

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TROY TOD TROSTLE,

Defendant-Appellant.

UNPUBLISHED

May 17, 2005

No. 253862

Kent Circuit Court

LC No. 03-001859-FH

Before: Cooper, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Defendant Troy Tod Trostle appeals as of right from his jury trial conviction for operating a vehicle under the influence of liquor (OUIL), third offense.¹ Defendant was sentenced to 46 to 180 months imprisonment. We affirm.

I. Facts and Procedural History

At approximately 1:20 a.m. on September 23, 2002, Sergeant Vincent Reilly of the Grand Rapids police department discovered a Ford LTD flipped upside down, teetering on the edge of a bridge on westbound Burton Road over northbound US-131. Officers dispatched to the scene surmised that the accident occurred within ten minutes of their arrival;² however, the driver of the vehicle could not be immediately located. While entering northbound US-131 to block traffic under the dangling vehicle, Officer Lance Taylor saw defendant run across the expressway. Defendant failed to stop when Officer Taylor activated his overhead lights and a foot chase ensued. Defendant jumped a fence and ran across a railroad yard before stopping and allowing himself to be taken into custody.

Defendant was placed into Officer Nicholas Calati's police cruiser. Defendant was visibly intoxicated and smelled heavily of alcohol. He was belligerent and refused to take a Breathalyzer test. When told that he was being arrested for OUIL, defendant informed Officer

¹ MCL 257.625(1).

² The officers reached this observation from the temperature of the vehicle's hood and the amount of fluids that had pooled underneath the vehicle.

Calati that he “should have hid in the bushes longer.”³ The officers determined that the Ford LTD belonged to defendant’s mother with whom he lived, but defendant denied driving the vehicle. Officer Calati testified that defendant claimed that a man with an Hispanic first name was driving. Defendant also testified that he told the officer that an acquaintance, Eddie Rodriguez, was driving.⁴ Officers found a set of keys in defendant’s pocket. The keys resembled Ford vehicle keys, but no one ever tested the keys in the vehicle’s ignition.⁵ At the police station, officers secured a warrant to conduct a blood alcohol test and discovered that defendant’s blood alcohol content was 0.19.

II. Sufficiency of the Evidence

Defendant contends that the prosecution failed to present sufficient evidence to support his conviction for OUIL as there was no evidence that he was the driver of the vehicle. In sufficiency of the evidence claims, we review the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.⁶ “[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.”⁷

MCL 257.625 provides in relevant part:

(1) A person . . . shall not operate a vehicle upon a highway . . . if either of the following applies:

(a) The person is under the influence of intoxicating liquor . . .

(b) The person has an alcohol content of 0.10 grams or more per 100 milliliters of blood per 210 liters of breath, or per 67 milliliters of urine.^[8]

Defendant concedes that he was under the influence of intoxicating liquor and that his blood alcohol content was almost twice the legal limit. However, defendant contends that the

³ Defendant testified in his own behalf. He asserts that he only said that he “should have hid in the bushes.”

⁴ Defendant asserts that he had been drinking and studying all day when Mr. Rodriguez drove him to a third party’s house. There, he claims that he worked on a car and continued to drink.

⁵ Officers on the scene failed to test the keys due to the precarious position of the vehicle.

⁶ *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

⁷ *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

⁸ MCL 257.625(1).

circumstantial evidence presented by the prosecution was insufficient to establish that he was the operator of the vehicle, rather than a passenger.⁹

The prosecution presented no *direct* evidence that defendant was the driver of the vehicle. The prosecution did show that the Ford LTD involved in the collision belonged to defendant's mother and defendant had a set of Ford keys in his pocket. Defendant was found near the accident scene and ran from the police. When apprehended, defendant told police either that he "should have hid in the bushes longer" or that he "should have hid in the bushes."¹⁰ Although defendant claims that Mr. Rodriguez was driving the vehicle, no one else was found nearby; an officer testified that defendant gave a different name on the scene; and defendant admitted that he failed to give police any information to help them locate Mr. Rodriguez.¹¹ Viewing this evidence in the light most favorable to the prosecution, a jury could find beyond a reasonable doubt that defendant was driving the vehicle at the time of the collision. Accordingly, defendant is not entitled to relief on this ground.

III. Missing Res Gestae Witness

Defendant also contends that the prosecution failed to exercise due diligence in producing a res gestae witness endorsed on its witness list. Defendant asserts that he was prejudiced by the absence of this witness and the trial court should have given the "missing witness" jury instruction.¹² We review a trial court's determination regarding the prosecution's exercise of due

⁹ The Michigan Supreme Court has provided the following guidance to determine if a defendant was "operating" a vehicle under the statute:

"[O]perating" should be defined in terms of the danger the OUIL statute seeks to prevent: the collision of a vehicle being operated by a person under the influence of intoxicating liquor with other persons or property. Once a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk. [*People v Wood*, 450 Mich 399, 404-405; 538 NW2d 351 (1995).]

¹⁰ Although evidence of flight, including running and hiding from the police, is insufficient standing alone to support a conviction, it is admissible to show consciousness of guilt. See *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003); *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

¹¹ Similarly, a prosecutor may properly comment on a defendant's failure to report a crime when "reporting the crime would have been natural if the defendant's version of the events were true." *Goodin*, *supra* at 432. If defendant's version of the events were true in this case, he would have been inclined to tell police how to find Mr. Rodriguez.

¹² CJI2d 5.12. The instruction provides: "[*State name of witness*] is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case." *Id.*

diligence and the appropriateness of giving the missing witness instruction for an abuse of discretion.¹³

“A res gestae witness is a person who witnesses some event in the continuum of a criminal transaction and whose testimony will aid in developing a full disclosure of the facts.”¹⁴ The Legislature outlined the prosecutor’s duty with regard to all witnesses in MCL 767.40a, which provides in relevant part:

(1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.

* * *

(3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.

(4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.

(5) The prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness. The request for assistance shall be made in writing by defendant or defense counsel not less than 10 days before the trial of the case or at such other time as the court directs. . . .^[15]

A prosecutor no longer has a duty to produce all res gestae witnesses at trial. The prosecutor’s duty is “to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant’s request.”¹⁶ Once a witness has been endorsed for trial, however, the prosecutor must use due diligence to produce that witness at trial.¹⁷ Due diligence requires only a good faith effort to produce the witness, not that every possible effort be made.¹⁸ The missing

¹³ *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004).

¹⁴ *People v O’Quinn*, 185 Mich App 40, 44; 460 NW2d 264 (1990), overruled in part on other grounds *People v Koonce*, 466 Mich 515; 648 NW2d 153 (2002).

¹⁵ MCL 767.40a.

¹⁶ *People v Perez*, 469 Mich 415, 418-419; 670 NW2d 655 (2003), quoting *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995).

¹⁷ *Eccles*, *supra* at 388.

¹⁸ *People v Watkins*, 209 Mich App 1, 4; 530 NW2d 111 (1995).

witness instruction is appropriate where the prosecutor fails to secure the presence of a witness who is not deleted from the witness list for good cause, fails to give reasonable assistance in locating a witness,¹⁹ or fails to use due diligence to produce the endorsed witness.²⁰

Everett Strong allegedly heard the accident and subsequently saw one man run from the Ford LTD. The prosecutor listed Mr. Strong as a witness on the information and endorsed him as a trial witness. Based on Mr. Strong's previous absences at two preliminary examinations,²¹ defendant raised a pretrial objection to the prosecutor's lack of due diligence in securing the presence of this eyewitness. The trial court allowed the case to move forward; however, defendant renewed his objection at the close of the prosecution's case-in-chief when Mr. Strong still failed to appear. The prosecutor indicated that Mr. Strong had been subpoenaed while in a Michigan prison. Mr. Strong's whereabouts had been tracked from Detroit to Chicago where he was arrested. Mr. Strong was then moved to a Michigan prison where he remained until one month prior to trial. Mr. Strong did not report to his parole officer upon his release and the prosecutor did not know where he could be located. Without further questioning, the trial court determined that Mr. Strong's absence was "not fatal to the prosecution's case" and denied defendant's motion.²²

The trial court should have made a record and inquired further into the prosecutor's efforts to locate Mr. Strong. However, a review of the record reveals that defendant was not actually prejudiced by Mr. Strong's absence at trial.²³ In fact, Mr. Strong's testimony would have been harmful to defendant's case.²⁴ Accordingly, defendant is not entitled to a new trial.²⁵

IV. Prosecutorial Misconduct

Defendant contends that the prosecutor improperly argued facts not in evidence. Prosecutorial misconduct claims are reviewed on a case by case basis, examining any remarks in context, to determine if the defendant received a fair and impartial trial.²⁶ A prosecutor enjoys

¹⁹ *Perez, supra* at 420.

²⁰ *Eccles, supra* at 388.

²¹ The lower court record references only one preliminary examination. Defendant waived his right to a preliminary examination before that hearing was actually conducted. However, the prosecutor did not object when defense counsel referenced two prior examinations that had been dismissed without prejudice in this case.

²² From the record, it appears that the trial court meant that the prosecutor had exercised due diligence in attempting to produce Mr. Strong.

²³ See *People v Pearson*, 404 Mich 698, 723; 273 NW2d 856 (1979), superseded in part on other grounds MCL 767.40; *People v DeMeyers*, 183 Mich App 286, 293; 454 NW2d 202 (1990).

²⁴ Officer Andrew Snyder's accident report indicates that Mr. Strong only saw one man run from the vehicle following the collision. According to defendant's version of events, however, Mr. Strong should have seen two men.

²⁵ *Pearson, supra* at 725.

²⁶ *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

wide latitude in fashioning arguments and may argue the evidence and all reasonable inferences arising from it.²⁷

In rebuttal, the prosecutor argued that Officer Andrew Snyder testified that a witness who heard the accident, Mr. Strong, told him that only one man ran from the accident scene. However, Officer Snyder *never* testified that a witness talked to him after the accident. In fact, as discussed above, the prosecutor presented no evidence regarding Mr. Strong, the only eyewitness to this accident. Over defendant's objection, the trial court instructed the jury: "We will let the jury use their collective memory and they've had the opportunity to take notes. . . . Again, in all things, it is what you recall the testimony to be, not what the attorneys say the evidence is." Following these instructions, the prosecutor continued to make the same argument.

The prosecutor clearly argued facts not in evidence. Furthermore, the prosecutor's misconduct was not inadvertent. Defendant objected to Mr. Strong's absence more than once and the prosecutor explained his attempts to locate the witness. Under the circumstances, it is highly unlikely that the prosecutor was unaware of whether or not he had elicited this testimony from Officer Snyder.²⁸ This Court will not countenance prosecutorial misconduct, especially when it amounts to a knowing and deliberate violation of the prosecution's duty to seek justice.²⁹ However, in light of the overwhelming evidence of defendant's guilt, it is unlikely that this error was outcome determinative.³⁰ Furthermore, the trial court's immediate corrective instruction to the jury cured the prejudice caused by the prosecutor's improper argument.³¹ Therefore, defendant is not entitled to the vacation of his conviction, despite the prosecutor's misconduct.

V. Defendant's Arguments In Propria Persona

Defendant also raises several challenges to his conviction in propria persona. Defendant first asserts that his stop and subsequent arrest were improper, as his flight from the police was insufficient to form a particularized suspicion for an investigative stop. As defendant failed to raise this issue below, our review is limited to plain error affecting defendant's substantial rights.³² An individual has the right to be secure against unreasonable searches and seizures.³³

²⁷ *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled in part on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

²⁸ See *People v Ray*, 119 Mich App 724, 728; 326 NW2d 622 (1982) (the prosecutor's continued improper questioning regarding the defendant's postarrest silence was not inadvertent as the defendant's first response "made the prosecutor aware that defendant had exercised his right to remain silent").

²⁹ See *People v Strong*, 404 Mich 357, 360-363; 273 NW2d 70 (1978) (finding that the prosecutor violated professional standards by deliberately inserting incompetent prejudicial evidence into the defendant's trial despite clear warnings from the trial court).

³⁰ *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

³¹ Cf *People v Leshaj*, 249 Mich App 417, 420-421; 641 NW2d 872 (2002) (finding that reversal was required where the trial court failed to take "swift action" to prevent prejudice).

³² *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

However, an officer may briefly stop an individual for investigatory purposes if he or she has “a particularized suspicion, based upon an objective observation, that the person stopped has been, is, or is about to be engaged in criminal wrongdoing. The ‘particularized suspicion’ must be based upon an assessment of the totality of the circumstances presented to the police officer.”³⁴ Standing alone, flight from an approaching officer is insufficient to support a particularized suspicion; however, it is a factor to be considered in the totality of the circumstances.³⁵ Defendant was found running across an expressway near an accident scene in the middle of the night and refused to stop at an officer’s request. This was sufficient to create a particularized suspicion that defendant had committed “wrongdoing” in causing the accident.

Defendant also asserts that his warrantless stop and arrest were unlawful pursuant to MCL 764.15(1)(a), as the charged offense was a misdemeanor that did not occur in the officers’ presence. However, the statute makes a specific exception when an accident has occurred and an officer has reasonable cause to believe that the individual committed OUIL.³⁶ Accordingly, defendant’s initial stop and subsequent arrest were constitutionally sound and lawful.

Defendant also asserts that the admission of his statement to Officer Calati about hiding in the bushes violated his Fifth Amendment right against self-incrimination, as he made the statement while in custody without being read *Miranda* rights.³⁷ Our review is again limited to plain error. We first note that the record is void of evidence indicating whether any officer read defendant his *Miranda* rights. However, the officers were not required to read defendant *Miranda* rights, as he was not being interrogated.³⁸ Both defendant and Officer Calati testified that defendant made this statement spontaneously. Accordingly, defendant’s right against self-incrimination was not violated by the admission of this statement.

Defendant contends, for the first time on appeal, that the search warrant for his blood draw lacked probable cause as there was no evidence that he was the operator of the vehicle. The affidavit presented in connection with this warrant is not a part of the record. However, we previously found that the prosecution presented sufficient evidence to support defendant’s conviction for OUIL. The record also indicates that Officer Snyder’s report includes Mr. Strong’s statement that only one man ran from the Ford LTD after the collision. Based on this evidence, we find that the affidavit likely contained sufficient information to form probable cause.

Defendant finally raises several instances of ineffective assistance of counsel. Defendant did challenge his trial counsel’s effectiveness at sentencing, but only on a single ground relating

(...continued)

³³ US Const, Am IV; Const 1963, art 1, § 11.

³⁴ *People v Shields*, 200 Mich App 554, 557; 504 NW2d 711 (1993), citing *United States v Cortez*, 449 US 411, 417-418; 101 S Ct 690; 66 L Ed 2d 621 (1981).

³⁵ *Id.* at 558.

³⁶ MCL 764.15(1)(h); *People v Spencely*, 197 Mich App 505, 507-508; 495 NW2d 824 (1992).

³⁷ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

³⁸ *People v Ish*, 252 Mich App 115, 118; 652 NW2d 257 (2002).

to the calculation of his prior offenses. As none of the grounds raised on appeal were raised below, defendant's challenges are unpreserved for appellate review.³⁹ Absent a *Ginther*⁴⁰ hearing, our review is limited to plain error on the existing record affecting defendant's substantial rights.⁴¹ Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise.⁴² To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently.⁴³ Defendant must overcome the strong presumption that counsel's performance was sound trial strategy.⁴⁴

Defendant asserts that trial counsel failed to promptly investigate his case. Defendant also contends that trial counsel improperly recommended that he waive his right to a preliminary examination before the third examination. As there is no record of counsel's actions before trial, defendant cannot overcome the presumption that trial counsel was effective.

Defendant also challenges trial counsel's failure to move for the suppression of his statement to Officer Calati and his failure to object to the use of defendant's prearrest silence. Defendant's first challenge is without merit, however, as we have already determined that defendant's statement to Officer Calati was properly admissible. We further reject defendant's contention that trial counsel should have objected to the use of his statement pursuant to MRE 801(d)(2), as defendant's statement was clearly not hearsay under this section. Trial counsel is not ineffective for failing to raise futile motions and objections.⁴⁵

Defendant fails to indicate how the prosecution used his prearrest silence against him at trial. We are not required to "discover and rationalize the basis" of an appellant's claim when that party merely announces its position without any supporting authority or facts.⁴⁶ However, it appears that defendant is challenging trial counsel's failure to object to the prosecution's questions regarding defendant's failure to give police further information regarding Mr. Rodriguez. The defense theory of the case was that Mr. Rodriguez, not defendant, was the driver of the vehicle at the time of the accident. Defendant made the issue relevant by presenting this version of events on direct examination.⁴⁷ Therefore, the prosecutor's questions were proper⁴⁸

³⁹ *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).

⁴⁰ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

⁴¹ *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

⁴² *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

⁴³ *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

⁴⁴ *Id.* at 600.

⁴⁵ See *Snider*, *supra* at 425.

⁴⁶ *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

⁴⁷ See *Goodin*, *supra* at 432.

⁴⁸ MRE 611(b); *People v Jackson*, 108 Mich App 346, 349; 310 NW2d 238 (1981).

and trial counsel was not required to object. Accordingly, defendant has failed to overcome the presumption that trial counsel was effective.

Affirmed.

/s/ Jessica R. Cooper

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra