

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ANTHONY CYNAR,

Defendant-Appellant.

---

UNPUBLISHED

September 16, 2004

No. 249270

Washtenaw Circuit Court

LC No. 00-000301-FH

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

PER CURIAM.

I. Overview

A jury convicted defendant David Anthony Cynar of fourth-degree fleeing and eluding a police officer<sup>1</sup> and driving without a valid operator's license.<sup>2</sup> We affirm.

II. Basic Facts And Procedural History

This case arose when police attempted to pull over Cynar's vehicle after he was found to be traveling together with a car carrying a possible suspect in a March 7, 2000 armed bank robbery in Dexter. At approximately 4:00 p.m. that day, Charles Piatt, a patrol officer for the county sheriff's office, received a call reporting the bank robbery and describing the suspect as a "scruffy" white man with a dark jacket. A report of the dispatch indicated that the suspect had been described more specifically as a "scruffy looking white male in his mid-fifties, skinny and dirty." A minute or two after hearing the dispatch, as Piatt approached within a block of the bank, he saw a white car with a passenger who appeared to match this description. Piatt also recognized the driver of the car as Mark Koernke, who Piatt knew was a member of the Michigan Militia and possibly armed.

After conferring with his sergeant, Piatt began following Koernke's car, but then lost sight of it. Piatt then drove onto I-94, where a deputy radioed that she had located the white car

---

<sup>1</sup> MCL 750.479a(1), (2).

<sup>2</sup> MCL 257.301.

and observed that it was now being followed by a U-Haul. When Piatt caught up with the white car on I-94, he noticed that it was being followed closely by the U-Haul, and that the driver's-side windows on both the car and the U-Haul were rolled down. Piatt testified that he turned on his lights and siren between the Liberty and Scio Church exits of I-94. At the next exit, which was Jackson Road, a school bus slowly merged onto I-94, causing the white car and the U-Haul to slow down. The U-Haul pulled partially off the road but did not stop. Piatt testified that he saw the drivers of the white car and the U-Haul making hand signals to each other. Piatt identified Cynar as the driver of the U-Haul, and explained that he had met Cynar several times over the course of the previous two years.

The white car then exited onto Ann Arbor-Saline Road while the U-Haul pulled back onto I-94 and continued driving. Several police vehicles followed the car while Piatt and Detective Lori Butler followed the U-Haul with their lights flashing and sirens on. Using his car's PA system, Piatt addressed Cynar by name and repeatedly told him to pull over and stop; however, Cynar continued driving at forty-five miles an hour to the next exit, which was approximately 1½ miles away, and turned to the right. Piatt testified that when Cynar reached the first intersection, he did not stop for the red light, but rather made a right turn onto southbound State Street at between 15 and 20 miles an hour. Cynar then turned left into a U-Haul dealership and stopped the truck. Piatt stated that he told Cynar several times to come out with his hands in the air, which Cynar eventually did. When Piatt told Cynar to put his hands on the back of his head, Cynar responded, "Fuck you. What are you going to do – shoot me?" Piatt then arrested and handcuffed Cynar. Piatt checked Cynar's driver's license and discovered that it had expired on February 16, 2000. The U-Haul rental agreement indicated that it had been rented by Nancy Koernke, Mark Koernke's wife, and was due to be returned at 2:00 p.m. that day. It was later discovered that Cynar, Koernke, and his passengers were not involved in the robbery.

Cynar testified that on the day of the robbery, he was driving from the Traverse City area to Detroit when his car began to break down. According to Cynar, he stopped in Dexter at Koernke's house to ask for help. Koernke told Cynar that he could not help right away because he had things to do, including returning the rented U-Haul. Cynar agreed to help return the U-Haul, and at around 4:00 p.m., Cynar followed Koernke and his two teenaged sons to the U-Haul dealership.

Cynar testified that he noticed several police vehicles behind him and Koernke as they drove down I-94, but they did not have their lights or sirens on at that time. Cynar eventually passed Koernke because he was driving slowly. After the school bus pulled onto I-94, Cynar saw that the police vehicles had turned their flashing lights on, so Cynar slowed down and pulled to the side of the road to allow them to pass. When the police vehicles did not pass or attempt to block him in, Cynar pulled back onto I-94 and continued driving because he believed he had done nothing wrong. Cynar testified that he initially thought the police vehicles were pursuing Koernke, because he knew that Koernke had previously been in trouble with the police.

When Cynar exited I-94 at State Road, he became aware that Koernke was no longer behind him and that the police still had their lights on. Cynar realized that the police were pursuing him, but because he was only a short distance from the U-Haul dealership, he continued to his destination. Cynar admitted that his driver's license had expired, but denied attempting to elude the police.

Cynar was charged with fourth-degree fleeing and eluding and driving without a valid operator's license. After the preliminary examination, the trial court granted Cynar's motion to quash the fleeing and eluding charge because it found no evidence that Cynar attempted to elude the police. This Court reversed, finding that Cynar's failure to stop his vehicle after being ordered to do so and running a red light constituted probable cause to believe that Cynar committed the crime of fleeing and eluding.<sup>3</sup> After a two-day trial, the jury convicted Cynar of fleeing and eluding and driving without a valid operator's license. Cynar appeals only the fleeing and eluding conviction.

### III. Sufficiency Of The Evidence

#### A. Standard Of Review

We review de novo challenges to the sufficiency of the evidence, taking the evidence in the light most favorable to the prosecutor and determining whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.<sup>4</sup>

#### B. Elements Of The Crime

Cynar was convicted of violating MCL 750.479a(1), which provides:

A driver of a motor vehicle who is given by hand, voice, emergency light, or siren a visual or audible signal by a police or conservation officer, acting in the lawful performance of his or her duty, directing the driver to bring his or her motor vehicle to a stop shall not willfully fail to obey that direction by increasing the speed of the vehicle, extinguishing the lights of the vehicle, or otherwise attempting to flee or elude the police or conservation officer. This subsection does not apply unless the police or conservation officer giving the signal is in uniform and the officer's vehicle is identified as an official police or department of natural resources vehicle.

Violation of this section establishes fourth-degree fleeing and eluding.<sup>5</sup> To establish a violation of MCL 750.479a(1), the following five elements must be met:

(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

---

<sup>3</sup> *People v Cynar*, unpublished opinion per curiam of the Court of Appeals, issued January 29, 2002 (Docket No. 235897).

<sup>4</sup> *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

<sup>5</sup> MCL 750.479a(2).

ordered to stop, [and] (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 . . . .<sup>[6]</sup>

Cynar contends that there was insufficient evidence to establish the first and fifth elements. We address these in turn.

### C. Lawful Performance Of Duties

Cynar argues that the prosecutor failed to establish that the officers were engaged in the lawful performance of their duties at the time of the alleged infraction. Specifically, Cynar argues that the officers did not have either probable cause or reasonable suspicion to support a traffic stop in light of the fact that he was not near the bank, he did not fit the description of the robber, there was no evidence to indicate that Koernke was a suspect, and there was no indication that there was more than one perpetrator or that there was a getaway driver with a U-Haul.

“Police officers may make a valid investigatory stop if they possess ‘reasonable suspicion’ that crime is afoot.”<sup>7</sup> Reasonable suspicion “entails something more than an inchoate or unparticularized suspicion or ‘hunch,’ but less than the level of suspicion required for probable cause.”<sup>8</sup> The reasonable suspicion “must be based on an objective manifestation that the person stopped was or was about to be engaged in criminal activity as judged by those versed in the field of law enforcement when viewed under the totality of the circumstances.”<sup>9</sup> While a “minimum threshold of reasonable suspicion must be established to justify an investigatory stop whether a person is in a vehicle or on the street,” the Michigan Supreme Court has indicated that “fewer facts are needed to establish reasonable suspicion when a person is in a moving vehicle than in a house[.]”<sup>10</sup>

In this case, Piatt was responding to a dispatch describing the bank robbery suspect as a “scruffy looking white male in his mid-fifties, skinny and dirty,” wearing a dark jacket. Piatt estimated that he got a five-second look at the passenger in Koernke’s front seat and was able to discern that he was a white man with facial hair and a dark jacket, although he could not determine the passenger’s age. Although this man was later found to be Koernke’s teenaged son, we do not find the age discrepancy between the description of the suspect and Koernke’s son

---

<sup>6</sup> *People v Grayer*, 235 Mich App 737, 741; 599 NW2d 527 (1999).

<sup>7</sup> *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996), quoting *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

<sup>8</sup> *Champion*, *supra* at 98, quoting *United States v Sokolow*, 490 US 1; 109 S Ct 1581; 104 L Ed 2d 1 (1989).

<sup>9</sup> *Champion*, *supra* at 98.

<sup>10</sup> *People v LoCicero (After Remand)*, 453 Mich 496, 502; 556 NW2d 498 (1996), citing *People v Whalen*, 390 Mich 672, 682; 213 NW2d 116 (1973).

dispositive, given that the car was located within a block of the bank shortly after the robbery occurred and that Piatt had only a brief opportunity to observe the potential suspect through the window of a moving vehicle.

Further, although Piatt acknowledged that the description of the bank robber did not indicate that he had either an accomplice or a getaway vehicle, as detective Butler explained, it is common for bank robbers to use getaway drivers, and it is permissible for trained officers to consider ““the modes or patterns of operation of certain kinds of lawbreakers”” when analyzing whether reasonable suspicion exists under the totality of the circumstances.<sup>11</sup> Finally, the officers observed that the U-Haul Cynar was driving appeared to be traveling together with the car containing the possible suspect, and this impression was confirmed when Koernke began giving Cynar hand signals out the driver’s side window.

We conclude that these were objectively manifested indications that Cynar may have been involved in the armed robbery. Because the officers’ actions were supported by a reasonable suspicion that Cynar was engaged in criminal activity, we conclude that a rational trier of fact could find that the officers were acting lawfully beyond a reasonable doubt.

#### D. Fleeing Or Eluding

Cynar argues that the prosecutor presented insufficient evidence to establish that he tried to flee or elude the police because he did not increase his speed, which was below the speed limit, and because he responded to the officers’ signal to stop his vehicle within 1½ miles. However, the statutory language does not require that a defendant exceed the speed limit, nor does it specify a minimum distance over which the fleeing or eluding must be sustained. Rather, the prosecution must demonstrate only that the defendant “refused to obey by trying to flee or avoid capture, which element necessitates a finding of some intent on the part of the defendant to flee or avoid capture.”<sup>12</sup>

In this case, after seeing that the police vehicles had turned on their flashing lights, Cynar slowed down and pulled to the side of the freeway, but when the police vehicles neither passed nor blocked him in, Cynar pulled back onto the freeway and continued driving. Piatt followed Cynar with his lights flashing and addressed Cynar by name over the PA system, repeatedly instructing Cynar to pull over and stop. Despite these directions, Cynar continued driving at forty-five miles an hour to the next exit, which was approximately 1½ miles away. When Cynar reached the first intersection, he ran a red light at between 15 and 20 miles an hour to make a right turn onto southbound State Street. Cynar did not stop the U-Haul until he arrived at the U-Haul dealership. Viewing this evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could find, beyond a reasonable doubt, that Cynar’s actions in speeding back up to forty-five miles an hour, continuing to drive down the freeway, and

---

<sup>11</sup> *People v Oliver*, 464 Mich 184, 196; 627 NW2d 297 (2001), quoting *People v Nelson*, 443 Mich 626; 505 NW2d 266 (1993), quoting *United States v Cortez*, 449 US 411, 418; 101 S Ct 690; 66 L Ed 2d 621 (1981).

<sup>12</sup> *People v Grayer (Grayer I)*, 235 Mich App 737, 742; 599 NW2d 527 (1999).

running a red light after exiting the freeway, all while being directed to pull over and stop by flashing lights, sirens, and verbal commands, demonstrated an attempt to avoid capture.

#### E. Reversal Of Motion To Quash

Cynar also argues that this Court erred in reversing the Circuit Court's order to quash the fleeing and eluding charge because this Court's opinion was partially based on a factual error. Specifically, the opinion indicates that Cynar "made a left turn against a red light after leaving the freeway,"<sup>13</sup> when the evidence indicated that Cynar actually made a *right* turn against a red light. This argument lacks merit in light of the fact Cynar undisputedly did not stop for the red light, which is illegal – and, more importantly, evasive – regardless which direction he turned. Therefore, this error does not undermine the validity of this Court's opinion with respect to the motion to quash.

### IV. Jury Instructions

#### A. Standard Of Review

We review claims of instructional error de novo.<sup>14</sup>

#### B. Legal Standards

We review jury instructions in their entirety to determine whether the trial court committed error requiring reversal.<sup>15</sup> Jury instructions "must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them."<sup>16</sup> "Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights."<sup>17</sup> "Error does not result from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction."<sup>18</sup>

#### C. The Trial Court's Instructions

With respect to the elements of the crime, the trial court instructed the jury:

---

<sup>13</sup> *Cynar, supra* at 2.

<sup>14</sup> *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

<sup>15</sup> *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997).

<sup>16</sup> *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439; (2000), citing *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975), and *Piper, supra* at 648.

<sup>17</sup> *Piper, supra* at 648.

<sup>18</sup> *Id.*

In this case, the Defendant is charged with the crime of fleeing or eluding in the fourth degree. To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that a police officer was in uniform and was performing his lawful duties and that the vehicle driven by the officer was adequately marked as a law enforcement vehicle;

Second, that the Defendant was driving a motor vehicle;

Third, that the officer ordered the Defendant to stop his vehicle;

Fourth, that the Defendant knew of the order;

And, fifth, that the Defendant refused to obey the order by trying to flee or avoid being caught. This means an intent to take affirmative action to flee or avoid capture, not simply failing to submit.

With the exception of the last sentence, which the trial court added, this instruction is identical to CJI2d 13.6d.

#### D. Lawful Performance Of Duties

At the beginning of trial and again at the close of evidence, defense counsel requested that the trial court instruct the jury that the police must have had probable cause to perform a “felony stop” on Cynar to be considered lawfully performing their duties. Noting that this issue seemed to be one of law that should have been decided before trial, the trial court determined that the actual issues in this regard were

whether the police had the authority and acted within that authority pursuing whoever down the highway and what was the obligation of drivers of vehicles on the highway regarding stopping, or not, when the police are running their sirens and their lights.

And forgetting about whether there’s probable cause to stop this particular driver, he had a duty to – to stop in response to what they were doing.

So I think there was nothing unlawful about their turning their sirens on, turning their lights on in general because of the information they had and pursuing the vehicles they were pursuing.

As to whether they had specific probable cause to stop this particular individual, I don’t think is the issue. So the Court is not going to give that instruction.

The trial court did tell defense counsel, however, that he could argue to the jury that the stop was unlawful, and defense counsel did so in his closing argument.

While we agree that an instruction respecting the standard for lawful arrest would have been appropriate in this case, we conclude that, because the trial court's instructions included the requirement that the police were acting lawfully and did not preclude Cynar from arguing that the arrest was unlawful, the trial court's refusal to give the additional instruction does not merit reversal.<sup>19</sup>

#### E. Fleeing And Eluding

Cynar argues that the trial court erred in refusing to instruct the jury regarding the definitions of "flee" and "elude." This Court has observed that "flee" and "elude" have no meaning particular to the statute, and are defined as they would be ordinarily understood by their dictionary definitions.<sup>20</sup> Accordingly, this Court held that the standard jury instruction adequately informed the jury of the meaning of this element.<sup>21</sup> In this case, the trial court gave an additional instruction clarifying that fleeing or eluding required "an intent to take affirmative action to flee or avoid capture, not simply failing to submit." We conclude that the standard jury instruction, particularly where augmented in this fashion, adequately informed the jury, and that defining the terms "flee" and "elude" was unnecessary.

#### F. Specific Intent

Cynar's final argument respecting the jury instructions is that the trial court erred in refusing to instruct the jury regarding specific intent. However, as Cynar acknowledges, this Court has ruled that fleeing and eluding is not a specific intent crime.<sup>22</sup> This opinion is binding<sup>23</sup> and has not been appealed. Therefore, the trial court did not err in refusing to give a specific intent instruction.<sup>24</sup>

### V. Prosecutorial Misconduct

#### A. Standard Of Review

We review de novo allegations of prosecutorial misconduct while reviewing the trial court's factual findings for clear error.<sup>25</sup>

---

<sup>19</sup> *Canales*, *supra* at 574; citing *Reed*, *supra* at 349-350 and *Piper*, *supra* at 648.

<sup>20</sup> *People v Grayer (Grayer II)*, 252 Mich App 349, 354; 651 NW2d 818 (2002).

<sup>21</sup> *Id.* at 355.

<sup>22</sup> See *People v Abramski*, 257 Mich App 71, 73; 665 NW2d 501 (2003).

<sup>23</sup> See MCR 7.215(C)(2).

<sup>24</sup> See *People v Perez-DeLeon*, 224 Mich App 43, 57; 568 NW2d 324 (1997).

<sup>25</sup> *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).



## B. Other Acts Evidence

Cynar argues that the prosecutor elicited evidence of other acts evidence that the trial court abused its discretion in admitting. Specifically, Cynar argues that it was improper for the prosecutor to ask whether it was true that Cynar was not wanted for anything. However, the prosecutor's question was in response to Cynar's own testimony that he was not wanted for anything and, further, Cynar answered only that he was not wanted for anything as far as he knew. We conclude that the prosecutor's question was responsive to Cynar's own testimony, and that, in any event, no other acts evidence was admitted as a result of Cynar's answer. Therefore, no error occurred.

Cynar also argues that the prosecutor improperly asked whether Cynar had had conflict with the police and other authorities or public officials, and that the trial court erred in permitting Cynar to answer affirmatively after he objected to the question.

Evidence of other acts is admissible if it passes the following test:

First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice . . . .<sup>26</sup>

An examination of the exchange in context reveals that the prosecutor was attempting to discover why Cynar would not pull over and stop despite the officers' flashing lights and sirens, and also why Cynar's first response to the police would be an obscenity. Thus, evidence that Cynar had previous conflicts with the police was relevant to show that he had a motive to flee or elude the police, and that he did so intentionally. Evidence of other acts is admissible if it is relevant to show motive or intent.<sup>27</sup> Further, in light of Cynar's initial obscene comment to the police, which was admitted without objection, the jury is likely to have inferred that Cynar's relationship with the police was not altogether positive, and any prejudice resulting from his direct answer to this question was therefore minimal. We conclude that the trial court did not abuse its discretion in allowing this testimony.

Affirmed.

/s/ William C. Whitbeck  
/s/ David H. Sawyer  
/s/ Henry William Saad

---

<sup>26</sup> *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993).

<sup>27</sup> See MRE 404b.