

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TANYA LEE MARKOS,

Defendant-Appellant.

UNPUBLISHED

March 29, 2005

No. 249780

Oakland Circuit Court

LC No. 2001-178820-FH

Before: Neff, P.J., and Cooper and R. S. Gribbs*, JJ.

PER CURIAM.

Defendant appeals as of right from her jury trial conviction of operating a motor vehicle while under the influence of intoxicating liquor or while having an unauthorized blood alcohol level (OUIL/UBAL-3d), MCL 257.625(1), third offense, MCL 257.625(8)(c). The trial court sentenced defendant to 183 days in jail and three years' probation. Defendant also pleaded guilty to operating a vehicle with a suspended license, MCL 257.904(1), and was sentenced to fifty-six days in jail. Defendant's issues on appeal relate to her OUIL/UBAL-3d conviction. We affirm.

At approximately 2:40 a.m. on April 19, 2001, a Farmington Hills police officer observed defendant's car cross over the solid right line approximately four times. The officer also saw defendant apply the brakes several times even though there was no other traffic on the road and there were no obstructions in the roadway. The officer testified that when he stopped defendant, he smelled a strong odor of intoxicants, saw that defendant's eyes were bloodshot, and noticed that defendant slurred her speech. The officer administered six field sobriety tests, five of which defendant failed. Defendant initially told the officer that she had consumed only one beer, but after the sobriety tests, she admitted she had drunk "a couple more than that." The officer arrested defendant, and an open bottle of beer was found in her car.

At the police station, defendant submitted to two Breathalyzer tests. Before performing a breath alcohol test, there is a required fifteen-minute observation period during which the subject

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

may not smoke, eat, drink, or regurgitate. 1999 AC, R 325.2655(1)(e).¹ The officer observed defendant for fifteen minutes; however, approximately one minute after the observation period began, defendant was given permission to wash her face. While at the sink, defendant apparently either took a drink of water or rinsed her mouth. When asked if she had drunk any water, defendant said “no.” Thirteen minutes and twenty-two seconds elapsed between the time defendant put water in her mouth until the first test was administered, and fourteen minutes and thirty-two seconds elapsed before the second test. The results of both tests were 0.17 percent.

Defendant first argues that the Breathalyzer test results should have been suppressed because the administrative rule regarding the observation period was violated. *People v Rexford*, 228 Mich App 371, 378-379; 579 NW2d 111 (1998). Defendant presented an expert witness who testified that the water in defendant’s mouth might have affected the Breathalyzer test results. The prosecution’s expert witness, however, testified that both test results were accurate and unaffected by the water. The officer observed defendant driving somewhat erratically, and he testified expressly regarding all six field sobriety tests, providing detailed descriptions of the tests and defendant’s performance. Defendant admitted that she had drunk more than a few beers, the officer found an open bottle of beer in her car, she smelled strongly of intoxicants, her eyes were bloodshot, and her speech was slurred. Furthermore, the jury viewed a videotape of the traffic stop and a videotape of the waiting period and administration of the Breathalyzer tests. The jury received an abundance of evidence besides the Breathalyzer test results. Although 1999 AC, R 325.2655(1)(e) was technically violated, the prosecution’s expert witness testified that the tests were not affected. We therefore conclude that admission of the Breathalyzer tests was not error.

Defendant next argues that the trial court erred in denying defendant’s motions for a mistrial, for a judgment of acquittal, or for a new trial, when the jury was inadvertently shown during deliberations an inadmissible portion of a videotape exhibit. The portion of the tape in issue contains a reference to defendant’s probationary status. We review a lower court’s decision on a motion for a mistrial or a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

The parties do not dispute that the evidence was not relevant under 404(b) and therefore should not have been admitted. Furthermore, the evidence was likewise inadmissible under MRE 609. However, an error in the admission of evidence is not grounds for vacating a verdict, granting a mistrial, or granting a new trial unless substantial justice requires it. MCL 769.26; MCR 2.613(A). *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001). Defendant’s argument that the mention of her probationary status was outcome determinative is unpersuasive.

¹ 1999 AC, R 325.2655(1)(e) provides as follows:

A person may be administered a breath alcohol analysis on an evidential breath alcohol test instrument only after being observed for 15 minutes by the operator before collection of the breath sample, during which period the person shall not have smoked, regurgitated, or placed anything in his or her mouth, except for the mouthpiece associated with the performance of the test.

The mention of defendant's probationary status was inadvertent, and defense counsel conceded that there was a doubt about whether the jury actually heard the remark. Sufficient credible evidence was properly presented for the jury to find defendant guilty of the charged act beyond a reasonable doubt. *Whittaker, supra* at 427.

For the same reason, and considering the same evidence, we reject defendant's argument that reversal is required because the trial court failed to give a curative instruction about how the jury should consider the inadmissible evidence contained in the videotape. While we believe the court should have given the instruction, we are convinced that it is "highly probable" that the trial court's refusal to give defendant's requested curative instruction did not contribute to the verdict. *People v Mitchell (On Remand)*, 231 Mich App 335, 339; 586 NW2d 119 (1998).

Defendant next argues that she was denied a fair trial when the prosecutor made certain remarks during his closing argument. Because defense counsel failed to timely object to these comments,² this issue has not been properly preserved for appeal. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To avoid forfeiture of the issue defendant must show: (1) that an error occurred; (2) that the error was plain, i.e., clear or obvious; and (3) that the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We will only reverse defendant's convictions if she is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763-764.

The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial, i.e., whether prejudice resulted. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). We review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *Abraham, supra* at 272-273. 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. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

The challenged remarks include: (1) "He does what you'd expect any officer in your community to do. He takes her off the street. Tries to make it safe for everybody else;" (2) "[Y]ou can look at a motor vehicle and you can consider that a dangerous weapon because we know how many people are killed every year, every single day of the year, every hour of every day of the year by drunks, by drunk drivers;" and (3) "I'm asking you to send the defendant a message, tell her it's not okay to go out there and drive when you've had too many to drink. It's not okay to put all of our lives and our family members lives at risk, anybody who may be out on the roadway."

The prosecution's first comment was properly responsive to defendant's assertion throughout trial that the officer acted improperly in stopping and arresting defendant.

² Although defense counsel raised this issue before the trial court, he waited until after closing and rebuttal arguments were completed and the trial court had instructed the jury.

Furthermore, the prosecutor was not making a statement that the jury had a duty to convict defendant, but that the officer had a duty as a police officer to arrest her once he ascertained that she was driving under the influence of alcohol.

The prosecutor's second and third statements are more problematic. A prosecutor may not urge the jury to convict the defendant as part of their civic duty. *Bahoda, supra* at 282. A prosecutor's remarks must be reviewed in context to determine whether they constitute error, and civic duty arguments are prohibited because they inject into the trial issues that are broader than a defendant's guilt or innocence. *Id.* at 284-285. We conclude that the prosecutor did not inject into the trial "issues that are broader than a defendant's guilt or innocence" or attempt to appeal to the fears and prejudices of the jury. *Id.* Furthermore, the trial court twice instructed the jury that the lawyers' statements and arguments are not evidence. Absent an objection, the "judge's instruction that arguments of attorneys are not evidence dispelled any prejudice[,] and the jury is presumed to follow the court's instructions. *Id.* at 281; *People v Lueth*, 253 Mich App 670, 687; 660 NW2d 322 (2002). Thus, defendant failed to establish that the prosecutor's comments in his closing argument constituted outcome-determinative plain error.

Finally, defendant argues that even if any one of the errors discussed above was insufficient, in itself, to reverse defendant's conviction or grant a new trial, the cumulative effect is nevertheless sufficient to warrant remand for a new trial. We review a cumulative-error argument to determine whether the combination of alleged errors denied defendant a fair trial. *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003). The cumulative effect of several minor errors may warrant reversal where the individual errors would not, but "the effect of the errors must [be] seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003) (citation omitted).

As discussed previously, there were errors in defendant's trial. Defendant's probationary status was inadvertently admitted, and the trial court failed to provide a curative instruction. These errors, however, were harmless in light of the substantial evidence supporting defendant's conviction. *Whittaker, supra* at 427. Thus, the cumulative effect of these errors does not require reversal. *Ackerman, supra* at 454.

Affirmed.

/s/ Janet T. Neff

/s/ Roman S. Gribbs