of human life, it is not prevented from being a proximate cause of this result by proof of the fact that it alone would not have resulted in death, nor by proof that another contributory cause would have been fatal even without the aid of this act." [Quoting Perkins & Boyce, Criminal Law (3d ed), p 783.]

Thus, "[w]here an independent act of a third party intervenes between the act of a criminal defendant and the harm to a victim, that act may only serve to cut off the defendant's criminal liability where the intervening act is the sole cause of harm." *Bailey*, 451 Mich at 677. The Supreme Court in *Schaefer* elaborated:

> The linchpin in the superseding cause analysis . . . is whether the intervening cause was foreseeable based on an objective standard of reasonableness. If it was reasonably foreseeable, then the defendant's conduct will be considered a proximate cause. If, however, the intervening act by the victim or a third party was not reasonably foreseeable—e.g., *gross* negligence or intentional misconduct—then generally the causal link is severed and the defendant's conduct is not regarded as a proximate cause of the victim's injury or death. [*Schaefer*, 473 Mich at 437-438.]

That is, evidence of grossly negligent conduct might constitute evidence of a sole, intervening cause, but "[a]nything less than that constitutes, at most, merely a contributory cause of [injury or] death, in addition to the defendant's conduct." *Bailey*, 451 Mich at 679.

Applying these principles, we conclude that the trier of fact could not reasonably conclude from the evidence that Slezak's collision constituted the sole, intervening cause of Misty's death and John's serious impairment, and thus that the trial court did not abuse its discretion in declining to give an instruction on intervening, superseding causation. The uncontradicted evidence established that defendant caused the first accident when he lost control of his vehicle, crossed over the centerline, and collided head-on with the Considines' Fiesta.[2] Further, the only reasonable conclusion from the evidence presented was that defendant's head-on collision with the Considines' vehicle was a substantial factor in producing the resultant harm, if not the exclusive cause. The front-end of the Considines' Fiesta was so "compressed" after the head-on collision that defendant and Gilles could not open its doors to help John and Misty, who were trapped inside.

Deputy Jerry Yaldoo, a crash reconstructionist who testified for the prosecution, explained that defendant's head-on collision was so severe it would normally result in death or serious injury because it involved two moving vehicles that came to a "violent abrupt stop" in milliseconds. He explained that, because the Considines were located in the front seat, they would have absorbed all the "blunt force" from the head-on impact. Data obtained from the vehicles' event data recorders supported Yaldoo's opinion. Consistent with the evidence regarding the severity of the head-on collision, a medical examiner testified to Misty's multiple blunt force injuries, and John testified that his feet were "totally crushed."[3] Because John and Misty were in the front seat when

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[2] There was no indication, nor does defendant argue, that John Considine lost control of the Fiesta. Instead, the evidence indicated that he was going the speed limit in the proper lane of traffic.

[3] MCL 257.58c defines "[s]erious impairment of a body function" as including, but not limited to, the "[l]oss or substantial impairment of a bodily function." Defendant did not dispute that John suffered a serious impairment of a body function.

defendant collided head-on with their Fiesta, which compressed its entire front-end, their serious injuries logically resulted from that collision.

In contrast, Slezak collided with the victims' rear passenger side with less velocity and force because the Fiesta was then stopped.[4] Moreover, while Yaldoo explained that the force of Slezak's collision would possibly cause serious nonfatal injury to an occupant in the rear passenger seat, that seat was unoccupied, and the Considines were in the front seat. Although neither party presented evidence differentiating which precise injuries were caused by which accident, the only reasonable conclusion from the evidence was that the Considines sustained serious injuries as a direct and natural result of defendant's head-on collision with their vehicle *before* Slezak's collision, the alleged intervening act. Defendant's head-on collision was, at a minimum, a substantial factor, i.e., a contributory cause, in bringing about John's serious injuries and Misty's death. See *Bailey*, 451 Mich at 676.

On this evidence, a trier of fact could not reasonably conclude that Misty's death and John's serious impairment resulted *solely* from Slezak's collision so as to constitute a potential independent, intervening cause that broke the link between defendant's collision and the Considines' harm to cut off his criminal liability. At best, the evidence showed that the Considines' injuries resulted from the combined effect of both collisions—that Slezak's subsequent collision with the Considines' vehicle was a "possible additional, contributory cause" of Misty's death and John's impairment along with defendant's collision. *Bailey*, 451 Mich at 680. But, a mere contributory cause of injury in addition to the defendant's conduct does not constitute a legally sufficient intervening cause to cut off a defendant's criminal liability for the death and impairment that occurred. See *Bailey*, 451 Mich at 676. Defendant presented no evidence to suggest that Slezak's collision alone would have caused John's injuries and Misty's death.

Further, the evidence did not suggest that Slezak's collision with the Considines' vehicle was unforeseeable, or that her conduct was grossly negligent, to break the causal chain between defendant's conduct and the Considines' harm. See *Schaefer*, 473 Mich at 436-438. Here, as the direct result of defendant's head-on collision with the Considines' vehicle, two disabled vehicles with no working lights came to rest in the middle of the roadway on a dark and unilluminated area at night, creating the unexpected and serious danger that an approaching vehicle might not be able to avoid the vehicles. This hazard, set in motion by defendant's collision, clearly presented a foreseeable risk of further injury to the Considines who remained trapped inside their vehicle. While Slezak's inability to stop in time to avoid colliding with the Considines' vehicle was arguably a contributing factor, we cannot conclude that her conduct was unforeseeable given the conditions she faced: witnesses described an "extremely dark" or "pitch black" night on a snow-covered stretch of roadway without streetlights, along with disabled and unlit vehicles, when the

[4] Deputy Yaldoo opined that defendant's head-on collision with the Considines was "severe," "much more serious," and "worse," and would cause greater injury and damage than Slezak's subsequent collision. In addition, Yaldoo explained that the Fiesta's Delta-v from defendant's collision was negative 55.66 miles per hour, whereas its Delta-v from Slezak's collision was 20 to 22 miles per hour, and that the higher the Delta-v, the more severe the collision.

only lights in view were the hazard lights from Gilles's car in the shoulder of the opposite lane, and when the smoke or steam from the crashed vehicles resembled characteristic fog.[5] Defendant presented no evidence indicating that Slezak was, or should have been, aware of the danger presented by disabled vehicles stopped in her lane of traffic.

Furthermore, there was no evidence suggesting that Slezak was driving in a grossly negligent manner, i.e., that she was aware of the risk presented, but acted with " 'wantonness and disregard of the consequences which may ensue . . . .' " *Feezel*, 486 Mich at 195, quoting *People v Barnes*, 182 Mich 179, 198; 148 NW 400 (1914). By all accounts, Slezak was driving normally in her lane of traffic and was in control of her vehicle. She had exercised caution by traveling "a little" slower than normal and below the speed limit because of the snowy road conditions. And there was nothing indicating that Slezak lacked alertness, or was distracted, intoxicated, or otherwise compromised, or that she was not driving at a safe speed given the road conditions. Gilles, who witnessed the accident, surmised that Slezak did not have time to avoid the vehicles because she did not realize "what was going on" until the "last possible second." Similarly, Gilles's wife, who also witnessed the accident, surmised that Slezak was not aware of the accident because it was dark and "there weren't any lights" on the vehicles.

On this record, we conclude that Slezak's inability to protect herself and the Considines from the consequences of defendant's "unexpected introduction of a serious hazard" in her lane of traffic could not constitute an intervening cause to sever the causal chain between defendant and the Considines' harm. *People v Bergman*, 312 Mich App 471, 486; 879 NW2d 278 (2015). At best, Slezak's conduct in colliding with the Considines' vehicle amounted to ordinary negligence, which, again, is reasonably foreseeable and thus "insufficient to exculpate an intoxicated driver." *Feezel*, 486 Mich at 200 n 8. See also *Schaefer*, 473 Mich at 438-439. Because Slezak's collision was a reasonably foreseeable result of defendant's collision, it could not legally constitute an intervening cause of Misty's death and John's impairment to cut off defendant's criminal liability. See *Schaefer*, 473 Mich at 436-439. Therefore, the trial court adequately instructed the jury on the issue of causation when it explained that defendant's operation of his vehicle must have been both a factual and a proximate cause of Misty's death and John's impairment.

[5] Slezak testified that she did not notice the crashed vehicles in her lane of traffic until she was only 20 to 30 feet away and it was too late to stop. While she noticed the hazard lights from Gilles's vehicle as she approached about a quarter of a mile from the accident, those lights did not actually alert her to the danger posed by the crashed vehicles stopped in her lane and she remained completely unaware that she was driving toward the vehicles—she testified that she merely thought "somebody had pulled over, there was something wrong with their car but she didn't think there was anything more to it than that," which was a reasonable conclusion considering that Gilles's vehicle was on the shoulder of the eastbound lane and Slezak was driving in the westbound lane. Although Slezak took her foot of the gas when she saw what she thought was fog, she did not "hit the brake until a split second" before the collision. Deputy Yaldoo testified that Slezak's collision was unavoidable by the time she saw the crashed vehicles.

B. PROSECUTORIAL ERROR

Defendant next argues that the prosecutor impermissibly shifted the burden of proof on the element of intoxication to defendant by encouraging the jury to ask why the defense did not arrange for its own independent testing of defendant's blood sample, thereby depriving him of a fair trial. We disagree.

We review claims of prosecutorial error "de novo to determine whether the defendant was denied a fair and impartial trial." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). An issue regarding prosecutorial error is preserved when the defendant contemporaneously objects and requests a curative instruction. *Id*. Defendant objected to the prosecution's statements during closing arguments and requested a curative instruction. Therefore, defendant has preserved this issue of alleged error for appellate review.

"Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). "The prosecutor's statements are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial." *People v Mullins*, 322 Mich App 151, 172; 911 NW2d 201 (2017) (quotation marks and citation omitted). "Generally, prosecutors are given great latitude regarding their arguments and are free to argue the evidence and all reasonable inferences from the evidence as they relate to their theory of the case." *Id*. (quotation marks and citation omitted). Limits exist, however:

> A prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof. Also, a prosecutor may not comment on the defendant's failure to present evidence because it is an attempt to shift the burden of proof. However, a prosecutor's argument that inculpatory evidence is undisputed does not constitute improper comment. [*People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010) (citations omitted).]

Further, "[i]t is not error to comment on the failure of the defense to produce evidence on a phase of the defense upon which the defendant seeks to rely." *People v McGhee*, 268 Mich App 600, 634; 709 NW2d 595 (2005) (quotation marks and citations omitted). "Moreover, attacking the credibility of a theory advanced by a defendant does not shift the burden of proof." *McGhee*, 268 Mich App at 635. Even "improper remarks by the prosecutor might not require reversal if they respond to the issues raised by the defense." *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003).

Defendant contends the following prosecutorial rebuttal argument was improper: "Blood test. . . . I have a question. If we're to believe all the argument questions, an attempt to discredit the reliability and accuracy of that blood test, why not get it tested by an independent agency?" Defendant objected and, after the trial court overruled his objection, the prosecutor continued:

> So, that's my question, ladies and gentlemen, if there was such a problem with the test results in this case, if this was so inaccurate, there was carryover, if there was a problem with the maintenance in the machines, you have an entire tube

> of blood, a separate tube of blood that hasn't been touched; you send it out. Find out for yourself.

In *Callon*, 256 Mich App at 329, the defendant, as here, claimed that the prosecutor "improperly argued to the jury that he could have performed his own testing of the blood tested by the police to verify whether it was his, and that the prosecutor's closing argument denied him a fair trial by shifting the burden of proof to him." This Court concluded:

> Defendant's argument that the prosecutor's statements shifted the burden of proof is without merit. The prosecutor merely argued that the evidence proved defendant's guilt beyond a reasonable doubt despite defendant's exculpatory version of events. A prosecutor's argument that inculpatory evidence is undisputed does not constitute improper comment. Here, the prosecutor did not shift the burden of proof; she merely attacked the credibility of a theory defendant advanced at trial that there was a mistake made in the custody or testing of the blood seized by the police. [*Id*. at 331 (citations omitted).]

Likewise, our Supreme Court explained:

> [W]here a defendant . . . advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. [*People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995).]

Here, we conclude that the prosecutor did not impermissibly shift the burden of proof on the element of intoxication to defendant. The clear implication of defense counsel's argument, and related questioning of the MSP scientist who performed the blood alcohol testing of defendant's sample, was an attempt to discredit her testing in order to attack the reliability of defendant's BAC test results, which the prosecution relied on to prove that defendant was legally intoxicated. As in *Callon*, in this context the challenged prosecutorial argument was responsive to defense counsel's theory attempting to discredit the reliability of the MSP's blood alcohol testing and defendant's test results and, thus, was not improper.[6] The prosecutor was permitted to

[6] The prosecutor's argument was supported by the evidence. Brina Gendhar, the MSP scientist who performed the blood alcohol testing of defendant's sample, testified that one reason the MSP lab retained in its possession an extra untouched tube of blood is for independent testing. Gendhar explained:

> The first reason is we like to leave one tube completely untouched by our agency in the event that somebody does not trust our results and would like to have that

argue that the MSP lab results were accurate, and she did not shift the burden of proof by remarking on defendant's failure to have his blood independently tested when defense counsel advanced the theory that those results were not reliable.

Contrary to defendant's argument, the prosecutor's remarks did not impermissibly encourage the jury to conclude that defendant had been intoxicated from defendant's failure to advance evidence to the contrary. See *id*., 450 Mich at 113; *Callon*, 256 Mich App at 331. Again, a prosecutor is afforded wide latitude during argument and may argue evidence and all reasonable inferences that arise from the evidence in relation to the theories presented. *Mullins*, 322 Mich App at 172. Given the context, the trial court did not err in finding that defense counsel "opened the door" to the challenged rebuttal argument.

Moreover, the trial court instructed the jury regarding the presumption of innocence and the prosecution's burden, which properly informed the jury that the burden of proof rests with the prosecution, not the defense, and those instructions should have adequately "dispelled any prejudice arising from the prosecutor's comment[s]." *Callon*, 256 Mich App at 331. Additionally, the trial court instructed the jury that the lawyers' statements and arguments are not evidence. This Court "must presume that the jury followed these instructions." *Fyda*, 288 Mich App at 465. Accordingly, defendant was not denied a fair trial by the challenged remarks.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant contends that he was denied the effective assistance of counsel by his trial attorney's failure to investigate the need for, or to retain, an accident reconstruction expert to support his defense that Slezak's accident was an intervening, superseding cause of Misty's death and John's serious impairment. We disagree.

The United States and Michigan Constitutions guarantee that in all criminal prosecutions the accused shall enjoy the right to effective assistance of counsel. *People v Kammeraad*, 307 Mich App 98, 122; 858 NW2d 490 (2014). Arguments based on ineffective assistance of counsel present a mixed question of fact and constitutional law. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). "Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *Id*. When the defendant does not "move in the trial court for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent from the record." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

To establish that trial counsel was ineffective, "a defendant must show that (1) the lawyer's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for the lawyer's deficient performance, the result of the proceedings would have been different." *People v Anderson*, 322 Mich App 622, 628;

> sent to an independent testing analysis. We don't want to be accused of sort of tampering with that sample.

Gendhar further testified that no independent testing of defendant's second tube of blood was performed.

912 NW2d 607 (2018). " 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Id.*, quoting *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). This Court presumes effective assistance of counsel; a criminal defendant bears a heavy burden of proving otherwise. *People v Schrauben*, 314 Mich App 181, 190; 886 NW2d 173 (2016).

Regarding trial strategy, "[d]efense counsel must be afforded 'broad discretion' " because of the necessity to take calculated risks to win a case. *People v Pickens*, 446 Mich 298, 325; 521 NW2d 797 (1994). "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). In addition, a "defendant must overcome the presumption that counsel's actions were based on reasonable trial strategy." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007).

However, "a court cannot insulate the review of counsel's performance by calling it trial strategy." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). Our Supreme Court has recognized that "[t]he Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997) (quotation marks and citation omitted).

In this case, defendant did not ask for an evidentiary hearing or new trial based on ineffective assistance of counsel. Because of this, our review is limited to mistakes apparent from the record.[7] Moreover, defendant asserts that "[w]ithout an expert defense counsel could not dispute the calculations or the accuracy of the calculation[s] or the ultimate conclusion of the expert that defendant's car not the second car was the cause of the accident." However, defendant failed to provide any offer of proof to the effect that an expert would have been able to provide favorable testimony to counter the strong evidence indicating that his head-on collision was a proximate cause of Misty's death and John's impairment.

Also, the record includes no indication regarding whether, or to what extent, defense counsel investigated the theory of superseding cause, or consulted, or attempted to retain, an accident reconstructionist. While it is obvious from the existing record that defense counsel did not call such an expert to testify, "[t]he mere fact that such an expert was never called as a witness by the defense does not show that one was never consulted or retained." *People v Bass*, 317 Mich

[7] We note that defendant included a request for a remand for an evidentiary hearing on this issue in his brief on appeal, but not by way of a proper motion to remand under MCR 7.211(C)(1). See *People v Bass*, 317 Mich App 241, 276 n 12; 893 NW2d 140 (2016) ("As a threshold consideration, to the extent that defendant now requests that his Court remand this matter for a *Ginther* hearing to permit him to substantiate his claims of ineffective assistance, his request for such relief is improperly made; it appears in the text of his Standard 4 brief, not in a proper motion to remand under MCR 7.211(C)(1)."). Also, defendant did not furnish an offer of proof or affidavit with regard to any proposed expert. See MCR 7.211(C)(1)(a).

App 241, 279; 893 NW2d 140 (2016). Furthermore, the record does not suggest that an expert could have provided favorable testimony to advance the theory that Slezak's collision was an intervening, superseding cause of the victims' death and impairment and thus relieve defendant of criminal liability. Because of this, defendant has not satisfied his burden in showing how the strategy of his trial counsel fell below an objective standard of reasonableness. Thus, defendant's claim of ineffective assistance of counsel fails.[8]

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael F. Gadola
/s/ Anica Letica

[8] Defendant cites *People v Ackley*, 497 Mich 381, 393; 870 NW2d 858 (2015), where our Supreme Court concluded that the defendant's trial counsel was constitutionally ineffective for failing to adequately investigate and secure expert assistance. Unlike here, in *Ackley*, a *Ginther* hearing was held, wherein the defendant demonstrated, not only that the absence of expert assistance in his favor was critical, but that there were experts available who would have advanced his theory of defense. *Id*. at 389-398. Here, defendant has not shown that an expert would, or could, have advanced his theory that Slezak's collision was an intervening, superseding cause of the victims' death and impairment to relieve him from criminal liability.