STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2004
v	No. 244703 Macomb Circuit Court
MARVIN FREEMAN LEE, Defendant-Appellant.	LC No. 02-001580-FH

Before: Owens, P.J., and Kelly and R. S. Gribbs*, JJ.

PER CURIAM.

Defendant appeals as of right from a jury conviction of third-degree fleeing and eluding, MCL 257.602a(3), and malicious destruction of police property, MCL 750.3777b. The trial court sentenced defendant as a fourth habitual offender, to four to twenty years' imprisonment for the fleeing and eluding conviction, and a concurrent term of three to five years' imprisonment for the malicious destruction conviction. We affirm.

This case arose after police officers, most of whom were in unmarked cars and in civilian clothes, arrested defendant on a parole violation warrant in the parking lot of the apartment complex where he lived. Defendant was charged with possession of cocaine, felonious assault, fleeing and eluding, and malicious destruction of property. The jury acquitted defendant of the drug possession and felonious assault charges, and convicted defendant of the two remaining charges.

On defendant's motion, the trial court ruled that defendant's prior convictions were inadmissible. Defendant objected at trial to admission of testimony that the LEIN check the police conducted on the date in question contained an officer caution notice (i.e., that defendant should be approached with caution), but the court admitted the testimony as relevant to show the arresting officers' state of mind.

Defendant argues on appeal that he was denied a fair trial by admission of the police officers' testimony that persons with parole violation warrants will do anything to elude police, and that defendant was dangerous and violent, and had to be approached with caution. While noting that the fact that defendant was arrested on a parole violation warrant was relevant, defendant maintains that the officers' state of mind was not relevant to whether he (defendant)

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

committed the charged offenses. Alternatively, defendant contends that even if the officers' state of mind were relevant, their testimony was substantially more prejudicial than probative, and became cumulative. Defendant asserts that absent the improper police testimony, it is likely he would have been acquitted on all counts, instead of just two counts, and that the court's curative instructions were insufficient to cure the error. We disagree.

We review a trial court's determination to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). Reversible error may not be predicated on an evidentiary ruling unless a substantial right was affected. MRE 103(a), *People v Travis*, 443 Mich 668, 686; 505 NW2d 563 (1993). An evidentiary error does not merit reversal unless after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003).

Under the circumstances present in the instant case, we reject defendant's argument. First, defense counsel placed in controversy the issue of the officers' state of mind, in opening statement, by challenging the officers' method and use of force in arresting defendant, and by maintaining that defendant was not dangerous and should not have been shot four times. Second, the trial court cautioned the jury several times that it could consider the officers' testimony only with respect to the officers' states of mind, and not as going towards defendant's guilt of the instant offenses.[1] The trial court also struck as non-responsive one officer's testimony to the effect that defendant "was wanted on a felony warrant, and on that return it tells you that the person has a prior past of such and such convictions, which all of them on the return, they're violent felonies." Jurors are presumed to follow instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

The officers' testimony was relevant to the issue whether the police were justified in confronting defendant and using force to arrest defendant. Defendant placed the reasonableness of the arrest in controversy, thus the court's admission of the testimony was not an abuse of discretion. We conclude that error, if any, was harmless, given the cautionary instructions and the final jury instruction given regarding the limited nature for which the evidence was admitted and could be considered.

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[1] The court instructed the jury:

> Ladies and gentlemen, I want to instruct you concerning the testimony that you are hearing at the present time, that a person's prior background or reputation is not something to be used by you as evidence of this commission of this crime. The reason we are allowing the testimony is to show what was in the mind of the police officer. We are not even verifying whether or not what he has – what information he has is either true or false, but this police officer does have a right to act on information that he receives, and he has a right to act in accordance with that information.
>
> So, the evidence here is confined to what is in the mind of this police officer, having nothing at all to do with the background of this material.

Defendant argues that he was denied a fair trial by the prosecutor's failure to instruct the police witnesses and keep their testimony within the bounds of the trial court's rulings, and, alternatively, that the trial court reversibly erred in refusing to order the prosecutor to instruct her police witnesses to avoid testimony about defendant's prior convictions. We disagree.

This Court reviews de novo claims of prosecutorial misconduct. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). "A prosecutor has the responsibility of a minister of justice, not simply that of an advocate." *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003). This responsibility involves a duty to question witnesses in a way that avoids improper testimony. *People v Dennis*, 464 Mich 567, 576 n 7; 628 NW2d 502 (2001). The test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Reversal because of improper questions is not warranted absent a showing of "'some prejudice or pattern of eliciting inadmissible testimony.'" *Id.* at 587-588, quoting *People v White*, 53 Mich App 51, 58; 218 NW2d 403 (1974).

Defendant failed to create a record regarding the prosecution's advice or lack thereof to the testifying police officers regarding the trial court's ruling precluding admission of defendant's prior convictions. Thus, there is no record to review and defendant is not entitled to appellate relief on this issue. Defendant's appellate brief cites no authority to support his alternate argument that the trial court should have instructed the prosecutor to curb her witnesses' testimony, thus that issue is waived. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995).

In a supplemental brief filed in propria persona, defendant argues that the prosecution presented insufficient evidence of third-degree fleeing and eluding and malicious destruction of police property. Defendant also argues his convictions were against the great weight of the evidence. We disagree.

An appeal based on a claim of insufficient evidence is reviewed de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). "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." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

> [T]here are six elements necessary to establish third-degree fleeing and eluding: (1) the law enforcement officer must have been in uniform and performing his lawful duties and his vehicle must have been adequately identified as a law enforcement vehicle, (2) the defendant must have been driving a motor vehicle, (3) the officer, with his hand, voice, siren, or emergency lights must have ordered the defendant to stop, (4) the defendant must have been aware that he had been ordered to stop, (5) the defendant must have refused to obey the order by trying to flee from the officer or avoid being caught, which conduct could be evidenced by speeding up his vehicle or turning off the vehicle's lights among other things, and (6) some portion of the violation must have taken place in an area where the speed limit was thirty-five miles an hour or less, or the defendant's conduct must have resulted in an accident or collision, or the defendant must have been previously

> convicted of certain prior violations of the law as listed in MCL 750.479a(3)(c). [*People v Grayer*, 235 Mich App 737, 741; 599 NW2d 527 (1999).]

Defense counsel offered a different version of events than the prosecutor, and one defense witness, who lived at defendant's apartment complex, testified that on the date and time in question he heard squealing tires, screaming and swearing in the apartment parking lot, heard gunshots, and when he later looked to see what was happening, saw no marked police cars and no uniformed police officers. However, defendant himself did not testify at trial, his attorney's arguments were not evidence, *People v Lawton*, 196 Mich App 341, 354; 492 NW2d 810 (1992), and the police officers testified that one of the cars was marked, had its lights flashing, and the driver-officer was uniformed. There was ample police testimony at trial from which the jury could have found the elements of third-degree fleeing and eluding proven beyond a reasonable doubt. *Johnson, supra.*

Defendant also argues that there was insufficient evidence to convict him of malicious destruction of police property, MCL 750.377b. We disagree. "The essential elements of malicious destruction of police property are that defendant did (1) willfully and maliciously destroy or injure, (2) personal property belonging to the police department." *People v Richardson*, 118 Mich App 492, 494-495; 325 NW2d 419 (1982). The wilful and malicious element of MCL 750.377b has been defined as:

> The defendant committed the act while knowing it to be wrong and without any just cause or excuse and did it intentionally or with a conscious disregard of a known risk to the property of another. [*Richardson, supra* at 496-497.]

Evidence at trial that defendant was attempting to evade capture conflicted with defense counsel's claim that defendant was justified in attempting to flee what he believed was an armed robbery. Intent may be inferred from surrounding facts. *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987). Because there was ample testimony from which a rational trier of fact could find that defendant saw the marked police car with lights flashing, and was thus aware that he was being arrested by law enforcement officials, and because it is undisputed that defendant thereafter drove his vehicle into one of the cars twice, a claim of accident is undercut. There was testimony that the marked police car had its lights flashing when defendant twice drove into the unmarked police car that was assisting the marked police car. When viewed in a light most favorable to the prosecution, sufficient evidence was presented from which a rational trier of fact could conclude beyond a reasonable doubt that defendant maliciously destroyed police property. *Johnson, supra* at 723.

Defendant also contends that his convictions were against the great weight of the evidence. This Court reviews for an abuse of discretion a lower court's ruling on a motion for new trial based on a claim that the verdict was against the great weight of the evidence. *Lueth, supra* at 680. Given the testimony of police officers on the scene, summarized above, and the absence of eyewitness testimony to the contrary, defendant's claim that the verdict was against the great weight of the evidence is without basis.

Defendant finally argues that evidence presented at trial broadened the charges against him because the information stated that the complaining officer was in uniform, when the evidence at trial showed that that particular officer was not in uniform, but another officer present was. We disagree.

Whether a defendant has been afforded due process is a question of law this Court reviews de novo. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999). The information contained all the elements required to convict of third-degree fleeing and eluding. MCL 767.47 provides: "No indictment is invalid by reason of any repugnant allegations contained therein, provided that an offense is charged. All unnecessary allegations shall be rejected as surplusage." Our Supreme Court has indicated that failure to state the correct complainant's name is not fatal. *People v Corsi,* 216 Mich 65, 69; 184 NW 439 (1921). In any event, MCR 6.112(H) permits amendment of an information "before, during, or after trial . . . unless the proposed amendment would unfairly surprise or prejudice the defendant." And the dispositive question with respect to prejudice from a faulty information is "whether the defendant knew what acts he was being tried for so he could adequately put forth a defense." *People v Traughber*, 432 Mich 208, 215; 439 NW2d 231 (1989). Because defendant in the instant case was aware of the charges against him, he suffered no prejudice.

Affirmed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Roman S. Gribbs