

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL RICHARD NANTELLE,

Defendant-Appellant.

UNPUBLISHED

October 11, 2005

No. 253407

Dickinson Circuit Court

LC No. 02-002999-FH

Before: Whitbeck, C.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant Carl Nantelle appeals as of right his jury convictions of unlawfully driving away an automobile (UDAA),¹ and operating a motor vehicle while impaired (OWI),² third offense.³ We affirm in part and reverse in part. We decide this case without oral argument under MCR 7.214(E).

I. Basic Facts And Procedural History

Nantelle and his roommates spent the evening of September 24, 2002, at Janie's, a pool hall in Iron Mountain. While at Janie's, Nantelle consumed at least three beers. The trio left Janie's at approximately 11:30 p.m., and returned to their apartment. When they arrived, however, Nantelle did not want to stay home, so one of his roommates, Eric Lequia, gave him permission to borrow Lequia's Ford Bronco to drive back to Janie's.

At approximately 5:30 a.m., Iron Mountain police discovered the Bronco and a semi truck belonging to KSR Company, Inc. (KSR), in a ditch alongside Traders Mine Road. The officers were then dispatched to a residence on Stanton Street, which was within walking distance of the ditch. A Stanton Street resident reported that a man, who she later identified as Nantelle, had been in her yard at approximately 5:00 a.m., asking for her assistance in finding his girlfriend's car, which he claimed his girlfriend had driven into a ditch. The homeowner testified

¹ MCL 750.413.

² MCL 257.625(3).

³ MCL 257.625(10)(c).

that defendant appeared intoxicated. Police located Nantelle a short time later walking along Stanton Street. The officers also testified that Nantelle was visibly intoxicated.

The officers decided to conduct an OUIL investigation and began administering field sobriety tests, but Nantelle became aggressive, so they decided to put him in handcuffs for their safety. A patdown search of Nantelle revealed the keys to the semi truck in his pocket. According to the officers, at that point, Nantelle admitted being in the semi truck. The keys to the Bronco were later found in the cab of the semi truck. The officers arrested Nantelle for UDAA and continued the OUIL investigation. Later that morning, Nantelle was charged with UDAA and OUIL. A blood alcohol test showed that Nantelle's blood alcohol content at 8:00 a.m. on September 25, was 0.12 grams per deciliter.⁴

At trial, KSR's owner testified that the semi truck was normally parked at a location about a quarter mile away from where the truck was found stuck in the ditch. The keys were kept inside the cab of the truck. KSR's owner further testified that he did not know Nantelle and had not given him permission to use the truck.

According to Nantelle, after arriving at Janie's, he met two construction workers and he agreed to go to another bar with them. Nantelle testified that one of construction workers agreed to drive Lequia's Bronco to the Gold Nugget in Spread Eagle. Nantelle admitted that he and the men then proceeded to "get drunk." Nantelle explained that after awhile he went outside and passed out in the back of the Bronco. The next thing Nantelle recalled was waking up in the back of the Bronco, which was now in the ditch along Traders Mine Road. There was no sign of the construction workers. After Nantelle got out of the Bronco, he claimed that a semi truck pulled up, and the driver asked him if he needed help. Nantelle stated that the semi truck driver attempted to render assistance but then left the scene on foot. Nantelle speculated that the driver left because the semi truck was stuck.

Nantelle testified that approximately five minutes after the semi truck driver left he walked to a gas station and the station attendant offered to give him a ride home. According to Nantelle, he arrived back home at approximately 3:30 a.m. Nantelle claimed that he had an argument with this other roommate, Wendy Zablocki, and he consumed two or three more drinks. Nantelle explained that approximately one hour later he set out on foot to find the Bronco. He recalled asking the Stanton Street resident for assistance. Nantelle admitted at trial that he made up the story about his girlfriend driving the car into the ditch. The jury convicted Nantelle, and he was sentenced to concurrent terms of forty months to five years' imprisonment for UDAA and third-offense OWI.

⁴ The legal limit at the time of the offense was 0.10. MCL 257.625(1)(b) (2002).

II. Suppression Of Evidence

A. Standard Of Review

Because he did not raise this claim in the trial court, Nantelle has failed to properly preserve for our review the issue of whether the police illegally searched his pocket and seized the keys to the semi truck that was stuck in the ditch. Although, generally, unpreserved issues may not be reviewed on appeal, appellate review can be appropriate when a significant constitutional issue is involved.⁵ Because Nantelle claims that the evidence was gathered pursuant to an unlawful search that violated his constitutional right to due process, his claim is subject to review for plain error affecting his substantial rights.⁶ “Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error ““seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings” independent of the defendant’s innocence.”⁷

B. Reasonable Suspicion

Nantelle argues that the police illegally stopped and searched him without a warrant because the officers did not have reasonable suspicion to suspect that he had committed a crime. Nantelle also argues that because the semi truck keys were discovered on his person pursuant to the unconstitutional search, this evidence should have been suppressed. We disagree that the initial stop was improper, but we agree that the keys were improperly seized.

The United States and Michigan Constitutions guarantee the right of people to be secure against unreasonable searches and seizures.⁸ A warrantless search is generally unreasonable and evidence seized pursuant to an unconstitutional search must be excluded from trial.⁹ However, established exceptions exist to the general rule that balance the individual’s privacy interests against legitimate government interests in law enforcement.¹⁰ A police officer is authorized to make an investigatory stop if he possesses reasonable suspicion that the person stopped was or was about to be engaged in criminal activity.¹¹

⁵ See *People v Rodriguez*, 251 Mich App 10, 27; 650 NW2d 96 (2002).

⁶ *People v Hawkins*, 245 Mich App 439, 447; 628 NW2d 105 (2001).

⁷ *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993), quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 2d 555 (1936).

⁸ US Const, Am IV; Const 1963, art I, § 11.

⁹ *People v Wilson*, 257 Mich App 337; 668 NW2d 371 (2003), vacated in part 469 Mich 1011 (2004).

¹⁰ *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996).

¹¹ *Terry v Ohio*, 392 US 1, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

Here, the officers were called to the scene to investigate two vehicles in a ditch. When they came upon Nantelle less than a mile away, he fit the description given to them by the homeowner who had observed an intoxicated man on her property looking for assistance in extricating a car from a ditch just minutes earlier. As the officers approached him, Nantelle immediately told them that he was looking for a vehicle stranded in a ditch. The officers testified that Nantelle was slurring his speech, had poor balance, and smelled of intoxicants. Thus, we conclude that the officers had reasonable suspicion to make an investigatory stop of Nantelle.

Because of the interest in protecting officers' safety, a police officer conducting an investigatory stop has authority to conduct a patdown search for weapons if he has reasonable suspicion that the individual stopped for questioning is armed and thus poses a danger to the officer.¹² When the officers informed Nantelle that his story that his girlfriend had driven the car into the ditch and then headed to the airport did not check out, he became agitated, angry, and uncooperative. The officers asked him to recite the alphabet, which he did, in a slurred fashion. Nantelle then refused to participate in any further field sobriety tests and became more aggressive. The officers then decided to put him in handcuffs for their safety. A patdown search of Nantelle revealed the keys to the semi truck in his pocket. While we believe that the officer had the authority to conduct a patdown search for weapons, we cannot conclude that the officer had the authority to seize the keys from Nantelle's pocket. An object felt during a legitimate patdown search for weapons may be seized without a warrant if its identity is immediately apparent and the officer has probable cause to believe that contraband or evidence of a crime will be found.¹³ Here, the searching officer simply testified that during the search he felt something "rigid" that "concerned him." The record is devoid of any indication that the identity of the object as a weapon or contraband was immediately apparent to the officer. Thus, the keys were not properly seized under this warrantless search exception.

We acknowledge the prosecution's argument that the seizure of the keys was nevertheless authorized under the search incident to arrest exception to the warrant requirement. But we cannot conclude that the officer had the authority to seize the keys from Nantelle's pocket under this exception either. While Michigan law provides a statutory exception to the warrantless arrest rule for OUIL offenses that gives a police officer authority to arrest a defendant for OUIL even if he did not witness the driving or the accident,¹⁴ the officers clearly testified that Nantelle was not charged with OUIL until after the blood alcohol tests results were received. Rather the officers testified that they initially placed Nantelle under arrest for UDAA immediately after discovering the semi truck keys in his pocket. A search conducted immediately before an arrest is incident to an arrest and therefore legal if probable cause existed.¹⁵ But when an arrest

¹² *Id.*; *Champion, supra* at 98-99.

¹³ *People v Custer*, 465 Mich 319, 331-332; 630 NW2d 870 (2001).

¹⁴ MCL 764.15(1)(h); MCL 764.15(1)(d); MCL 267.625(9)(a)(ii); *People v Stephen*, 262 Mich App 213, 219; 685 NW2d 309 (2004).

¹⁵ *Champion, supra* at 115-116.

“follow[s] quickly on the heels of the challenged search,” the arrest is improper if the probable cause for the arrest was “provided by the fruits of that search.”¹⁶ Here, the probable cause for Nantelle’s arrest for UDAA, the discovery of the keys in his pocket, was provided by the fruits of the search. Thus, the keys were improperly seized, and Nantelle’s substantial rights were violated by their admission into evidence.

Additionally, defense counsel’s failure to object to the admission of the evidence constituted ineffective assistance of counsel. There is a reasonable probability that, but for counsel’s failure to object, the result of the proceeding would have been different.¹⁷ Reversal of Nantelle’s UDAA is warranted because the error seriously affected the fairness of the judicial proceedings.¹⁸

III. Sufficiency Of The Evidence

A. Standard Of Review

We review challenges to the sufficiency of the evidence de novo, viewing the evidence in a light most favorable to the prosecution to determine whether a rational factfinder could have found that the essential elements of the crime were proven beyond a reasonable doubt.¹⁹

B. UDAA

To convict a defendant of UDAA, the prosecution needs to establish beyond a reasonable doubt that (1) the defendant possessed the vehicle, (2) the defendant drove the vehicle away, (3) the defendant did the act wilfully, and (4) the defendant did not have authority or permission.²⁰ Nantelle contends that there was insufficient evidence introduced at trial to support his UDAA conviction. We agree.

Circumstantial evidence and the reasonable inferences that arise from that evidence can constitute satisfactory proof of the elements of a crime.²¹ However, absent the evidence showing that the keys to the semi truck were found in Nantelle’s possession, the only evidence supporting the charge was that the keys to the Bronco were found inside the cab of the semi truck, and that, before being moved, the semi truck had been parked down the road within sight of the area where both vehicles were eventually found. While Nantelle did admit to being in the truck, he

¹⁶ *Id.* at 116-117, quoting *Rawlings v Kentucky*, 448 US 98, 111; 100 S Ct 2556; 65 L Ed 2d 633 (1980).

¹⁷ *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

¹⁸ See *Carines, supra* at 763.

¹⁹ *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *Hawkins, supra* at 457.

²⁰ *People v Hendricks*, 200 Mich App 68, 71; 503 NW2d 689 (1993).

²¹ *Carines, supra* at 757.

only did so after the officers found and questioned him about the keys in his pocket. Thus, his statement was inadmissible.²² Accordingly, we conclude that there was insufficient evidence to support the jury's verdict that Nantelle unlawfully drove away the semi truck.

C. OWI

A person shall not operate a vehicle within this state when his ability to operate the vehicle is "visibly impaired" due to the consumption of intoxicating liquor.²³ To convict a defendant of OWI, the prosecution needs to establish beyond a reasonable doubt that "defendant's ability to drive was so weakened or reduced by consumption of intoxicating liquor that defendant drove with less ability than would an ordinary, careful and prudent driver. Such weakening or reduction of ability to drive must be visible to an ordinary, observant person."²⁴

A jury could have reasonably inferred from the facts and circumstances that Nantelle was driving the Bronco. Evidence showed that when the police officers discovered them, the vehicles were off the roadway in a ditch along Traders Mine Road and that the semi truck was stuck. Evidence also showed that the weather was clear and that the road surface was dry. Moreover, Nantelle admittedly consumed at least three beers before the time he set out in the Bronco and that his last known destination was a bar where he continued to drink. He was visibly intoxicated when he first encountered the police officers, and at 8:00 a.m. his blood alcohol level was still 0.12. Based on this evidence, the jury could have reasonably inferred that, due to the consumption of alcohol, Nantelle's ability to drive as an ordinary careful driver was reduced to the point where an ordinary, observant person would have noticed it. Viewing the evidence in a light most favorable to the prosecution, we conclude that a jury could have reasonably found that Nantelle was operating a vehicle while impaired.²⁵

IV. Due Process Claim For Trial Court's Refusal To Admit Evidence

A. Standard Of Review

We review a trial court's decision whether to admit or exclude evidence for an abuse of discretion.²⁶ An abuse of discretion should only be found "if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made."²⁷

²² See *People v Richardson*, 204 Mich App 71, 78; 514 NW2d 503 (1994).

²³ MCL 257.625(3).

²⁴ *Oxendine v Secretary of State*, 237 Mich App 346, 354; 602 NW2d 847 (1999), quoting *People v Lambert*, 395 Mich 296, 305; 235 NW2d 338 (1975).

²⁵ See *Johnson*, *supra* at 723.

²⁶ *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

²⁷ *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

B. Gas Station Attendant's Testimony

Nantelle insists that, prior to being arrested, he walked from the scene to a nearby gas station. He states that the gas station attendant gave him a ride home. Nantelle testified that, after spending approximately one hour at home, he walked back to the scene where the police officers had their first contact with him. Defense counsel admitted that she was not sure what the gas station attendant's testimony would be and that, when previously questioned, the gas station attendant denied that he gave Nantelle a ride home. Nevertheless, Nantelle argues that this evidence would have "help[ed] establish a timeframe" that would support his theory that he was not driving the vehicles. Nantelle argues that the trial court's refusal to allow the gas station attendant to testify violated his constitutional right to due process by denying him the opportunity to present a defense. We disagree.

Under MCR 6.201(H), a defendant is required to promptly notify the prosecution if he discovers additional information or material subject to disclosure. If the defendant fails to comply with this rule, MCR 6.201(J) allows the court the discretion to order the evidence excluded. When reviewing a trial court's exercise of its discretionary power to exclude the testimony of undisclosed witnesses, we must consider the following factors: "(1) the amount of prejudice that resulted from the failure to disclose, (2) the reason for nondisclosure, (3) the extent to which the harm caused by nondisclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant's guilt, and (5) other relevant factors arising out of the circumstances of the case."²⁸

Although Nantelle gave late notice, two weeks gave the prosecutor sufficient time to investigate the witness, so the prejudice that resulted from failure to disclose was minimal. However, Nantelle's reason for nondisclosure – that he was unable to locate the witness – is not satisfactory because he had ample time to locate the witness but unnecessarily delayed the search. On January 13, 2003, Nantelle gave notice to the court of an unidentified man who had given him a ride home. However, Nantelle did not even begin to attempt to contact the witness until after July, almost six months later. Despite Nantelle's incarceration from March 2003 until the end of July 2003, he and his defense counsel were not entirely without contact such that defense counsel was precluded from searching for the witness. Ultimately, only a few phone calls to the gas station and the attendant's home were required to determine his name by September 20, 2003. We are not convinced that defense counsel had insufficient time to locate the witness.

Nantelle cites *People v Merritt* for the proposition that the preclusion sanction is extremely severe and that a "judge's discretion in exercising preclusion should be limited only to an egregious case."²⁹ However, in holding that the trial court should have permitted the witness' testimony, the Court in *Merritt* noted that the judge "made no observations as to the prejudice to

²⁸ *People v Travis*, 443 Mich 668, 682; 505 NW2d 563 (1993), quoting *United States v Myers*, 550 F2d 1036, 1043 (CA 5, 1977).

²⁹ *People v Merritt*, 396 Mich 67, 82; 238 NW2d 31 (1976).

the prosecution, or dereliction on the part of defendant.”³⁰ In contrast, here, the trial court specifically noted Nantelle’s dereliction by pointing out that he had had over nine months to obtain the name of the individual. Defense counsel’s failure to even begin any attempt to locate the witness until five months after she first indicated to the court that she knew of the witness’ existence indicates a dereliction of investigation that does not warrant late admission of the witness’ testimony.

Moreover, Nantelle is unable to show that the witness would have testified in a manner that aided his cause. As the trial court pointed out, the evidence had “limited relevance” in light of defense counsel’s admission that the witness had previously denied giving him a ride home. The trial court did not abuse its discretion in refusing to allow the attendant’s testimony.

C. Letter From An Unavailable Witness

Nantelle also insists that the trial court erred in excluding a letter purportedly written by an unavailable witness. Nantelle was unsuccessful in his attempts to locate his other roommate, Wendy Zablocki, to testify on his behalf at trial. Zablocki, however, allegedly sent Nantelle a letter that “identified a time” when he was with her on the night of the crime. He gave his defense counsel a copy of the letter ten days before the motion hearing held on October 10, 2003. In turn, defense counsel first notified the prosecution of the letter’s existence just minutes before the hearing. Defense counsel stated that she was unable to locate the witness and wanted to admit the letter in lieu of the witness’ testimony.

The letter purportedly states that on the night in question Nantelle admitted to Zablocki that he was too drunk to drive. According to Nantelle, this establishes that he was not driving any vehicle at 4:00 a.m. Because Nantelle seeks to admit the letter for the truth of the matter asserted, i.e., that he was “too drunk to drive” in order to prove he did not drive, the letter constitutes inadmissible hearsay.³¹ No exceptions for unavailable witnesses are applicable.³² Even the “catch-all” exception³³ to inadmissible hearsay when the declarant is unavailable does not apply. First, Nantelle failed to divulge the letter to the prosecution sufficiently in advance of trial in order to enable the prosecution to investigate it.³⁴ Additionally, the requisite circumstantial guarantees of trustworthiness of the letter were severely lacking because the letter was neither signed nor dated, and the only individual who could supposedly testify to its authenticity was Nantelle himself. In the absence of further verification, Nantelle’s self-serving claim that the unavailable witness did in fact write the letter is insufficient to withstand an attack on its authenticity. The trial court did not abuse its discretion in refusing to allow admission of the letter.

³⁰ *Id.* at 83.

³¹ MRE 801(c).

³² MRE 801; see MRE 804(b).

³³ MRE 804(b)(7).

³⁴ *Id.*

D. Prosecution's Failure To Assist In Locating The Author Of Allegedly Exculpatory Letter

Nantelle also alleges that the court had a duty to order the prosecution to assist in locating the author of the letter. This argument has not been preserved on appeal because defense counsel never complained or objected at the motion in limine that the prosecutor did not assist with the search for the witness. An issue not preserved for appeal is subject to review only for plain error affecting the defendant's substantial rights.³⁵

A prosecuting attorney has a statutory duty to provide reasonable assistance to the defendant, upon request, to the extent necessary to locate and serve process upon a witness.³⁶ In this case, defense counsel stated at trial that she did in fact seek the prosecution's help and was told that the prosecution had no information on Zablocki's whereabouts. Despite defense counsel's late start in locating her witnesses, the prosecutor responded in a timely manner that he had no information on the witness and defense counsel did not express dissatisfaction with the prosecution's actions with regard to the search for the witness in any way.

Further, although the trial court gave defense counsel additional time to locate the witness, nowhere on the record does it indicate that defense counsel was denied further requested assistance by the prosecutor or that she was dissatisfied with what research the prosecution had done. The prosecution performed exactly what was asked of it and Nantelle neither expressed any dissatisfaction with the prosecution's assistance or lack thereof nor requested specific further assistance when defense counsel was given more time to locate the witness. Because Nantelle does not indicate any specific failure on the part of the prosecution to comply with its statutory duty, Nantelle's substantial rights were not violated.

V. Instruction on Lesser Offense Of OWI

A. Standard Of Review

Although claims of instructional error and determinations whether an offense is a necessarily included offense are generally reviewed de novo,³⁷ the issue in this case is unpreserved because Nantelle failed to object to the trial court's instruction on OWI on the ground now alleged on appeal. At trial, defense counsel objected to the OWI instruction, arguing that sufficient evidence did not support the instruction. However, on appeal, Nantelle argues that OWI is not a necessarily included lesser offense of OUIL. Thus, because an objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground, this issue is unpreserved and we review it for plain error.³⁸

³⁵ *Hawkins, supra* at 447.

³⁶ MCL 767.40a(5).

³⁷ *People v Apgar*, 264 Mich App 321, 326; 690 NW2d 312 (2004).

³⁸ *People v Canter*, 197 Mich App 550; 496 NW2d 336 (1992).

B. OWI Instruction

A jury may be instructed on a necessarily included lesser offense, but a jury may not be instructed on a cognate lesser offense.³⁹ Nantelle, therefore, argues that it was error to instruct on the OWI charge because the offense of OWI is a cognate lesser offense, not a necessarily included lesser offense. However, we have previously established that the offense of OWI is a necessarily included lesser offense of OUIL.⁴⁰ Further, the Legislature has provided specific authorization to permit a guilty verdict for an OWI charge for OUIL prosecutions.⁴¹ Therefore, the trial court was authorized to instruct the jury as it did on the lesser offense of OWI. Nantelle's substantial rights were not violated by this instruction.

VI. Prosecution's Examination Of Nantelle: Inquiry Into Officer's Credibility

A. Standard Of Review

Although defense counsel objected to the line of questioning by the prosecution, she objected on the ground of speculation, not because the questioning regarding the credibility of the officers violated Nantelle's rights to due process by using improper and unjust methods. Normally, we review prosecutorial misconduct to determine whether the defendant has been denied a fair trial due to the actions of the prosecutor,⁴² but appellate review of allegedly improper conduct by the prosecutor is precluded when the defendant fails to timely and specifically object, unless failure to consider the conduct would result in a miscarriage of justice.⁴³

B. Vouching For Credibility

Matters of credibility are to be determined by the trier of fact, so a prosecutor may not ask a defendant to comment on the credibility of prosecution witnesses.⁴⁴ However, reversal of a conviction is not warranted if the prejudicial effect of the error could have been cured by a cautionary instruction or by precluding such further questioning.⁴⁵ In this case, the prosecutor and Nantelle had the following exchange during Nantelle's testimony:

Q. (By prosecution:) How did [the keys] come to be found by the officers in your pants pocket?

³⁹ *Apgar, supra* at 326-327.

⁴⁰ *Oxendine, supra* at 354.

⁴¹ MCL 257.625(3).

⁴² *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

⁴³ *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999).

⁴⁴ *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985).

⁴⁵ *Id.* at 18.

A. (*Nantelle:*) They weren't found in my pants pocket.

Q. Well, then how do you explain that?

A. What is there to explain? They weren't in my pants pocket.

Q. *Are you accusing these officers, who have never seen you before, before that day, of risking their jobs, and their family security in order to nail you for a drunk driving by planting those keys in your pocket?*

A. I think you are overexaggerating [sic]. But they are, every, everyone who has testified.

Q. Is that what you are saying?

A. No it is not.

Q. *Are you saying that these officers are lying?*

A. Yeah. Definitely. Each one of them had a different story.

Q. They both said those keys were in your pocket.

A. No, they didn't.

Q. Yes, they did.

A. That wasn't the testimony.

Q. *So you are saying these officers risked their jobs to nail you for a drunk driving?*

DEFENSE COUNSEL: I'm going to object, Your Honor. How would he know that they are risking their jobs.

THE COURT: It has already been asked and answered.

Q. (*By the prosecutor:*) *Do you think they would come in here and perjure themselves before this court under oath to say that these keys were on your pocket?*

A. (*Nantelle:*) If it meant to justify their actions, yes.

Q. That's your answer?

A. Yes.

Q. And you expect this jury to believe that?

A. I hope they believe the truth. [Emphasis added.]

The above exchange indicates that the prosecutor's strategy was to discredit Nantelle by inviting him to label the police officers "liars." Asking Nantelle to comment on the credibility of the prosecution's witnesses was improper because his opinion of their credibility was not probative of the matter. We conclude, however, that Nantelle was not denied a fair trial as a result of the prosecutor's actions because "[a] timely objection by defense counsel could have cured any prejudice, either by precluding such further questioning or by obtaining an appropriate cautionary instruction."⁴⁶

VII. Trial Court's Departure From Sentencing Guidelines

A. Standard Of Review

We review a trial court's determination of the existence of a factor for departing from sentencing guidelines for clear error.⁴⁷ The determination that a factor is objective and verifiable is reviewed de novo.⁴⁸ Finally, we review the trial court's decision to impose a particular sentence for an abuse of discretion.⁴⁹

B. Substantial And Compelling Reasons

Nantelle argues that the trial court improperly exceeded the guideline range by imposing a sentence of forty to sixty months when the scored guideline range was fourteen to twenty-nine months. Generally, a sentence must be proportionate to the seriousness of the crime, and a court that departs upward from the sentencing guidelines must place its reasons for departure on the record at the time of sentencing.⁵⁰ These reasons must be substantial and compelling.⁵¹ In order to be substantial and compelling, a reason must be objective and verifiable.⁵² Additionally, a court may not base a departure on an offense characteristic or offender characteristic that is already considered in determining the appropriate sentence range, unless the court finds from the facts contained in the record that the characteristic has been given disproportionate weight.⁵³

Nantelle contends that his sentencing guidelines score adequately reflected his previous convictions in that he was scored the maximum points for prior low severity felony convictions⁵⁴

⁴⁶ *Id.*, quoting *People v Buckey*, 133 Mich App 158, 167; 348 NW2d 53 (Cynar, J., concurring in part).

⁴⁷ *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003).

⁴⁸ *Id.* at 264, 266.

⁴⁹ *Id.*

⁵⁰ MCL 769.34(3); *Babcock*, *supra* at 258-259, 262-264.

⁵¹ *Id.*

⁵² *Babcock*, *supra* at 257-258.

⁵³ MCL 769.34(3)(b).

⁵⁴ MCL 777.52.

and for prior misdemeanor convictions.⁵⁵ He states that because the guideline language provides for “four or more” felonies and “seven or more” misdemeanors, these convictions are already taken into account. However, as the trial court pointed out, the full extent of Nantelle’s prior criminal record is not reflected by the sentencing guidelines. He has seven prior felonies and forty prior misdemeanor convictions, so three of his felonies and thirty-three of his misdemeanors are not adequately taken into account in the guidelines. The existence of Nantelle’s prior convictions are an objective and verifiable factor that the trial court rightfully considered to be a substantial and compelling reason to depart from the guidelines. Thus, the trial court did not abuse its discretion by departing from the sentencing guidelines.

We reverse Nantelle’s UDAA conviction because the evidence that led to his arrest, the keys, was improperly seized, and he was denied a fair trial by their admission into evidence. We affirm on the remainder of Nantelle’s claims.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ E. Thomas Fitzgerald

⁵⁵ MCL 777.55.