STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED November 27, 2012
v	No. 303884 Wayne Circuit Court
ROBERT ANTHONY BOJAJ, Defendant-Appellant/Cross-Appellee.	LC No. 10-010299-FC

Before: GLEICHER, P.J., and OWENS and BOONSTRA, JJ.

PER CURIAM.

A jury convicted defendant Robert Anthony Bojaj of second-degree murder, MCL 750.317, and operating a motor vehicle while intoxicated causing death, MCL 257.655(4)(a). Defendant did not dispute that he drove his Lexus while intoxicated or that his intoxicated driving caused the death of Shelby Gunn. Rather, defendant contended that he lacked the requisite intent for conviction of second-degree murder.

The prosecutor argued that defendant's high speed, reckless driving and the level of his intoxication supported a finding of malice. Using data gleaned from the Lexus's event data recorder (EDR), a prosecution expert opined that the vehicle could have been traveling at a speed of 126 miles per hour (mph) when it struck the victim's car. Despite that defendant timely challenged the accuracy and scientific reliability of the EDR data, the trial court refused to hold a *Daubert* hearing.[1] After defendant was convicted, the trial court confessed error and granted defendant a new trial.

Defendant appeals his murder conviction, challenging the sufficiency of the prosecution's evidence and raising a prosecutorial misconduct claim. The prosecution cross-appeals, arguing that the trial court abused its discretion by granting a new trial and that it incorrectly scored one of the sentencing offense variables (OVs). We agree with the trial court's belated determination that a *Daubert* hearing was required, but conclude that strong evidence of defendant's excessive

[1] *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

speed grounded in eyewitness observation and expert calculation without reference to the EDR data support the jury's verdict. Accordingly, we affirm defendant's convictions, reverse the order granting a new trial, and remand for resentencing.

I. UNDERLYING FACTS AND PROCEEDINGS

Shortly after 1:30 a.m. on August 15, 2010, several drivers witnessed defendant's black Lexus speeding northbound on I-275 near Canton. Debra Cooper estimated defendant's speed at 100 mph, expounding: "I have seen cars go past me doing eighty miles an hour, ninety miles . . . . I have never had a car go past me as fast as this one had." Cooper observed defendant's car contact the rumble strips on the left side of the highway for three to five seconds before swerving to the rumble strips on the other side of the road and disappearing from sight. She described that the accident "wasn't a surprise to me because anybody driving like that you could see it coming." Another driver, Megan Ann Boehms, described the Lexus as traveling "at a very high rate of speed" and "swerving." Boehms saw the Lexus hit Gunn's car in the right-hand lane before veering to the left and becoming impaled on the center guardrail. Yet another driver, Paul Rauker, heard the loud noise created as the Lexus's tires were "riding on the rumble strips" and then witnessed the Lexus cross from the left hand lane to the right, back to the left, and then back to the right.

The witnesses agreed that after defendant's vehicle crested a small hill, his car entered the right lane of freeway traffic and struck Gunn's Dodge Intrepid from the rear, killing her. Other evidence established that after hitting Gunn's vehicle, the Lexus collided with the right guardrail before travelling across all lanes of traffic and becoming entangled in the left median cable barrier. When one of the first police officers on the scene approached the Lexus, he smelled intoxicants and observed defendant "attempting to climb into the passenger seat." Defendant's eyes were bloodshot and his speech slurred. He admitted to drinking cognac. Approximately two hours later defendant's blood alcohol level measured .26.

After establishing these facts, the prosecutor presented the testimony of Mark Jakstis, a Design and Technical Analysis Manager at Toyota Motor Sales, U.S.A. Jakstis described the Lexus's EDR as "part of the airbag system," with the capability of recording certain information during a "trigger event" such as a crash. The EDR stores information acquired milliseconds before an accident, including the vehicle's speed, the engine speed, the accelerator pedal position, and the driver's brake use. The last vehicle speed recorded by the EDR in defendant's Lexus was 78.3 mph, which Jakstis described as "the maximum recordable speed for this vehicle." The EDR reported that the accelerator was "in the mid position," which meant that the driver was "pushing down on the accelerator a bit" and "still accelerating" at the time the EDR stopped recording data. According to Jakstis, the EDR reported that the Lexus's brakes had not been applied.

In addition to this information, Jakstis claimed that the EDR contained the Lexus's "Delta-V," which he defined as "the change in velocity of the vehicle during the crash." Jakstis interpreted the delta-V data as consistent with a "34 mile an hour change in speed during this crash," adding "and it's still going up." Under cross-examination Jakstis admitted that Toyota considered the EDR data system in defendant's Lexus a "prototype tool," and that the specific device was used only in Toyota vehicles. He conceded that Toyota designed the EDR "to look at

the performance of an airbag system in a crash" rather than to aid law enforcement after an accident.

Michigan State Police Sergeant Kevin Lucidi, a "traffic crash reconstructionist," utilized the EDR data to formulate one of the two speed determinations he provided to the jury. Lucidi first calculated defendant's speed at the time of the impact without resorting to the EDR data, instead basing his calculations on the "conservation of linear momentum formula." This approach relies on "basic physics principals" predicated on physically-measurable components including the coefficient of friction, vehicle weights, the distance the vehicles traveled post-impact, and the speed of the victim's vehicle. Because the speed of Gunn's vehicle at the time of impact was unknown, Lucidi assigned it three different speeds: 50, 60 and 70 mph. After plugging these numbers into an equation, Lucidi calculated speed ranges for the Lexus. He opined that based on this mathematical formula, the Lexus' minimum speed at impact ranged from 82 to 98 mph and that its maximum speed fell between 109 and 126 mph.

Lucidi then described a second, independent methodology for calculating defendant's speed which incorporated the delta-V supplied by the EDR. Applying the delta-V number testified to by Jakstis, Lucidi opined that if the Dodge was traveling between 50 and 60 mph at the time of impact, the Lexus's maximum speed ranged from 117 to 126 mph. Thus, Lucidi concluded that the top number in the speed range – 126 mph – was the same regardless of the formula he employed.

The defense countered Lucidi's opinions with the testimony of accident reconstructionist Larry Petersen. Petersen criticized several of the assumptions built into Lucidi's calculations. For example, Petersen estimated that the front end of the Lexus contacted 50% of the rear of the Dodge, while Lucidi believed the overlap percentage to have been 80%. Petersen believed that the correct coefficient of friction differed from the figure Lucidi relied on, because the pavement likely was somewhat damp. Petersen described the manner in which these variables changed the ultimate speed calculations. In Petersen's view, defendant's vehicle was moving at a speed between 85 and 97 mph when the crash occurred.

The parties' closing arguments focused on whether defendant possessed the requisite mens rea to convict him of second-degree murder. The prosecutor set the scene as follows:

> The issue that we're talking about here is that the defendant at the time of [the victim's] death . . . had one of these states of mind: Intent to kill, intent to do great bodily harm, or if you look at the bottom, knowingly created a very high risk of death or great bodily harm knowing that the death or such harm would be the likely result of his actions. And that's where this case is going to turn. . . . Did the defendant knowingly create a very high risk of death or great bodily harm knowing that the death or such harm would be the likely result of his actions?

Defense counsel argued that while defendant had driven while intoxicated, his misconduct did not extend beyond drunk driving. Defense counsel insisted that defendant was not "a murderer" and that the prosecutor failed to prove that defendant knowingly created a high risk of death or great bodily harm.

The jury convicted defendant of second-degree murder and operating a vehicle while intoxicated causing death. Defendant subsequently moved for a new trial, raising the arguments discussed *infra*. The trial court rejected all but one of defendant's contentions, concluding that a new trial was warranted based on its failure to conduct a *Daubert* inquiry concerning the reliability of the EDR data. Defendant now appeals his convictions while the prosecutor cross-appeals the grant of a new trial and defendant's sentence.

II. THE PROSECUTION'S APPEAL

A. A NEW TRIAL IS NOT WARRANTED

We first consider whether the trial court abused its discretion by granting defendant a new trial based on its failure to conduct a *Daubert* inquiry into the reliability of the evidence obtained from the EDR. We review for an abuse of discretion a trial court's denial of a motion for a new trial. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000), overruled in part on other grounds in *People v Miller*, 482 Mich 540, 561 n 26; 759 NW2d 850 (2008). An abuse of discretion occurs when the decision results in an outcome falling outside the range of reasonable and principled outcomes. *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006). De novo review applies to questions of law associated with a new trial ruling. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001).

Approximately three months before trial, defendant sought a *Daubert* hearing to determine whether Lucidi's testimony "rests on a reliable foundation and is relevant to the charges with which [defendant] is charged." In a supplemental brief filed in support of his motion, defendant asserted that evidence used to support Lucidi's calculations came from the EDR, and that the EDR data lacked reliability. Defendant pointed to statement issued by Toyota that accompanied the EDR data, providing in relevant part:

> The Beta Toyota SRS Airbag EDR Readout Tools are currently used by TMS [Toyota Motor Sales, U.S.A., Inc.] in the United States and are prototype tools. At this time, TMS is aware that there may be general limitations to some SRS Airbag EDR memory capabilities such as:
>
> - if power to the SRS Airbag EDR is lost during a crash event, all or part of the crash may not be recorded.
>
> - nondeployment or low delta V events may be overwritten by subsequent impact events.
>
> - it is possible that the use of this readout tool may alter certain service diagnostic memories in some circumstances.
>
> In addition to the general limitations, **there may also be specific memory capability limitations for some SRS Airbag EDR units and therefore the data should also be independently corroborated, e.g., through physical evidence, other research, etc.** [Emphasis added].

The trial court denied defendant a *Daubert* hearing.

Defendant's new trial motion included an allegation that defendant "was deprived of due process and a fair trial" by the failure of the trial court to perform its gatekeeping function. The trial court ruled that in precluding a *Daubert* hearing it had "dropped the ball" by construing the motion as "simply a battle of the experts" rather than a challenge to the reliability of the EDR. The trial court continued:

> I've got a guy sitting in prison for fifteen years of his life based on an EDR that the expert said was the basis of [the] one hundred and twenty-six mile an hour calculation. EDR's are no [sic] required by law. The devices vary widely from manufacturer to manufacturer. And to top it all off, EDR's were not manufactured to determine the speed of vehicle, but to determine the performance of airbags. We've got a device that's being used to determine one hundred and twenty-six miles an hour that was developed that isn't, that Toyota is not going to vouch for about whether airba[g]s deploy properly.

We concur with the trial court's determination that a *Daubert* hearing was warranted. However, the admission of the EDR data absent verification of its reliability qualified as harmless error.

MRE 702 "requires trial judges to act as gatekeepers who must exclude unreliable expert testimony. See [*Daubert*, 509 US 579], and *Kumho Tire Co, Ltd v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999)." Staff Comment to 2004 Amendment of MRE 702. In *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004), our Supreme Court elaborated that the trial court's gatekeeper role

> applies to *all stages* of expert analysis. MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology. [Emphasis in original.]

Before admitting expert scientific testimony, the trial court must satisfy its "fundamental duty" of ensuring that the expert testimony is reliable and relevant. *Id.* MRE 702 explicitly incorporates the *Daubert* standards of admissibility regarding an expert's testimony. *Gilbert*, 470 Mich at 781. Although this standard is flexible, the trial court should consider the following nonexhaustive list of factors: (1) whether the theory or technique can be or has been tested; (2) "whether the theory or technique has been subjected to peer review and publication;" (3) "in the case of a particular scientific technique," the known or potential rate of error; and (4) whether the theory or technique has gained general acceptance within the scientific community. *Daubert*, 509 US at 593-594.

Toyota's disclaimer regarding the potential reliability of the EDR established that under certain circumstances, data obtained from the device lacked accuracy or reliability. Furthermore, defendant brought to the trial court's attention that the EDR had not been independently

evaluated for accuracy. Accordingly, before allowing Lucidi to use the data as a foundation for his testimony, the trial court was required to hold a *Daubert* hearing.

Nevertheless, we find the error harmless. The alleged error in this case—the admission of expert testimony based on a potentially inadmissible foundation—qualifies as preserved nonconstitutional error. Whether preserved nonconstitutional error is harmless depends on the nature of the error and its effect on the reliability of the verdict "in light of the weight of the untainted evidence." *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001) (quotation marks and citation omitted). The error is presumed harmless, and the defendant bears the burden of demonstrating that it resulted in a miscarriage of justice. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative," i.e., that "it undermined the reliability of the verdict." *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000) (citations omitted).

Even assuming that the EDR data was erroneously admitted, the exceedingly high speed at which defendant was driving immediately before the accident was independently corroborated by eyewitnesses and Lucidi's conventional speed calculation. Admittedly, the delta-V and other evidence purportedly derived from the EDR carried the weight of advanced technology. But other powerful evidence demonstrated that defendant elected to drive after consuming an enormous amount of alcohol, operated his vehicle at a speed approximating 100 mph, repeatedly crossed multiple traffic lanes, and ignored the rumble strip's audible warning that he was out of control. Given this evidence, any impropriety in admitting the EDR data did not undermine the reliability of the verdict.

B. RESENTENCING IS WARRANTED

In its cross-appeal, the prosecution additionally contends that the trial court erred by failing to score 25 points under OV 6, MCL 777.36(1)(b). Defendant argues that the prosecution vindictively sought resentencing only after defendant exercised his right to appeal, and that the trial court properly scored OV 6 at zero because it scored OV 17 at 10.

We first consider defendant's vindictiveness claim. A presumption of vindictiveness arises when the prosecution seeks a higher sentence after a defendant succeeds in obtaining a reversal of his conviction. See *North Carolina v Pearce*, 395 US 711, 725; 89 S Ct 2072; 23 L Ed 2d 656 (1969). "[V]indictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *People v Jones*, 403 Mich 527, 532; 271 NW2d 515 (1978). No authority supports that we may presume vindictiveness when a prosecutor cross-appeals a defendant's sentence following a defendant's direct appeal. Because defendant has brought forward no evidence of vindictiveness, we reject this claim.

Whether the trial court erred by scoring OV 17 rather than OV 6 presents a somewhat harder question. OV 6 addresses an offender's intent to kill or injure another individual. This variable requires the trial court to assess 25 points if it finds the offender "created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable

result . . . ." MCL 777.36(1)(b). The court must "score this variable consistent with a jury verdict unless the judge has information that was not presented to the jury." MCL 777.36(2)(a). OV 17 considers the offender's degree of negligence. MCL 777.47. It requires that the trial court assess 10 points if the "offender showed a wanton or reckless disregard for the life or property of another person . . . ." MCL 777.47(1)(a). An offender may not be scored 10 points under OV 17 if points are given under OV 6. MCL 777.47(2).

The trial court ruled that "OV 17 indicates that you get your pick one or the other, OV 6 or OV 17. That's the intent here, and OV 6 is more appropriately [sic] for a situation of a much more general Second[-]Degree Murder case." We cannot accept this reasoning in light of the Legislature's explicit instruction that a sentencing judge "shall" assess points under OV 6 "consistent with a jury verdict unless the judge has information that was not presented to the jury." The trial court identified no information relevant to defendant's intent that was not presented to the jury. Therefore, the trial court erred by ignoring the guidelines' instruction to score OV 6 at 25 points, rather than scoring OV 17 at 10 points.

The addition of 15 points to defendant's total OV score increases his sentencing level from C-II to C-III. A defendant convicted of second-degree murder and placed in cell C-III of the sentencing grid has a minimum sentencing guidelines range of 225 to 375 months to life. Defendant's minimum sentence of 180 months falls below this corrected range. Resentencing under correctly scored guidelines is therefore required. *People v Francisco*, 474 Mich 82, 89-90; 711 NW2d 44 (2006).

III. DEFENDANT'S APPEAL

A. SUFFICIENCY AND GREAT WEIGHT OF THE EVIDENCE

Defendant first contends that insufficient evidence of malicious intent supported his second-degree murder conviction. In reviewing an evidentiary sufficiency challenge, we view the evidence in the light most favorable to the prosecution to determine "whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). "Circumstantial evidence and the reasonable inferences that arise from the evidence" can supply satisfactory proof of the elements of a crime. *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005). Questions of credibility and intent are for the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). This Court generally will not second-guess the trier of fact's determinations concerning what inferences fairly arise from the evidence or its determination regarding "the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

The elements of second-degree murder are: (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). The mental states consistent with malice include the intent to kill or do great bodily harm, or an intent to commit an act "in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id.* at 464. Proof of the latter type of malice does not require a finding that the defendant intended to

harm or kill the victim. Rather, "[t]he intent to do an act in obvious disregard of life-endangering consequences is a malicious intent." *Id.* at 466. "Malice can be inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm." *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998).

In *Goecke* and its two companion cases, the defendants were charged with second-degree murder arising from intoxicated driving that resulted in fatalities. The Supreme Court identified several factual constellations supporting a finding of malice, including driving "recklessly at high speeds along a main artery" in a city, a defendant's admitted awareness of the extent of his alcohol-induced impairment, and near-miss encounters with other vehicles before the fatal crash. *Goecke*, 475 Mich at 470. Defendant attempts to distance his actions from the facts described in *Goecke*, pointing out that he drove at night on a freeway containing very little traffic and tried to avoid striking Gunn's car. We find these distinctions irrelevant. Defendant's blood alcohol was significantly higher than any of the three *Goecke* defendants. His freeway speed as estimated by the eyewitnesses grossly exceeded the legal limit. After passing at least two other cars, twice contacting the rumble strips, and while approaching a dimly lit hill, defendant failed to either slow down or bring his driving under control. This evidence more than sufficed to prove that defendant willfully disregarded the obvious life-endangering consequences of his intoxicated driving.

Similar reasoning leads us to reject defendant's claim that the jury's second-degree murder verdict contravened the great weight of the evidence. "We review for an abuse of discretion a trial court's grant or denial of a new trial on the ground that the verdict was against the great weight of the evidence." *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). A verdict is against the great weight of the evidence "if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id*.

As described above, ample evidence supported a rational inference of malice. The eyewitness testimony emphasized defendant's high rate of speed and the readily apparent recklessness of his driving. According to expert testimony, defendant's blood alcohol level was consistent with having consumed 10 drinks. After reviewing the entire record, we reject that the jury's resolution of the evidence preponderated so heavily against the record facts that it constitutes a miscarriage of justice. Consequently, the trial court did not abuse its discretion in denying defendant's motion for a new trial on this ground.

B. PROSECUTORIAL MISCONDUCT

Defendant next asserts that the prosecutor committed misconduct by claiming during her rebuttal argument that the judge permitted the prosecution to request a conviction for second-degree murder. We conclude that defendant invited the prosecutor's reference to the judge's role in the charging process.

During his closing argument, defense counsel contended that the prosecution had in several respects overstated or exaggerated its claims. For example:

> Again, what I'm pointing out she talked about in closing argument about the accelerator being full open. Nobody says that except for her. What I'm suggesting to you though is remember I'm not blasting Ms. Siringas. This is a case that has been going on for a while. She's emotional about it. She's into this case. But the bottom line is she's got to be right about the facts because this man's life is on the line here, and the facts matter. Somewhere, somewhere, somehow the truth matters. And if you're going to convict him please do it based upon the facts of the case. Because when you look at the facts of the case you're not going to sit here and call my client a murderer. That's ridiculous.

Defense counsel continued:

> The government has great powers. The Prosecutor's Office has great powers, and with that great power to charge, to decide what somebody is going to be standing trial for comes with it great responsibilities. They've decided to charge with the highest possible penalty per a case you can charge. Hold her to that. Hold her to that and make sure she's telling you the truth as to what the law and the facts are in this case before you render a verdict. I beg you to do that.

In rebuttal, the prosecutor responded to this argument as follows:

> Listening to Mr. Bernier you'd think I was the one on trial. Ms. Siringas this, Ms. Siringas that, Ms. Siringas this, Ms. Siringas that. Ms. Siringas is vengeful. Ms. Siringas is emotional. A little sexism coming from over there from Mr. Bernier pointing to me. Emotional, sexist, I think hysterical was something he talked about. Are we talking about a little sexism here coming through? Is that what that's all about? That because [sic] the facts of this case ladies and gentlemen, are so compelling. Because what his client did is so egregious that I'm emotional, I'm vengeful, the prosecution is over reaching, the prosecution is doing that. Those are buzz words intended to somehow turn me into the villain and feel sorry for his client. . . .
>
> My job is to present the evidence whatever it is. If it's compelling then it's compelling. If it's less egregious than it is, so be it. But whatever it is that's what [sic] each us has a job. And as prosecutors we do lodge charges against defendants. Police agencies don't lodge charges. Trooper Thompson, Officer Hinojosa, you know they write up a report. A guy is drunk. They give the circumstances. They bring a warrant to the prosecutor. The prosecutor who knows the law issues charges. But are we alone in this judicial system? Do we act un-checked, do we act independently? Can we just file anything?
>
> And he keeps talking about the highest charge that could be leveled against somebody. You know what the highest charge is? Murder in the First Degree. That's the highest charge. That's premeditated intent to kill deliberate. That's the highest charge. If this [sic] a Murder charge? Yes, it is. Does the law allow it? Yes, it does. If the facts that we've presented here did not sustain that, enough evidence to bring it to you, ladies and gentlemen, because you ultimately

> make the final decision. If that was not allowed the Judge sits here and he wouldn't let you decide something that the law does not allow for you to decide.

At that point, defense counsel objected.

This Court reviews de novo a preserved claim of prosecutorial misconduct. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). The test for prosecutorial misconduct is whether the defendant received a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate the prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

We discern no impropriety in the prosecutor's argument concerning the charging decision. Rather, the prosecutor fairly and accurately responded to defense counsel's salvo. "The doctrine of invited response is used as an aid in determining whether a prosecutor's improper remarks require the reversal of a defendant's conviction. It is used not to excuse improper comments, but to determine their effect on the trial as a whole." *People v Jones*, 468 Mich 345, 352; 662 NW2d 376 (2003). Defense counsel alleged that the prosecutor had repeatedly misstated facts highly relevant to whether defendant committed second-degree murder. Counsel then segued into an argument concerning the government's "great power" to make charging decisions, inaccurately asserting that defendant had been charged with the highest crime possible under the law. Viewed against the backdrop of the record, defense counsel urged that the prosecutor had misused her power by overcharging defendant.

In response, the prosecutor accurately explained the charging process, albeit in a shorthand fashion, and correctly refuted that defendant had been charged with the "highest" possible crime. Because the prosecutor's remarks constituted a fair response to defense counsel's arguments and contained no misrepresentations, we find no prosecutorial misconduct.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant contends that his trial counsel rendered ineffective assistance by failing to effectively challenge defendant's consent to blood alcohol testing. Defendant asserts that due to his profound intoxication and the head injury he sustained during the crash, he lacked the capability to knowingly, voluntarily and intelligently consent to blood testing. Although counsel moved to exclude the blood test results, defendant contends that counsel "merely gave lip service to the motion, without calling any witnesses, and resting solely on the testimony of the interrogating officer." Further, defendant argues that he had not been placed under arrest when State Police Officer Hinojosa attempted to obtain consent, rendering inapplicable the implied consent statute, MCL 257.625c(1).

Because defendant did not request a new trial or an evidentiary hearing, our review is limited to errors apparent from the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish an ineffective assistance claim, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result would

have been different and the result that did occur was fundamentally unfair or unreliable." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). We must presume "that a defendant received effective assistance of counsel, and the defendant bears a heavy burden to prove otherwise." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Because defendant was under arrest when he consented to the blood testing, defendant's counsel was not ineffective for failing to aggressively pursue a futile suppression motion. At the time defendant committed his offense, the implied consent statute, MCL 257.625c, provided, in relevant part:

> (1) A person who operates a vehicle upon a public highway . . . within this state is considered to have given consent to chemical tests of his or her blood, breath, or urine for the purpose of determining the amount of alcohol . . . in his or her blood or urine or the amount of alcohol in his or her breath in all of the following circumstances:
>
> (a) If the person is arrested for a violation of section 625(1), (3), (4), (5), or (6), section 625a(5), or section 625m . . . .
>
> (b) If the person is arrested for felonious driving, negligent homicide, manslaughter, or murder resulting from the operation of a motor vehicle, and the peace officer had reasonable grounds to believe the person was operating the vehicle in violation of section 625.
>
> * * *
>
> (3) The tests shall be administered as provided in section 625a(6).

When a chemical test is "administered as provided in section 625a(6)," the person subject to chemical testing is advised of certain rights as found in MCL 257.625a(6)(b), which provides:

> A person arrested for a crime described in section 625c(1) shall be advised of all of the following:
>
> * * *
>
> (*iv*) If he or she refuses the request of a peace officer to take a test described in subparagraph (*i*), a test shall not be given without a court order, but the peace officer may seek to obtain such a court order.
>
> (*v*) Refusing a peace officer's request to take a test described in subparagraph (*i*) will result in the suspension of his or her operator's or chauffeur's license and vehicle group designation or operating privilege and in the addition of 6 points to his or her driver record.

The implied consent and chemical test rights statutes, MCL 257.625c and MCL 257.625a(6)(b), apply to a person under arrest. *People v Borchard-Ruhland*, 460 Mich 278, 288; 597 NW2d 1 (1999).

In *People v Gonzales*, 356 Mich 247, 253; 97 NW2d 16 (1959), our Supreme Court adopted the following definition of "arrest":

> An arrest is the taking, seizing, or detaining of the person of another, either by touching or putting hands on him, or by any act which indicates an intention to take him into custody and subjects the person arrested to the actual control and will of the person making the arrest. The act relied upon as constituting an arrest must have been performed with the intent to effect an arrest and must have been so understood by the party arrested. [Quotation marks and citation omitted.]

Defendant was certainly under arrest at the time the officers read him the chemical test rights and when the blood draw was taken. During defendant's preliminary examination, Canton police officer Adam Shulman testified that after defendant was extracted from his vehicle by paramedics, he was placed on a gurney and rolled into an ambulance. Shulman then handcuffed defendant to the gurney. Under cross-examination, Shulman acknowledged that defendant was under arrest at that point:

> Q. . . . [T]here was no doubt he was under arrest once you handcuffed him and you strapped him to the gurney, you told him so?
>
> A. Uh-huh, yes.

Officer Hinojosa then entered the ambulance and advised defendant of his "chemical test rights." According to Hinojosa, the form from which he read defendant his rights commenced as follows: "I'm a peace officer, you are under the [sic] arrest for the offense of . . . causing the death of another while operating a vehicle while under the influence of or while physically impaired by an alcoholic liquor . . . ." Defendant then consented to the blood draw. Given this evidence, defense counsel did not perform ineffectively by opting to permit the trial court to consider the admissibility of the blood test results based on the preliminary examination transcript, or by failing to pursue an evidentiary hearing regarding whether defendant's consent was knowing and voluntary. Once the police arrested defendant for felonious driving causing Gunn's death and observed his likely intoxication, defendant's consent to blood testing was implied by law.

Defendant's convictions are affirmed and the court's order for a new trial is reversed. We remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Donald S. Owens
/s/ Mark T. Boonstra