

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WALANDO KENNEY,

Defendant-Appellant.

UNPUBLISHED

March 14, 2000

No. 209920

Oakland Circuit Court

LC No. 97-153496-FH

Before: Murphy, P.J., and Hood and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unlawfully driving away an automobile (“UDAA”), MCL 750.413; MSA 28.645, and was sentenced as an habitual offender, fourth, offense, MCL 769.12; MSA 28.1084, to a prison term of two-and-a-half years to twenty years. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in denying defendant’s motion to quash the information because the evidence presented at the preliminary examination was insufficient to warrant a bindover for trial. However, if sufficient evidence was presented at trial to convict defendant of the charge for which he was bound over, any error in the bindover is harmless. *People v Dunham*, 220 Mich App 268, 276-277; 559 NW2d 360 (1996).

In reviewing a claim regarding the sufficiency of the evidence, the evidence must be viewed in the light most favorable to the prosecutor, and the evidence is sufficient if a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v. Hampton*, 407 Mich. 354, 368, 285 NW2d 284 (1979); *People v Marsack*, 231 Mich App 364, 370; 586 NW2d 234 (1998). Circumstantial evidence and reasonable inferences can constitute satisfactory proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). In reviewing whether the evidence was insufficient to support a conviction, this Court should not interfere with the jury’s role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 478, amended 441 Mich 1201 (1992).

The elements of UDAA are: (1) possession of the vehicle, (2) driving the vehicle away, (3) that the act is done willfully, (4) the possession and driving away must be done without the owner's permission. *People v Hendricks*, 200 Mich App 68, 71; 503 NW2d 689 (1993). Here, Farmington Director of Public Safety Director Gary Goss noticed two men driving slowly in a black Aerostar near an apartment complex very early on a Sunday morning. The Aerostar was traveling at a speed equal to or slower than Goss was walking, and the occupants of the Aerostar were looking at parked vehicles. After walking for approximately one-half mile, Goss heard a car alarm go off in the vicinity of the apartment complex.

A resident of the apartment complex saw two men standing around a Ford Explorer. The alarm on the Explorer was sounding, and the hood on the Explorer was up. A Ford Aerostar was parked next to the Explorer. The resident then observed both vehicles drive north on Power. Farmington Hills police officer Aaron Malewski was driving south on Power when he saw a black Aerostar coming toward him and a black Explorer pull to the curb and stop. Malewski then saw a man wearing dark clothing run toward the backyard of homes on Power. The backyards bordered woods. Malewski pulled up next to the Explorer and noticed that the alarm was sounding and that the driver's side window was broken. Malewski then pursued the man, but gave up the pursuit when he received a radio communication. Although Malewski could not identify defendant as the man who ran through the backyards adjoining the woods, defendant's appearance was consistent with that man and Malewski did not see any other men in the woods.

Police officer Terrance Purves stopped an Aerostar and took the driver into custody. Purves then observed an individual running out of the woods. Purves saw Officer Rozum stop defendant, whom Purves testified was the same individual who ran out of the woods. Both officers testified that defendant was wet from the waist down, and that the woods from which defendant had come contained a river. James Park, the owner of the Explorer, testified that the Explorer was parked in the apartment complex parking lot and that he did not give anyone permission to drive the Explorer.

From the above-stated facts, we believe that it is readily conceivable that defendant committed this crime. The prosecutor presented circumstantial evidence that, when taken along with the reasonable inferences from this evidence, was sufficient to allow a rational trier of fact to find defendant guilty beyond a reasonable doubt.

Defendant next contends that he was denied a fair trial due to the prosecution's misstatements and mischaracterizations of testimony during its opening statement and closing argument. A preserved, non-constitutional error is only a ground for reversal where, after an examination of the entire cause, it affirmatively appears that the error was outcome determinative. Defendant bears the burden of demonstrating that such an error was a miscarriage of justice. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999); *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999).

Prosecutorial comments are evaluated on a case-by-case basis and the reviewing court must examine the pertinent remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Rice*, 235 Mich App 429, 435; 597 NW2d 843 (1999). Defendant first

asserts that the prosecutor erred when, during opening statements, she stated that defendant was the driver of the Aerostar and that he resisted arrest. A review of the prosecutor's remarks reveals that the prosecutor confused defendant with the driver of the Aerostar, and then switched midway through her opening statement to discuss the testimony regarding defendant. Because the prosecution did not present any evidence that defendant was the driver of the Aerostar, the prosecutor erred by telling the jury that it would present such evidence. However, this error only requires reversal where the prosecution did not act in good faith. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991).

The record does not support a finding that the prosecutor did not act in good faith when it made these statements. Although the remarks were prejudicial, they did not rise to the level of being outcome determinative because defense counsel was able to establish that defendant was not driving the Aerostar and that defendant did not resist arrest.

Defendant next asserts that during closing argument and rebuttal argument the prosecutor mischaracterized Officer Malewski's testimony when she stated that Officer Malewski "saw a black man wearing dark clothing run from the Explorer to the woods." A review of Officer Malewski's testimony reveals that, contrary to defendant's argument, the prosecutor's statements did not mischaracterize Malewski's testimony. Further, the prosecutor's remark that "[defendant] was driving the stolen car" was a reasonable inference from the testimony of Officers Malewski and Rozum that a man ran away from the vicinity of the Explorer into the woods and that defendant, whose description was consistent with the first man, was arrested after coming out of the woods on the other side.

Finally, defendant asserts that the prosecution mischaracterized testimony when it stated that "[defendant] was identified by three police officers as being arrested in the City of Farmington running away from the stolen car within minutes ---," before defendant objected. This statement clearly mischaracterized the testimony of the police officers. However, defendant objected in a timely manner and the trial court had an opportunity to correct the error and did so by instructing the jury that the lawyers' statements and arguments are not evidence. In light of this jury instruction, we cannot conclude that it is more probable than not that the prosecution's misstatement affected the outcome of the trial.

Affirmed.

/s/ William B. Murphy

/s/ Harold Hood

/s/ E. Thomas Fitzgerald