

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUSTIN TODD MORNINGSTAR,

Defendant-Appellant.

UNPUBLISHED

April 14, 2005

No. 248138

Wayne Circuit Court

LC No. 02-001618

Before: Whitbeck, CJ, and Zahra and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating a motor vehicle while visibly impaired (OWI), causing death, MCL 257.625(4), and sentenced to five to fifteen years' imprisonment. He appeals as of right. We affirm defendant's conviction but remand for resentencing.

Defendant first argues that the trial court erred in permitting a police officer to give an opinion regarding his intoxication. The prosecutor originally asked the officer whether, based on his experience and contact with defendant, defendant was under the influence of intoxicating liquor. Upon objection by defendant, the trial court asked the prosecutor to rephrase his question to inquire not whether defendant was actually intoxicated, but whether his behavior was consistent with someone who was intoxicated. After the prosecutor rephrased his question, the officer testified that defendant's behavior was consistent with a person who "had been operating under the influence of intoxicating liquors." Because defendant did not challenge the latter question and answer, this issue is unpreserved. See *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003) (to properly object, a party should make an objection between the question and the witness' answer); *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996) (an objection on one ground does not preserve an appellate attack on a different ground). Accordingly, our review of this issue is limited to plain error affecting substantial rights. MRE 103(d); *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999).

Defendant has not met his burden of establishing plain error. *Id.* at 763. Because the officer was not qualified as an expert, MRE 701 governed the admissibility of his opinion. The officer indicated that he had an opportunity to observe and speak with defendant shortly after arriving at the accident, and defendant admitted that he was the driver of the inverted vehicle at the scene. The officer detected the odor of beer on defendant's breath and noted that defendant's speech was slurred, his eyes were watery, and he staggered when he walked. The officer could

rationality infer from his observations that defendant's behavior was consistent with someone who was intoxicated. Because his opinion was not overly dependent upon scientific, technical, or other specialized knowledge, it was admissible under MRE 701. See *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1998), modified 433 Mich 862 (1989), and *Heyler v Dixon*, 160 Mich App 130, 148-149; 408 NW2d 121 (1987).

Defendant next argues that defense counsel was ineffective by failing to move for a mistrial after a prosecution witness allegedly testified that a defense attorney had asked another witness to lie. Because this issue was not raised in a motion for a new trial or a *Ginther*¹ hearing, our review is limited to mistakes apparent from the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). From our review of the existing record, we conclude that defendant has failed to establish either the deficient performance or prejudice prongs necessary to succeed on a claim of ineffective assistance of counsel. *Riley, supra* at 140; *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

A mistrial should be avoided if reasonable alternatives exist. *People v Little*, 180 Mich App 19, 29; 446 NW2d 566 (1989). A mistrial should only be granted when an irregularity prejudices a defendant's rights and impedes his ability to obtain a fair trial. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Here, the brief testimony regarding "Morningstar's lawyer," after the admonishment by the trial court, would not have warranted a mistrial. The jury heard no testimony that defense counsel told another witness to lie. If defense counsel was concerned that the jury might speculate, because of the witness' subsequent testimony, that he told a witness to lie, he could have moved to strike the witness' reference to "Morningstar's lawyer" in her earlier testimony or requested an appropriate instruction. Indeed, defense counsel may have elected not to do so as a matter of trial strategy to avoid highlighting the matter. Regardless, defense counsel was not required to make a futile motion for mistrial. *Riley, supra* at 142; *Rodgers, supra* at 715. Further, defendant has not established a reasonable probability that the jury verdict was influenced by the witness' brief reference to "Morningstar's lawyer." *Toma, supra* at 302-303. Hence, we find no basis for defendant's claim of ineffective assistance of counsel. Further, we are not persuaded that defendant has established any basis for a remand to the trial court for a *Ginther* hearing.

Defendant next argues that the prosecutor made various remarks in his opening statement, closing argument, and rebuttal argument, that deprived him of a fair trial. We disagree.

Because defendant did not object to the challenged remarks at trial, we review these claims under the plain error doctrine. *Carines, supra* at 763. Examined in context, the prosecutor's remarks did not, singularly or collectively, deprive defendant of a fair trial. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995); *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). The prosecutor's brief remark in his opening statement that the jurors should not let defense counsel "pull the accident wool over your collective eyes" was

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

responsive to defense counsel's use of the word "accident" during jury selection. It was not so inflammatory to affect the outcome of the trial. *Jones, supra* at 353, 355-356.

Although the prosecutor's remarks during rebuttal argument regarding defense counsel's obligation to do the best for his client, but "not necessarily to search for the truth," constituted plain error, given the evidence against defendant, they were not so egregious that they affected the outcome of the case. *People v Matuszak*, 263 Mich App 42, 54-55; 687 NW2d 342 (2004). Any prejudice was dispelled by the trial court's subsequent instruction to the jury that it was the sole judge of the facts and should decide the case based only on the evidence. Cf. *Bahoda, supra* at 281. The jury is presumed to follow the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Also, the prosecutor's remarks in his closing and rebuttal arguments regarding the defense theory concerning the cause of the accident, as well as the witnesses offered in support of that theory, were not plainly improper. A prosecutor is free to argue from the evidence that a witness, including an expert witness, is not credible. See *People v Howard*, 226 Mich App 528, 544-546; 575 NW2d 16 (1997). "The credibility of a witness is determined by more than words and includes tonal quality, volume, speech patterns, and demeanor, all giving clues to the factfinder regarding whether a witness is telling the truth." *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998), citing *State v Turner*, 521 NW2d 148 (Wis App, 1994). To the extent that the prosecutor's remarks could be considered improper, any prejudice was dispelled by the trial court's subsequent instructions regarding the jury's responsibility to determine which witnesses to believe, and that the "lawyers statements and arguments are not evidence." Cf. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). Hence, we find no outcome-determinative error that, singularly or cumulatively, warrants reversal.

Defendant next argues that the trial court erroneously instructed the jury that operating a motor vehicle while impaired, causing death, was a lesser included offense of operating a motor vehicle under the influence of intoxicating liquor (OUIL), causing death. We disagree.

"OWI is a lesser included offense of OUIL." *Oxendine v Secretary of State*, 237 Mich App 346, 354; 602 NW2d 847 (1999). See also *People v Fett (On Remand)*, 261 Mich App 638, 640; 684 NW2d 369 (2004). OWI and the "under the influence" part of OUIL stand in a hierarchical relationship because anyone who drives while so affected by alcohol consumption as to commit OUIL would also be visibly impaired and, hence, commit OWI. *Id.* at 354-355. Because MCL 257.625(4) adds only the elements of causation and death, see *People v Lardie*, 452 Mich 231, 259-260; 551 NW2d 656 (1996),² it follows that OWI, causing death, is properly viewed as a lesser included offense of OUIL, causing death, regardless of the Legislature's approval of the same penalty for both offenses. An offense may be inferior to another even

² Although MCL 257.625 has been amended several times since *People v Lardie*, 452 Mich 231; 551 NW2d 656 (1996) was decided, 1994 PA 211, 1994 PA 448, 1994 PA 449, 1996 PA 491, 1998 PA 350, 1999 PA 73, 2000 PA 77, 2000 PA 460, 2003 PA 61, 2004 PA 62, the amendments did not substantially change the statute for the purposes of our analysis.

though the penalties for the two offenses are the same. See *People v Torres (On Remand)*, 222 Mich App 411, 418-420; 564 NW2d 149 (1997).

Defendant next raises two challenges to the trial court's scoring of sentencing guidelines variables. First, defendant argues that the trial court erred by scoring ten points for offense variable (OV) 17, MCL 777.47. Defendant argues that OV 17 should have been scored at zero points and that, at a minimum, the case should be remanded to enable the trial court to explain its decision. But we conclude that defendant waived any claim that OV 17 should have been scored at zero points because defense counsel conceded at sentencing that at least five points should be scored for OV 17. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Further, any error in scoring OV 17 at ten points instead of five, or zero points for that matter, was harmless because the reduction would not have affected the guidelines range. *People v Houston*, 261 Mich App 463, 473; 683 NW2d 192 (2004).

Defendant further argues that, under the United States Supreme Court's decision in *Blakely v Washington*, 542 US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004), he was entitled to have the jury determine the facts underlying the scoring of OV 17 and OV 5, MCL 777.35. Because defendant did not present this issue to the trial court, we have reviewed it under the plain error doctrine. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004); *Carines*, *supra* at 763. We find no plain error because the holding in *Blakely* affects determinate sentencing schemes under the Sixth Amendment. See also *United States v Booker*, ___ US ___; 125 S Ct 738; 160 L Ed 2d 621 (2005). As our Supreme Court observed in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), *Blakely* does not affect Michigan's indeterminate sentencing scheme. Contrary to defendant's claim on appeal, *Claypool* is binding precedent on this Court. See *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004).

Finally, defendant argues that he is entitled to resentencing because the trial court departed from the sentencing guidelines range of nineteen to thirty-eight months without expressly announcing its understanding that a departure was authorized only for substantial and compelling reasons, MCL 77.34, and without identifying any objective and verifiable factors that would support a departure. We agree.

If a trial court imposes a sentence outside the guidelines range, we must determine whether it articulated a substantial and compelling reason to justify the departure. MCR 769.34(11); *People v Babcock*, 469 Mich 247, 261-262; 666 NW2d 231 (2003). If a reason is not objective and verifiable, it cannot be substantial and compelling. *Id.* at 270. Whether a particular factor relied on by the trial court exists is reviewed for clear error. *Id.* at 265. Whether it is objective and verifiable is reviewed de novo. *Id.* Finally, a court's decision whether objective and verifiable factors are substantial and compelling reasons for departure is reviewed for an abuse of discretion. *Id.*

The trial court relied on defendant's conduct of drinking and then driving, causing death, and ultimately found the sentencing guidelines range inadequate "based on what happened in the case." However, the guidelines already accounted for this factor in the scoring of thirty-five

points for OV 3, MCL 777.33.³ “The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.” MCL 769.34(3)(b). Although the trial court indicated that it found the guidelines insufficient, the court failed to articulate a substantial and compelling reason why defendant’s actions here were different from the actions of any other defendant who is convicted of the same offense. We remand for resentencing. In doing so, we reiterate the example given by our Supreme Court in *Babcock, supra* at 258 n 12 as guidance on remand:

For instance, if a defendant convicted of armed robbery is scored 25 points under offense variable one because he stabbed his victim, see MCL 777.31, that the defendant stabbed his victim probably could not constitute a substantial and compelling reason to justify a departure because the Legislature has already determined what effect should be given to the fact that a defendant has stabbed his victim and the courts must abide by this determination. However, if the defendant stabbed his victim multiple times, or in a manner designed to inflict maximum harm, that might constitute a substantial and compelling reason for a departure because these characteristics may have been given inadequate weight in determining the guidelines range.

Affirmed but remanded for resentencing.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Donald S. Owens

³ As amended by 2003 PA 134, effective August 1, 2003, we note that MCL 777.33 now assigns fifty points for a death resulting from the commission of a crime involving the operation of a vehicle if the offender was visibly impaired by the use of alcohol.