STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL EDWARD YARBROUGH,

Defendant-Appellant.

UNPUBLISHED
November 18, 2004

No. 249102
Oakland Circuit Court
LC No. 02-187371-FH

Before: Borrello, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant was convicted by a jury of fourth-degree fleeing and eluding, MCL 257.602a(2), and unlawful use of a license plate, MCL 257.256. He was sentenced to six months' probation and ordered to pay fines, costs, and fees. Defendant appeals as of right. We affirm.

Defendant's first issue on appeal is whether the prosecution presented sufficient evidence to support his fourth-degree fleeing and eluding conviction. Defendant argues that there was insufficient evidence to establish that he was aware that he had been ordered to stop and to establish that he refused to obey the officer's order by trying to flee or avoid being caught. We disagree.

A challenge to the sufficiency of the evidence presented at trial may be raised for the first time on appeal and need not be preserved in the trial court. *People v Patterson*, 428 Mich 502, 514-515; 410 NW2d 733 (1987). The test for determining the sufficiency of evidence in criminal cases is "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000)(citations omitted). A reviewing court should not interfere with the jury's role of determining the credibility of witnesses and the weight of the evidence. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992). The prosecutor is not obligated to negate every reasonable theory consistent with innocence. *Nowack, supra* at 400. Rather, the prosecutor only has to prove the elements of the crime beyond a reasonable doubt. *Id.* The *Nowack* Court stated:

> The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or

> circumstantial. "'Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.'" *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). [*Nowack, supra* at 400.]

Minimal circumstantial evidence is sufficient to establish a defendant's state of mind. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). This Court reviews the sufficiency of the evidence de novo. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), aff'd 466 Mich 39 (2002).

In *People v Grayer*, 235 Mich App 737, 741; 599 NW2d 527 (1999)(*Grayer I*), this Court recited the elements of third-degree fleeing and eluding, which, while having elements additional to those necessary to support fourth-degree fleeing and eluding, encompass the five elements of fourth-degree fleeing and eluding. See CJI2d 13.6c and CJI2d 13.6d. Those five elements of fourth-degree fleeing and eluding are as follows:

> (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 was 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, [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. [*Grayer I*, *supra* at 741; see also CJI2d 13.6d.][1]

[1] The *Grayer I* panel addressed fleeing and eluding as that crime is described in MCL 750.479a. *Grayer I*, *supra* at 738-741. The Standard Criminal Jury Instructions provide instructions for fleeing and eluding, with the commentary also making reference to MCL 750.479a. CJI2d 13.6a-13.6d. Here, defendant was charged under MCL 257.602a of the Motor Vehicle Code. MCL 257.602a(1) and MCL 750.479a(1) are nearly identical. The following quotation is found in both MCL 750.479a(1) and MCL 257.602a(1), with the bracketed words representing the only distinguishing, yet irrelevant, language:

> 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 [motor] vehicle, extinguishing the lights of the [motor] 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.

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Fleeing and eluding is a general intent crime and only requires the intent to do the physical act of fleeing and eluding an officer. *People v Abramski*, 257 Mich App 71, 73; 665 NW2d 501 (2003). "The statute criminalizes the conduct of a person who fails to obey the direction of an officer by 'increasing the speed of the vehicle, extinguishing the lights of the vehicle, or *otherwise* attempting to flee or elude[.]'" *Grayer I, supra* at 740, quoting MCL 750.479a(1)(emphasis in original). "The words 'flee' and 'elude' as used in [the statute] have not acquired a particular meaning in our courts." *Grayer I, supra* at 740-741. After review of dictionary definitions, the *Grayer I* panel concluded that "[b]oth terms connote an intent to take affirmative action, not simply fail to submit." *Id.* at 741.

Defendant appeals the sufficiency of the evidence with respect to the fourth and fifth elements of fleeing and eluding, i.e., that he was aware that he was ordered to stop and that he refused to obey the officer's order by trying to flee or avoid being caught.

Viewing the evidence in the light most favorable to the prosecution, we conclude that there was sufficient evidence to establish that defendant knew he was ordered to stop. The officer was in a fully marked police car and directly behind defendant's car when he activated his overhead lights and pushed his siren button twice, signaling defendant to pull over. Once the officer saw that defendant was continuing through the Coolidge intersection, he activated the siren. The officer briefly turned off the siren to establish that there was no noise preventing defendant from hearing the siren. Defendant's driver's side window was rolled down. Throughout the pursuit, the officer was less than a car length behind defendant's car.

Also, defendant's testimony established that he knew he was ordered to stop. Defendant noticed that the officer had activated the overhead lights when the police car pulled through the Coolidge intersection. Defendant heard a horn "halfway through the block" and realized that the police officer was "after me." At that point, defendant understood that the officer was attempting to pull him over, but he did not stop. The evidence presented was sufficient to establish that defendant was aware that he had been ordered to stop.

Similarly, viewing the evidence in the light most favorable to the prosecution, we conclude that the evidence was sufficient to allow a jury to find that defendant refused to obey the officer's order by trying to flee. Although the reported cases involved conduct that exceeds the conduct at issue in this case, "the statute itself does not limit fleeing and eluding to high-speed or long-distance chases. The Legislature could have limited the statute in those manners if it had chosen to do so. It did not." *Grayer I, supra* at 744-745. "[T]he statute does not require

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Considering the similar language of the statutes, we find it appropriate to rely on *Grayer* or any other authority that addresses MCL 750.479a. We note that subsection 2 of each statute provides that violation of subsection 1 constitutes fourth-degree fleeing and eluding. The penalties are consistent (two years maximum imprisonment), except that MCL 750.479a(2) provides for the possible imposition of a maximum fine of $2,000, whereas MCL 257.602a(2) only permits a maximum fine of $500. Finally, we note that MCL 750.479a(8) specifically provides that an individual cannot be convicted under its provisions and MCL 257.602a for conduct arising out of the same transaction.

a certain level of speeding or length of chase[.]" *Id.* at 743. The *Grayer I* panel continued, stating that the "[d]efendant accelerated his vehicle after the officer activated his flashing lights, which, under the statute, appears to be sufficient evidence from which to infer intent." *Id.*

The statute expressly provides that fleeing and eluding can be evidenced by a defendant "increasing the speed" of his or her vehicle after being signaled to stop. MCL 257.602a(1). It does not state that the driver has to be going in excess of the posted speed limit when he or she accelerates upon being signaled to stop. Defendant accelerated or increased the speed of his vehicle to the forty mile per hour speed limit *after* the officer activated the overhead lights and the siren. This entailed more than a simple failure to submit and was sufficient evidence, when viewed in a light most favorable to the prosecution, to support the conviction. There were several places where defendant could have pulled off the road, including a gas station, a shopping plaza with two driveways, several residential driveways, and a party store. Defendant acknowledged the existence of the various driveways, but testified that there was nowhere to pull over. A jury could infer that defendant did not stop voluntarily for the officer, but instead, stopped only because the other cars at the red light prevented him from going forward. Although there was room for defendant to pull over to the side of the road at the red light and indicate his intent to stop, he remained in the center of the lane. Additionally, defendant was knowingly driving with an invalid license plate, giving him a motive to flee or avoid being stopped.

Also, in *People v Grayer,* 252 Mich App 349, 356; 651 NW2d 818 (2002)(*Grayer II*), the Court found that the "defendant's actions after the vehicle pursuit ended . . . constituted circumstantial evidence of defendant's intent to flee and elude the police while he was operating his vehicle." After defendant was stopped, he informed the officer that his mother had just fallen and that it was an emergency. A jury could consider defendant's lie to be additional circumstantial evidence that he was trying to flee and elude. Viewed in a light most favorable to the prosecution, the evidence was sufficient to allow a jury to conclude that defendant refused to obey the officer's order by trying to flee or avoid being stopped.

Defendant's second issue on appeal is whether alleged prosecutorial misconduct denied defendant a fair and impartial trial. Defendant argues that he was denied a fair and impartial trial due to several prosecutorial remarks that misled the jury in applying the law to the facts, as well as an assertion that led the jury to suspend its own powers of critical analysis and judgment in deference to those of the prosecutor.

Defense counsel did not object to the alleged prosecutorial misconduct at trial. Unpreserved claims of prosecutorial misconduct are reviewed under the plain error test. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). "To avoid forfeiture under the plain error rule, three requirements must be met: (1) error must have occurred, (2) the error was plain, i.e., clear or obvious, (3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999)(citations omitted). Reversal is appropriate only if the plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Ackerman, supra* at 448-449. When reviewing claims of prosecutorial misconduct, this Court will not find error requiring reversal if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Schutte,* 240 Mich App 713, 721; 613 NW2d 370 (2000).

Claims of prosecutorial misconduct are reviewed on a case-by-case basis. *People v Kelly*, 231 Mich App 627, 637; 588 NW2d 480 (1998). This Court examines the prosecutor's remarks in context to determine whether the defendant received a fair and impartial trial. *People v McLaughlin*, 258 Mich App 635, 644-645; 672 NW2d 860 (2003). "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Schutte, supra* at 721.

On appeal, defendant argues that several of the prosecutor's comments during opening statement and closing argument misstated the law and confused the jury. During her opening statement, the prosecutor stated that fleeing and eluding "means that you didn't stop for a police officer when you knew he was trying to stop you." After listing the elements of fourth-degree fleeing and eluding, the prosecutor asserted that "all of those elements just basically mean he didn't stop when a police officer tried to stop you," and "it simply means that the defendant knew that an officer was trying to pull him over and he didn't." Similarly, during closing argument, the prosecutor stated, "the instruction does not say that a person needs to be try[ing] to be fleeing and eluding, like try[ing] to run away and get away from the cop. It's enough if they refuse to stop," and "the law requires that when you see a police officer with lights on, you have to stop and pull over to the side of the road. It doesn't matter if you're the target."

The prosecutor's remarks were arguably improper in that they equated mere failure to stop or submit with fleeing and eluding. Both "fleeing" and "eluding" indicate an intent to take affirmative action and not simply a failure to submit. *Grayer I, supra* at 741. Applying *Grayer I*, defendant's mere failure to stop, without any other affirmative action that could qualify as fleeing and eluding, such as increasing speed, might not establish that defendant refused to obey the officer's order by trying to flee or avoid being caught.

However, there is no error requiring reversal if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Ackerman, supra* at 449. If defense counsel had objected to the prosecutor's remarks, any possible error could have been cured by an instruction. Also, "if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can potentially be cured." *Grayer II, supra* at 357. The trial judge correctly instructed the jury on the elements of fourth-degree fleeing and eluding, and it informed the jury that the attorneys' statements were not evidence. Thus, any possible prejudice from the allegedly erroneous prosecutorial arguments was cured. Moreover, we cannot conclude that any assumed error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.

Finally, defendant argues that the prosecutor's assertion that "there's no requirement that he be trying to go through parking lots and get away from the [police, and if] that were the case, you wouldn't be here, because this case would have been dismissed" is analogous to the prosecutor's statement in *People v Humphreys*, 24 Mich App 411, 418; 180 NW2d 328 (1970), that "if the defendant in the opinion of the police and in my opinion was innocent of this charge, we would not be here right now." However, *Humphreys* is distinguishable as it involved an expression of personal belief in the defendant's guilt that may have led the jury "to suspend its own powers of critical analysis and judgment in deference to those of the police and the prosecutor." *Id.* The prosecutor's statement in this case did not lead the jury to suspend its own critical analysis and judgment. We hold, therefore, that the claimed prosecutorial misconduct did not deprive defendant of a fair and impartial trial. Moreover, there was no plain error affecting

substantial rights, defendant is not actually innocent, and the integrity of the judicial proceedings was not compromised. *Carines, supra* at 763-764.

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Janet T. Neff