

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ALLEN INGRAHAM,

Defendant-Appellant.

UNPUBLISHED

January 12, 2016

No. 324226

Crawford Circuit Court

LC No. 13-003663-FC

Before: RONAYNE KRAUSE, P.J., and GADOLA and O'BRIEN, JJ.

PER CURIAM.

Defendant was convicted of third-degree fleeing and eluding, MCL 257.602a(3), following a jury trial. He was sentenced as a fourth-offense habitual offender, MCL 769.12, to 3 to 25 years' imprisonment. We affirm.

I. FACTUAL BACKGROUND

In the early morning hours of November 21, 2013, police officer Michael Grosberg was on road patrol in a fully marked patrol car when a silver Dodge pickup truck passed his location. Grosberg testified that the truck had a loud exhaust, so he pursued the vehicle in order to initiate a traffic stop. Grosberg testified that even though he put his lights on, the truck maintained its speed. Grosberg then turned on his siren, after which the truck accelerated to 84 or 85 miles per hour. Grosberg said that the truck got away from him after it turned onto a snowmobile trail. After running the vehicle's tag, Grosberg discovered that it belonged to defendant and Deedee Galloway. Galloway testified that defendant had possession of the truck on the night in question.

Defendant's sister, Stacy Ingraham, and her boyfriend, Alexander Cummings, testified that defendant called and asked for a ride around 2:00 a.m. on November 21, 2013. Ingraham testified that when they got to defendant's location, defendant told her he had just "outran the cops." She said that defendant asked her to cover for him by telling the police that she picked him up from work. Ingraham testified that she initially told the police that she picked defendant up from work, but she changed her story after the prosecutor told her that if she did not testify truthfully she would be charged with a felony. At trial, when Cummings was asked whether defendant made statements about running from the police, he answered, "He may have." Cummings later admitted that at the preliminary examination, he testified that defendant made a statement about running from the police.

Before trial, defendant moved to exclude Ingraham's and Cummings's testimony that defendant told them he outran the police, arguing that the testimony was barred by the *corpus delicti* rule because there was no independent evidence that defendant was the driver of the truck. The trial court concluded that while the "identity of the perpetrator is an element of the crime, it is not required to show that a crime occurred and therefore not part of the corpus delicti." The trial court, therefore, denied defendant's motion to suppress.

On the Saturday before the Monday trial, the prosecutor informed defense counsel that he had a dashboard camera video from officer Grosberg's police vehicle, which he had inadvertently failed to turn over despite defense counsel's discovery request. The prosecutor said that he would seek to admit the video at trial. On the day of trial, defense counsel moved to exclude the video as a discovery sanction. The trial court denied defense counsel's request, but allowed her and defendant to view the video privately before trial began. Before the video was played in court, and after defendant had raised a hearsay objection, the trial court instructed the jury not to consider any statements made on the video for the truth of the matters asserted.

Following the close of the prosecution's case, defense counsel again moved to exclude the video, this time arguing that background audio on the video referenced a prior offense of operating a vehicle while intoxicated (OWI). Defense counsel asked the court to provide another cautionary instruction if the video was admitted. The prosecutor admitted that there were statements on the video about how one of the vehicle's owners had a prior OWI conviction, but argued that the statements were merely part of unclear radio traffic. The trial court reaffirmed its ruling to admit the video, and reiterated that the statements were not offered for the truth of the matters asserted. The trial court agreed, however, to provide the jury with another cautionary instruction. After closing arguments, the court instructed the jury that it could not "consider the statements made [in the video] as being true or evidence that [defendant] is guilty."

II. ANALYSIS

A. DASHBOARD CAMERA VIDEO

On appeal, defendant argues that the dashboard camera video of the chase should not have been admitted both because of the prosecution's discovery violation and because the video contained inadmissible other acts evidence. Defendant also argues that his trial counsel was ineffective for failing to thoroughly review the video.

A trial court's decision regarding the admission of evidence is reviewed for an abuse of discretion, *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999), as is a trial court's decision regarding the remedy for a discovery violation, *People v Davie*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). An abuse of discretion occurs "when the trial court chooses an outcome falling outside [the] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Although preserved, because this Court denied defendant's motion

for a remand for a *Ginther*¹ hearing,² our review of the ineffective assistance claim is limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

1. NON-COMPLIANCE WITH DISCOVERY REQUEST

“ ‘There is no general constitutional right to discovery in a criminal case.’ ” *People v Banks*, 249 Mich App 247, 254; 642 NW2d 351 (2002), quoting *Weatherford v Bursey*, 429 US 545, 559; 97 S Ct 837; 51 L Ed 2d 30 (1977). However, the Michigan Court Rules require the prosecution to turn over evidence, including electronically recorded statements, upon a request from a defendant. MCR 6.201(A)(2). “When determining the appropriate remedy for discovery violations, the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance.” *Banks*, 249 Mich App at 252. “[E]xclusion of otherwise admissible evidence is an extremely severe sanction that should be limited to egregious cases.” *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 454-455 n 10; 722 NW2d 254 (2006). Limiting instructions to the jury “are presumed to cure most errors” because “[j]urors are presumed to follow their instructions.” *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

The record shows that the prosecution did not offer the video to defense counsel until two days before trial, despite defense counsel’s valid request. As a remedy, the trial court allowed defendant and defense counsel to view the video privately before taking any testimony at trial. The trial court correctly concluded that the video essentially corroborates Grosberg’s testimony, and does not show any fact or element of the crime that was not otherwise independently established. Although defense counsel argued at trial that the video blindsided her defense due to the color of the vehicle being an issue, the trial record does not show that the color of the vehicle was ever in dispute. Therefore, the trial court’s remedy of allowing defendant and defense counsel to view the video before taking testimony and issuing limiting instructions, once right before the video was shown and once right before the jury began to deliberate, was within the range of reasonable and principled outcomes.

2. OTHER ACTS EVIDENCE

MRE 404(b)(1) states that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” On appeal, the prosecution contends that the complained of statements actually refer to the female co-owner of the vehicle, Galloway. In the video, there are two statements that come over the radio that reference an owner of the vehicle having an OWI and a suspended license. The only intelligible portion of the first statement is the phrase, “history OWI.” The second statement includes the phrase “female owner of vehicle . . . suspended right now for alcohol” Given that both statements are difficult to make out, and that the second statement refers only to the female

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

² *People v Ingraham*, unpublished order of the Court of Appeals, entered May 19, 2015 (Docket No. 324226).

owner of the vehicle, the trial court's decision to affirm its ruling and allow the video's admission was not an abuse of discretion. Moreover, we note that the court twice instructed the jury not to consider any statements heard on the tape for the truth of the matters asserted. Again, "[j]urors are presumed to follow their instructions" *Abraham*, 256 Mich App at 279.

3. INEFFECTIVE ASSISTANCE OF COUNSEL

"To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant." *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000). There is a "strong presumption of effective assistance of counsel." *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008).

As previously stated, the video was mostly duplicative of other evidence, namely Grosberg's testimony. The statements about an alcohol offense refer, at least in part, to a female owner of the vehicle, and the jurors were well aware that there were two owners of the vehicle, one of whom was female. Defense counsel asked the court to exclude the video on multiple grounds, and ensured that the trial court reiterated its limiting instruction to the jurors when the court denied counsel's requests. Under these circumstances, defendant has not demonstrated ineffective assistance of counsel.

B. DEFENDANT'S STATEMENT THAT HE "OUTRAN THE COPS"

Defendant argues that his statement to his sister that he "outran the cops," and similar testimony from Cummings, should not have been admitted because the admission of such evidence is contrary to the *corpus delicti* rule. The *corpus delicti* rule provides that "a defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury . . . and (2) some criminal agency as the source of the injury." *People v Konrad*, 449 Mich 263, 269-270; 536 NW2d 517 (1995). The rule "is designed to prevent the use of a defendant's confession to convict him of a crime that did not occur." *Id.* at 269. The "rule is limited, however, to admissions which are confessions, and not to admissions of fact which do not amount to confessions of guilt." *People v Rockwell*, 188 Mich App 405, 407; 470 NW2d 673 (1991). "Proof of the identity of the perpetrator of the act or crime is not a part of the corpus delicti." *Konrad*, 449 Mich at 270, quoting *United States v Di Orio*, 150 F 2d 938, 939 (CA 3, 1945).

The trial court did not err by denying defendant's motion to exclude the disputed statements because extensive corroborating circumstantial evidence in this case showed the occurrence of a specific agency and criminality. Grosberg testified extensively about pursuing the truck that eluded him, which was registered to defendant. Grosberg testified that he turned on his lights and siren, indicating a clear command from a marked patrol car for the driver of the truck to stop. The driver's failure to stop was sufficient evidence to show that an injury occurred and that criminality caused the injury. Defendant's statement that he outran the cops was used as evidence to show that it was, in fact, defendant who drove the vehicle and committed the crime. Again, the identity of the perpetrator is not part of the *corpus delicti*. *Konrad*, 449 Mich at 270. Therefore, the trial court did not abuse its discretion by admitting this evidence.

C. SUFFICIENCY OF THE EVIDENCE

Finally, defendant argues that the evidence adduced at trial was insufficient to support his conviction because there was no direct evidence that he was the driver of the truck. Following the close of the prosecution's case, defense counsel moved for a directed verdict, arguing that the evidence presented by the prosecution was insufficient to convict. The trial court concluded that there was sufficient circumstantial evidence to infer that defendant drove the vehicle on the night in question, and therefore denied defendant's motion. This Court reviews de novo a claim that the evidence at trial was insufficient to support a conviction, *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010), as well as a court's decision on a motion for a directed verdict, *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999).

"The sufficient evidence requirement is a part of every criminal defendant's due process rights." *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992). "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *Id.* at 515, citing *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). Reviewing courts resolve any factual conflicts in the prosecution's favor. *Wolfe*, 440 Mich at 515. Identity is a critical element in every criminal prosecution, but it may be established solely by circumstantial evidence. *People v Sullivan*, 290 Mich 414, 418; 287 NW 567 (1939).

The only element that defendant challenges on appeal is whether there was sufficient evidence to identify him as the driver of the truck. Defendant correctly points out that no direct evidence established that he was the driver of the truck; however, the circumstantial evidence is substantial. Two of defendant's coworkers testified that they saw the truck and defendant at their place of work that evening. One of the coworkers testified that he and defendant left at roughly the same time, and he saw the truck leave. Galloway testified that defendant was in possession of the truck on the night in question. Defendant's sister and her boyfriend testified that they picked defendant up in the general area where Grosberg lost the truck and where it was eventually recovered. Defendant's sister testified that defendant told her he outran the police and asked her to cover for him by telling the police that she had picked him up from work. Viewing this evidence in a light most favorable to the prosecution, a rational jury could conclude beyond a reasonable doubt that defendant was the driver of the truck who was fleeing and eluding Grosberg in the early morning hours of November 21, 2013.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Michael F. Gadola
/s/ Colleen A. O'Brien