S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL JOSEPH BINSFELD,

Defendant-Appellant.

UNPUBLISHED
December 15, 2005

No. 257263
Livingston Circuit Court
LC No. 04-014194 – FH

Before: Hoekstra, P.J., and Neff and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree fleeing and eluding, MCL 750.479a(3), and failing to stop at a personal injury accident, MCL 257.617a(2). Defendant appeals as of right. We affirm.

Defendant's convictions arise from his having left a gas station without having paid for gas, and the resulting motor vehicle chase of defendant by the owner of the gas station and a Michigan State Police trooper. Defendant argues that the prosecution failed to present sufficient evidence to prove beyond a reasonable doubt that defendant committed the offense of third-degree fleeing and eluding. We disagree.

When reviewing the sufficiency of the evidence to sustain a conviction, this 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 Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002) (citation and internal quotation marks omitted). To convict defendant of third-degree fleeing and eluding, the prosecution was required to prove the following six elements: (1) the law enforcement officer involved was in uniform and performing his lawful duties and the officer's vehicle was adequately identified as a law enforcement vehicle, (2) defendant was driving a motor vehicle, (3) the officer, by hand, voice, siren, or emergency lights, ordered defendant to stop, (4) defendant was aware that he was ordered to stop, (5) defendant refused to obey the order by attempting to flee or otherwise avoid being caught by the officer, and (6) a portion of the violation took place in an area where the speed limit was thirty-five miles per hour or less. *People v Grayer*, 235 Mich App 737, 741; 599 NW2d 527 (1999); see also MCL 750.479a(3). We understand defendant to be challenging the sufficiency of evidence to support only the fourth and fifth of these elements.

Regarding the fourth element, i.e., whether defendant was aware that he was ordered to stop, the state police trooper involved in the chase testified at trial that although he began the chase approximately 300 to 400 yards behind defendant on Hyne Road, he closed the distance between himself and defendant to approximately 100 yards by the time the two entered onto Commerce Road. The trooper further testified that although he could not always see defendant's van because of dips and curves in the road, his lights and siren were on for the entire 10- to 20-mile chase. The trooper described defendant's driving as erratic, testifying that defendant drove well above the speed limit, ran red lights, failed to stop at a stop sign, and forced cars and pedestrians off the road. In addition, the trooper testified that after defendant was apprehended, he stated that he had heard the siren and had seen the lights on the trooper's vehicle and knew that the trooper was behind him on Commerce Road. Viewing this evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could find that defendant was aware of the trooper's order to stop.

We find this evidence similarly sufficient to support the fifth element of the offense, i.e., that defendant refused to obey the trooper's order to stop by attempting to flee or otherwise avoid being caught by the trooper. In challenging the sufficiency of the evidence to support this element, defendant argues that a rational explanation for his erratic and dangerous driving was that he feared the gas station owner and the consequences of his having struck a car and damaged a lawn prior to the trooper having joined the pursuit. However, the prosecution is not required to negate every possible theory that is consistent with a defendant's innocence. *People v Hardiman*, 466 Mich 417, 423-424; 646 NW2d 158 (2002). Rather, the prosecution need only introduce evidence sufficient to convince a reasonable jury of the defendant's guilt in light of any contradictory evidence presented by the defendant. *Id*. at 424. We find that when viewed in the light most favorable to the prosecution, the evidence presented by the prosecution at trial was sufficient to meet its burden in this regard.

Defendant next argues that because the only roads on which he drove that had a speed limit of thirty-five miles per hour or less were in Oakland County, venue was improper in Livingston County. We disagree.

In reviewing a determination of venue in a criminal case, this Court reviews the record de novo to determine whether a rational trier of fact could have found that venue was proven beyond a reasonable doubt. See *People v Huffman*, 266 Mich App 354, 362; 702 NW2d 621 (2005); see also *People v Fisher*, 220 Mich App 133, 145; 559 NW2d 318 (1996) (a trial court's determination regarding venue in a criminal prosecution is also reviewed de novo). Here, venue was proper in Livingston County under MCL 762.8, which states that "[w]henever a felony consists or is the culmination of 2 or more acts done in the perpetration thereof, said felony may be prosecuted in any county in which any 1 of said acts was committed."

MCL 762.8 is concerned with the "acts" that culminate in the felony, and not with the elements of the felony. *People v Jones*, 159 Mich App 758, 761; 406 NW2d 843 (1987). There is no dispute that the only area with a speed limit of thirty-five miles per hour or less through which defendant drove was in Oakland County. However, acts which culminated in defendant driving through that portion of Oakland County, such as pumping $9 worth of gas and failing to pay for it, hitting a car, and failing to pull over for the trooper on Commerce Road, occurred in Livingston County. Because a reasonable trier of fact could find that defendant's acts which

culminated in his conviction for third-degree fleeing and eluding began in Livingston County, venue was proper in Livingston County pursuant to MCL 762.8.

Defendant next argues that the prosecutor impermissibly vouched for the credibility of the state police trooper. Because defendant failed to preserve any challenge of the prosecutor's conduct at trial, our review is for plain error affecting defendant's substantial rights. *People v Goodin*, 257 Mich App 425, 431; 668 NW2d 392 (2003). A prosecutor may not vouch for the credibility of a witness by implying that he has special knowledge concerning the witness' truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Nor may he state his own opinion regarding a witness' honesty. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). However, "a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004).

Here, the prosecutor did not vouch for the credibility of the trooper. He did not imply that he had special knowledge regarding the trooper's credibility, nor did he state his own opinion or belief regarding the trooper's truthfulness. Rather, he merely argued to the jury that the trooper had no reason to lie. Because the prosecution's argument in this regard was not improper, we find no error. *Id*.; *Goodin, supra*.

Defendant also argues that the prosecutor improperly commented on his right not to testify when the prosecutor remarked to the jury that it had not heard any evidence regarding the two reasons that jurors had given during voir dire to excuse a person for failing to pull over for a police officer, i.e., that the pursuer was a "fake cop," or an urgent medical condition was present. A prosecutor may not comment on a defendant's failure to testify. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). Here, however, the prosecutor was not commenting on defendant's failure to testify. He was merely observing that there was no evidence of the two scenarios that the jurors had identified as being, at least from their point of view, legitimate reasons for not heeding a police officer's order to pull over. Neither of those reasons are elements of the crime or any defense thereto for which proof was required. Therefore, whether or not defendant testified was of no matter, and we find no error in the challenged comments. See *People v Fields*, 450 Mich 94, 112-113; 538 NW2d 356 (1995) (unless the prosecutor's comments burden the defendant's right not to testify, or shift the burden of disproving an element of the offense to the defendant, they are not improper).

Defendant next argues that he is entitled to a new trial on the ground that he was denied the effective assistance of counsel at trial. We disagree.

A defendant who seeks a new trial on the ground of ineffective assistance of counsel bears a heavy burden. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). To meet this burden, the defendant must show: (1) that his trial counsel's performance was objectively unreasonable in light of prevailing professional norms, and (2) a reasonable probability that, but for counsel's unprofessional performance, a different outcome would have resulted. *Id*. at 599-600. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. See *People v Matuszak*, 263 Mich App 42, 58-59; 687 NW2d 342 (2004).

In challenging his counsel's performance at trial, defendant first argues that counsel was ineffective because he refused to let defendant testify. However, rather than indicating that trial counsel refused to let defendant testify, the record shows that defendant obligingly followed the advice of his attorney not to testify, so as to prevent the admission of defendant's prior convictions into evidence. Counsel's advice in that regard constitutes a matter of trial strategy that we will not second-guess on appeal. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant also argues that he received ineffective assistance of counsel because his trial counsel failed to request a jury instruction on fourth-degree fleeing and eluding, a lesser included offense of third-degree fleeing and eluding. However, it is clear from the testimony at the evidentiary hearing that defense counsel did not request an instruction on fourth-degree fleeing and eluding because that instruction would have been inconsistent with defendant's theory of defense, i.e., that he was unaware that he had been ordered to stop by the trooper. It is the role of defense counsel to choose the best defense for the defendant under the circumstances, *People v Pickens*, 446 Mich 298, 325; 446 NW2d 298 (1994), and, as noted above, this Court will not second-guess such matters of trial strategy, *Rice*, *supra*.

Finally, defendant argues that he received ineffective assistance of counsel because trial counsel could not have effectively represented him given the animosity that existed between them. Relying on this purported animosity, defendant also asserts that the trial court erred in failing to grant defendant's pretrial request for substitute counsel. We find no merit to either of these claims.

The trial court refused defendant's request for new counsel because the request came five weeks before defendant's trial was scheduled to begin, and because trial counsel stated that he could effectively represent defendant. This Court will not disturb a trial court's decision regarding substitution of counsel absent an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). When making his request for new counsel, defendant only told the trial court that he and his trial counsel were not "seein' eye to eye." Defendant, in his appeal brief, provides greater detail regarding the issues on which he and his trial counsel purportedly did not agree, such as whether a copy of the 911 tape should have been obtained through discovery, whether maps delineating the path of the chase should have been drawn for the jury, and whether defendant would win or lose at trial. However, these allegations were not before the trial court. Thus, having no other evidence of friction between defendant and his trial counsel than defendant's statement that he and his counsel did not see "eye to eye," and given trial counsel's statement that he could effectively represent defendant at the fast-approaching trial, the trial court did not abuse its discretion in denying defendant's request for substitute counsel.

Further, we find that the testimonial record fails to support defendant's claim that any animosity between him and his trial counsel prevented counsel from effectively representing him. Rather, a review of the record indicates that counsel effectively cross-examined the witnesses and gave a well-reasoned closing argument that resulted in defendant's acquittal of two of the four charges on which he was tried. Because defendant has failed to show that counsel's performance was either deficient or prejudicial, *Carbin*, *supra*, we cannot conclude that defendant was denied the effective assistance of counsel.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Alton T. Davis