STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMAR RAPHAEL WARE,

Defendant-Appellant.

UNPUBLISHED
February 13, 2007

No. 264705
Wayne Circuit Court
LC No. 09-003695-01

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction, following a bench trial, of fleeing and eluding, third degree, MCL 257.602a(3). He was sentenced as a habitual offender, second offense, MCL 769.10, to 34 to 90 months' incarceration. This appeal is being decided without oral argument under MCR 7.214(E). Because the fact finding by the trial court was sufficient, the record evidence fails to support fourth degree fleeing and eluding, and defendant was not denied effective assistance of counsel, we affirm.

Defendant argues that his conviction should be reversed and vacated because the trial court did not provide sufficient findings of fact to justify its verdict. Whether a trial court has sufficiently articulated its findings after a waiver trial is an issue of law that is reviewed de novo. *People v Vaughn,* 186 Mich App 376, 384; 465 NW2d 365 (1991).

MCR 6.403, which concerns trials where a defendant has waived the right to a jury, provides that the court, on the record or in a written opinion made part of the record, "must find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." In reviewing the sufficiency of the evidence presented in a bench trial, an appellate court views the evidence de novo and in the light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Harmon,* 248 Mich App 522, 524; 640 NW2d 314 (2001). "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of a crime." *People v Wilkens,* 267 Mich App 728, 738; 705 NW2d 728 (2005). Provided the trial court was aware of the issues in the case and correctly applied the law to the facts, its findings are deemed sufficient. *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995).

Fourth-degree fleeing and eluding consists of a driver willfully ignoring a direction by a uniformed police officer in a marked police vehicle to stop by increasing speed, extinguishing lights, or otherwise fleeing or eluding the police officer. MCL 257.602a(2). Third-degree fleeing and eluding encompasses the elements of fourth-degree and one of the following: (1) an accident resulted, (2) the fleeing occurred in a speed zone of 35 mph or less, or (3) the driver had a prior conviction for fourth-degree fleeing and eluding. MCL 257.602a(3). Here, the prosecution argued at trial that defendant willfully fled from fully uniformed police officers, which were in a fully marked police car, in excess of 45 mph in a residential speed zone posted at 25 mph. Defendant argued that his flight was not willful because he thought that someone was shooting at him and because he did not hear the police sirens or see the police emergency lights.

The trial court made a credibility determination in favor of the two uniformed police officers who testified at defendant's trial and found that the officers directed defendant to stop the car he was driving by activating the emergency lights on their marked police vehicle. The court also found that defendant drove off as the officers approached the car and that the officers then pursued defendant for over a mile and activated the siren. The court specifically found "beyond any reasonable doubt" that defendant "was fully aware that he was under the direction of a police officer in full uniform basically to stop and that he failed to do so, and he willfully failed to do so." These findings are sufficient to support a conviction for fleeing and eluding, fourth-degree. However, defendant was convicted of fleeing and eluding, third degree, which also requires that the offense occurred in a speed zone of 35 mph or less. *People v Grayer,* 235 Mich App 737, 741; 599 NW2d 527 (1999). Although, the trial court failed to specifically state the speed zone in his findings, MCR 6.403, the trial judge is not required to make specific findings for each element of the offense if it appears from the record that the trial court was aware of the issues in the case and correctly applied the law. *People v Legg,* 197 Mich App 131, 134; 494 NW2d 797 (1992). The record shows that defendant did violate the statute in a speed zone of 35 mph or less. The testimony of the officers, accepted by the trial court, established defendant's operation of a motor vehicle in a posted speed zone of 25 mph. The testimony by officers and defendant alike established that defendant's operation of the motor vehicle was in a residential neighborhood with defendant admitting that he operated the motor vehicle at 25 mph and 35 mph. The speed zone was not a contested issue, and we conclude the record supports defendant's conviction for fleeing and eluding, third degree.

Defendant also argues that the trial court erred reversibly in failing to instruct itself and consider the lesser-included offense of fleeing and eluding in the fourth degree. Whether a trial court is required to consider a lesser-included offense *sua sponte* is a question of constitutional law and reviewed de novo. *People v Darden,* 230 Mich App 597, 600; 585 NW2d 27 (1998).

Upon an indictment for an offense consisting of different degrees, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense as charged but guilty of a degree of that offense inferior to that charged or of an attempt to commit that offense. MCL 786.32; *People v Mendoza,* 468 Mich 527, 531-533; 664 NW2d 685 (2003). Consideration of a lesser-included offense is appropriate only if the lesser offense is a necessarily included lesser offense and a rational view of the evidence would support a finding of the lesser-included offense. *People v Nickens,* 470 Mich 622, 626; 685 NW2d 657 (2004). A necessarily included lesser offense has all of its elements contained within the greater offense. *People v Bearss,* 463

Mich 623, 627; 625 NW2d 10 (2001). It is impossible to commit the greater offense without also committing the necessarily included lesser offense. *Id.*

In this case, fourth-degree fleeing and eluding is a necessarily lesser-included offense of third-degree fleeing and eluding because third-degree contains all the elements of fourth-degree fleeing and eluding. The trial court was not required to consider fourth-degree fleeing and eluding because a rational view of the evidence does not support a finding of only fourth-degree fleeing and eluding. The record shows that the charged offense occurred in a residential speed zone, a speed zone of less than 35 mph. The trial court could find defendant guilty of fourth-degree fleeing and eluding only if it ignored the undisputed record.

Defendant also argues that his conviction be reversed and vacated because he was denied the effective assistance of counsel when his attorney failed to object when the prosecutor cross-examined him about the status of his driver's license. An issue concerning ineffective assistance of counsel presents a mixed question of law, which this Court reviews de novo, and of fact, which this Court reviews for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Ineffective assistance of counsel occurs when defense counsel's representation falls below an objective standard of reasonable performance and creates a reasonable probability that, but for defense counsel's unreasonable performance, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 557 (1994).

Evidence of other crimes, wrongs, or acts is not admissible to prove a person's character to show that he acted in conformity with his character. But such evidence is admissible to show several other purposes, including motive. MRE 404b(1). Here, defendant testified regarding his intent and operation of a motor vehicle. On cross-examination defendant was impeached concerning his statement that he had a driver's license when in fact the defendant's driver's license was suspended. While defendant offered other reasons for not stopping at the police officers' direction, defendant was questioned concerning his suspended driver's license as the true motive for his disregard of the stop order. Evidence regarding defendant's motive was material because defendant claims that he drove off after he heard gunshots and not because he wanted to avoid disclosing that his driver's license was suspended. The cross-examination was proper inquiry concerning truthfulness, MRE 608(b). Even if we consider this evidence under the notice limitations of MRE 404b(2), the first opportunity to give notice was at the time of cross-examination at the trial. Therefore, defense counsel was not ineffective for not objecting to the cross-examination concerning defendant's license because the evidence was offered for a proper purpose and in proper cross-examination. The failure to make a meritless objection does not constitute ineffective assistance of counsel. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio