

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OTIS KIRKLAND,

Defendant-Appellant.

UNPUBLISHED
September 3, 1996

No. 160725
LC No. 91105614 FH

Before: Marilyn Kelly, P.J., and Gribbs and W.E. Collette,* JJ.

PER CURIAM.

Defendant appeals as of right following his jury trial conviction for reckless driving. MCL 257.626; MSA 9.2326. He argues that the verdict was against the great weight of the evidence. He asserts that numerous instances of prosecutorial misconduct denied him a fair trial. Finally, he alleges that the judge erred in instructing the jury not to consider evidence of police misconduct. We affirm.

I

The trial judge did not abuse his discretion in denying defendant's motion for a new trial on the basis that the jury verdict was against the great weight of the evidence. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993). Defendant's arguments on appeal rely on facts unsupported by the record. Contrary to his assertion, Officer Cunningham did not testify that defendant drove by his location at 100 miles per hour and that he caught up to him within 3/4 of a mile. He testified that defendant passed his location driving approximately 85 miles per hour, and he was caught between five and six miles away.

Defendant also attacks Officer Cunningham's testimony that defendant ran a red light at Burt road. He claims that un rebutted testimony indicated there was no light at that intersection. However, the only evidence defendant presented on that issue was his own testimony. The jury was free to decide

*Circuit judge, sitting on the Court of Appeals by assignment.

which witness was more credible. We will not second-guess the jury. *People v Jackson*, 178 Mich App 62, 65; 443 NW2d 423 (1989).

Officer Cunningham did not testify, as defendant asserts, that defendant ran a red light on Greenfield Road at the intersection of James Street. Rather, he testified that defendant ran a red light on Greenfield, south of Nine Mile, but did not specifically mention James street.

There was sufficient evidence to sustain the verdict in addition to Officer Cunningham's testimony. Officer Birberick observed defendant drive 80 to 85 miles per hour, run a red light and weave in and out of traffic. The judge did not err in denying defendant's motion for a new trial.¹

II

Defendant was not denied a fair trial from remarks made by the prosecutor. Questions of prosecutorial misconduct are decided on a case-by-case basis. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). We examine the pertinent portion of the record and evaluate the remarks in context to determine whether the defendant was denied a fair and impartial trial. *Id.* at 82-83.

Defendant in this case first argues that it was improper for the prosecution to state that, although defendant was a Green Beret, "I respectfully remind you that it was a Green Beret who murdered his wife a few years ago, as well." The statement was a legitimate response to the defendant's extensive testimony concerning his military record and to statements made in defendant's closing argument. *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989).

Next, defendant asserts that reversible error occurred when the prosecution asked defendant on cross examination, "Have you filed your civil suit yet?" However, the judge gave a curative instruction to the jury effectively curtailing any potential prejudice. *People v Daniel*, 207 Mich App 47, 56; 523 NW2d 830 (1994).

Defendant asserts that it was error for the prosecution to state that Officer Birberick is entitled to the same presumption of innocence in his civil case as defendant is entitled to in this case. We cannot find that defendant was prejudiced in any manner by that statement. *People v Roberson*, 167 Mich App 501, 513; 423 NW2d 245 (1988).

Next, defendant argues that reversible error occurred when the prosecutor commented that defendant did not call several potential witnesses. We disagree. Prosecutors are permitted to argue the evidence and make permissible inferences in order to support their case or theory. *People v Christel*, 449 Mich 578; 537 NW2d 194 (1995).

Defendant argues that the prosecutor misconstrued the evidence in stating that defendant was intoxicated when arrested. However, the prosecution presented testimony that defendant's breath smelled of alcohol, his eyes were bloodshot, his clothes in disarray and he had to rest his hand on the

car to steady himself. Therefore, the prosecutor could properly infer from the evidence that defendant was intoxicated. *Christel, supra*.

Finally, defendant argues the judge improperly instructed the jury not to consider evidence of police misconduct. To the contrary, a review of the record reveals that no such instruction was given. Defendant's argument is without merit.

Affirmed.

/s/ Marilyn Kelly

/s/ Roman S. Gibbs

/s/ William E. Collette

¹ The record also does not support defendant's argument that the trial judge who heard the motion for new trial did not review the transcripts before ruling.