

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAURAETTA DENISE CAREY,

Defendant-Appellant.

UNPUBLISHED

March 26, 2013

No. 307803

Kent Circuit Court

LC No. 10-012189-FH

Before: STEPHENS, P.J., and HOEKSTRA, and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant Lauraetta Denise Carey appeals by right following her conviction by a jury of reckless driving causing death, MCL 257.626(4), reckless driving causing serious injury, MCL 257.626(3), driving while license suspended and causing death, MCL 257.904(4), and driving while license suspended causing serious injury, MCL 257.904(5). Because we conclude that, even if the court did err with regard to admission of the testimony of the People’s expert witness, which we do not concede it did, the error was not outcome determinative, and therefore, we affirm.

This case began with a high-speed car chase that ended in a fatal crash. The chase began in the early morning hours of October 31, 2010, when Lauraetta Denis Carey, the defendant, found Samuel Cordaryl Clark, the victim, sitting in his car with another woman outside the Galewood Tavern. Lauraetta, Cordaryl’s on-again off-again girlfriend and mother of two of his children, pulled up next to Cordaryl’s car in the Galewood’s parking lot, stepped out of her car, made eye contact with Cordaryl, and gestured in his direction. Then Cordaryl, who had been sitting in his car with the door open, closed the door and sped off; Lauraetta got back into her car and raced off after him.

As Cordaryl sped down side streets and main streets, onto Highway 131, back off again, and eventually onto 28th Street, Lauraetta followed close behind; both were at times exceeding 100 miles-per-hour. In the police interview conducted within hours of the crash, Lauraetta said that she had been trying to follow Cordaryl as closely as possible, and that she bumped his car to “get his attention” and make him pull over and talk to her. As both cars sped down 28th Street, Cordaryl appeared to slow down in preparation for a turn when Lauraetta’s car bumped into the backend of his one last time. Cordaryl’s car spun out of control, hit a curb, flipped, went up a grassy embankment, hit a tree, and then some bushes, and finally came to rest in the back of the

house at 2020 28th Street, where it caught fire and eventually exploded. Cordaryl died from smoke inhalation.

After conviction, defendant moved for a new trial based on allegations stemming from a statement made under oath by the prosecutor's accident reconstruction expert, Officer David Thompson. During his response to the prosecutor's question about how the victim's car ended up in the house, Officer Thompson opined that, "This particular incident was, in my belief a --- it wasn't an accident, it was on purpose." Although defendant neither objected to this statement during the trial nor asked for a curative instruction, defendant alleged in the motion for a new trial that the prosecutor had violated discovery rules by intentionally withholding or misrepresenting the expected testimony of the prosecutor's expert.

On appeal, defendant abandons his claim of prosecutorial misconduct by implicitly conceding that the prosecutor accurately conveyed to defense counsel what Officer Thompson had told the prosecutor about his intended testimony. Based on references in his brief to MRE 702, which governs the admission of expert scientific or technical evidence, defendant now argues that the trial court was somehow obligated to have stricken the on-purpose statement as inadmissible expert testimony, *sua sponte* and in the absence of any objection. Defendant has not properly preserved this issue for appellate review, but in the interest of ensuring a fair trial, this Court will review it as unpreserved error. *People v George*, 130 Mich App 174; 342 NW2d 908 (1983).

This Court reviews unpreserved error under the plain error rule. *People v Pesquera*, 244 Mich App 305, 316; 625 NW2d 407 (2001). To avoid forfeiture under the plain error rule, three requirements must be met: (1) error occurred, (2) the error was plain, and (3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750 763; 597 NW2d 130 (1999). A "plain" error is an error that is clear or obvious. *Grant*, 445 Mich at 549. A plain error affects substantial rights if it is prejudicial to the defendant and is outcome determinative. *Id.* Defendant has the burden of persuasion regarding prejudice. *Carines*, 460 Mich at 770. Even if all three prongs of the plain error tests are met, however, reversal is not warranted unless the error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 772. *See also* MCL § 769.26.¹

Defendant provides no authority for his proposition that the trial court's gatekeeper role obligated the court to have stricken the on-purpose statement as inadmissible expert testimony, or that it should have done so *sua sponte*. The exercise of its gatekeeper role is within the trial court's discretion. While it is true that a trial judge "may neither abandon this obligation nor perform the function inadequately," (*Gilbert v DaimlerChrysler Corp.*, 470 Mich 749, 780; 685 NW2d 391 (2004) (citation omitted)), it is also true that "a court's failure to exercise discretion

¹ MCL § 769.26 also provides that a judgment or verdict shall not be "set aside or reversed or a new trial 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."

cannot be raised on appeal when the court was not asked to exercise discretion below.” *People v Hearn*, 159 Mich App 275, 284; 406 NW2d 211 (1987).

Even if, hypothetically, the trial court had some manner of duty to *sua sponte* exclude inadmissible expert testimony, the record does not suggest that the on-purpose statement was inadmissible under the *Daubert* standard. See *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). The proper role of the trial judge as gatekeeper is to “filter out expert evidence that is unreliable.” *People v Unger*, 278 Mich App 210, 217; 749 Mich App 210 (2008), citing *Chapin v A & L Parts, Inc*, 274 Mich App 122, 139; 732 NW2d 578 (2007). “The inquiry is into whether the opinion is rationally derived from a solid foundation.” *Id.* Where an expert witness’s opinion is purely speculative, it should be excluded or stricken pursuant to MRE 403. *Phillips v Mazda Motor Mfg*, 204 Mich App 401,412; 516 NW2d 502 (1994). However, “[a]n expert’s opinion is admissible if it is based on the ‘methods and procedures of science’ rather than ‘subjective belief or unsupported speculation.’” *Unger*, 278 Mich App at 217-218, citing *Daubert*, 509 US at 589-590.

At the time of his testimony, Officer Thompson was a Master Police Officer with the Wyoming Police Department. He had spent more than 27 years in law enforcement and 20 years in accident reconstruction work. In keeping with the methodology of accident reconstruction, he had based his testimony on his own observations at the scene, the briefings and reports of other officers, and measurements and photographs taken at the scene. Officer Thompson’s opinion that the incident was on purpose was not “subjective belief or unsupported speculation,” but was “rationally derived from a solid foundation.” *Unger*, 278 Mich App at 217.

Furthermore, there is no indication that the Officer’s on-purpose statement was prejudicial. “Generally, the failure of defense counsel to request a curative instruction regarding a gratuitous answer will preclude appellate review of the issue in the absence of a showing of manifest injustice.” *People v Barker*, 161 Mich App 296, 305-306; 409 NW2d 813 (1987). Nevertheless, a police witness is under a special duty to avoid forbidden areas; “when an unresponsive remark is made by a police officer, this Court will scrutinize that statement to make sure the officer has not ventured into forbidden areas which may prejudice the defense.” *People v Holly*, 129 Mich App 405, 415; 341 NW2d 823 (1983). Where a police officer gives an unresponsive remark that is highly prejudicial, reversal will be required. *Id.* at 415-416.

The prosecutor asked Officer Thompson, “How did the [victim’s car] end up in the house?” This question seems to call for an answer that describes the process of how the car came to be in the house. Part of Officer Thompson’s response was that “[t]his particular incident was, in my belief a --- it wasn’t an accident, it was on purpose.” Even if Officer Thompson’s remark had been unresponsive, the “proper practice” is “a motion to have the testimony stricken and the jury instructed to disregard it.” *Kiesgen v Harness*, 242 Mich 422, 427; 218 NW 667 (1928). A “proper practice” that places responsibility on a party to act would seem incompatible with imposing a duty on the court to do so *sua sponte*. Even in cases where a witness’s “unauthorized remark . . . is likely to do much mischief, it is presumed that the judge will apply the proper corrective measures in his or her instructions *if requested to do so.*” *Barker*, 161 Mich App at 306 (emphasis added). Additionally, an attorney may well have a sound or seemingly-sound tactical reason for deciding not to object to a statement that is technically objectionable,

further supporting the conclusion that a court does not have a duty to strike *sua sponte* responses that go beyond the scope of a question. *Id.* at 307.

Finally, even presuming the trial court could somehow be said to have erred by allowing Officer Thompson's statement to remain in evidence, there is no indication that doing so affected defendant's substantial rights. *Grant*, 445 Mich at 549. An error affecting a defendant's substantial rights "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings"; the burden of persuasion is on the defendant. *Carines*, 460 Mich at 763. If defendant meets the burden of showing prejudice, this Court must then "exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.* at 763-764. This Court considers the entire record and assesses the effect of the error "in light of the weight and strength of the untainted evidence." *People v Smith*, 456 Mich 543, 555; 581 NW2d 654 (1998), quoting *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996).

Defendant does not articulate how the on-purpose statement affected her trial, so she may be deemed to have abandoned her appeal entirely. However, a review of the record strongly suggests that, even if the court *had* excluded the on-purpose statement of the prosecution's expert, the weight and strength of the remaining evidence would have produced the same result.

From the police video recording of their interview with defendant, which was admitted into evidence, members of the jury heard and saw defendant admit to following the victim at high speeds and bumping into his car more than once in an effort to "get his attention" and make him stop and talk to her. They heard passengers in both cars testify to the excessive speeds at which the cars were traveling and the fact that defendant's car struck the victim's car more than once. They heard a witness who happened to be driving down Highway 131 testify to what he saw of the chase. They also heard testimony from mechanics and expert witnesses who determined that defendant's brakes were functional and provided a reconstruction of the choreography of the final crash. Even without Officer Thompson's on-purpose statement, the evidence against defendant was overwhelming.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Joel P. Hoekstra
/s/ Amy Ronayne Krause