

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOUNA LEE HANIBLE,

Defendant-Appellant.

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UNPUBLISHED  
November 1, 2007

No. 271177  
Wayne Circuit Court  
LC No. 06-001807-01

Before: Kelly, P.J., and Meter and Gleicher, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of third-degree fleeing and eluding a police officer, MCL 257.602a(3)(a), receiving and concealing a stolen vehicle, MCL 750.535(7), and operating a vehicle without a license, MCL 257.311. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 46 months to 25 years for both the receiving and concealing and the fleeing and eluding convictions, and to time served, 18 days, for the operating without a license conviction. Defendant appeals as of right. We affirm defendant's convictions, but vacate the trial court's order that defendant reimburse \$760 in court-appointed attorney fees, and remand for the trial court to reassess these fees, taking into account defendant's ability to pay them.

Nicholas Nyshick, the victim, testified at trial that he owned a navy blue 2006 Dodge Dakota, which he parked and locked on Midland Street in Redford around 2:45 a.m. on January 29, 2006. The victim recalled noticing "a couple hours later" that the Dakota had disappeared, and that only "a little bit of broken glass" remained near its parking spot. The victim, who denied giving anyone permission to use the Dakota, called the police.

A Detroit police officer testified that around 5:00 p.m. on January 30, 2006, near Five Mile Road in Detroit, he observed a Dakota pickup driving 40 miles an hour in a 25 mile an hour speed limit zone. The officer recounted that he and his partner, who both wore police uniforms, approached the rear of the Dakota in their marked police car, and turned on their lights and siren. According to the officer, the Dakota did not reduce its speed and ignored at least one stop sign. A check of the Law Enforcement Information Network revealed that the Dakota had been stolen. The officer recalled that within several blocks after the pursuit began, the Dakota headed into a vacant lot and struck a tree. The officer testified that he watched defendant climb out the missing driver's side window of the Dakota and flee on foot, and that the police apprehended

him within a few blocks of the accident scene. The victim later visited an impound lot to retrieve the Dakota, which had an estimated \$8,200 in damage.

Defendant first contends that during the prosecutor's closing argument, she improperly argued facts not in evidence and vouched for the credibility of a witness. Because defendant voiced no timely objection at trial to the prosecutor's allegedly improper comments, we review this unpreserved issue only to determine whether any plain error affected his substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). No error requiring reversal exists if a timely instruction could have cured the prejudicial effect of the prosecutor's remarks. *People v Schutte*, 240 Mich App 713, 720-721; 613 NW2d 370 (2000), criticized in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

This Court reviews properly preserved claims of prosecutorial misconduct according to the following standards:

Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. 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. [*Id.* at 721.]

The prosecutor's conduct is considered in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant's claims of misconduct arise from the prosecutor's statement, "And the other thing is that I didn't call the other officer because the testimony would have been redundant, he would have said the same thing, so I didn't bother to call the other officer." Contrary to defendant's contention, the record supports the prosecutor's observation. Immediately after the trial court excused the police officer who testified at trial, the court inquired in the jury's presence, "Do we need his partner, . . . or would it be redundant?" The prosecutor responded that she did not need the other officer's testimony, and the trial court explained to the jury, "The People don't intend to call the partner, ladies and gentlemen, because his testimony would be repetitive of what you just heard, so they're willing to waive that witness." Our review of the record thus reveals that the prosecutor simply explained to the jury her rationale for not producing an endorsed trial witness, in a manner that accurately repeated information previously provided on the record.

Furthermore, we detect from the prosecutor's challenged remark no hint that she improperly "vouch[ed] for the credibility of h[er] witnesses to the effect that [s]he ha[d] some special knowledge concerning . . . [the testifying officer's] truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). The prosecutor voiced no feeling or intuition about either officer's credibility. Even assuming that some impropriety inhered in the prosecutor's

remark, no prejudicial error occurred because the trial court instructed the jury to decide the case solely on the basis of the trial evidence, and that the statements and arguments of the attorneys do not constitute evidence. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).<sup>1</sup>

Defendant next challenges the trial court's assessment of attorney fees. Although the appointment of counsel from assigning defendant's trial counsel advised defendant that he "may be ordered to reimburse the court for all or part of [his] attorney and defense costs," defendant lodged no objection during sentencing to the trial court's imposition of \$760 in attorney fees. "Because defendant failed to object below, we review [this claim] only for plain error affecting defendant's substantial rights." *People v Dunbar*, 264 Mich App 240, 251; 690 NW2d 476 (2004).<sup>2</sup>

Defendant does not dispute the trial court's authority to order his reimbursement of the attorney fees incurred by his appointed counsel. Defendant complains only that the trial court improperly failed to consider his current inability to pay. In *Dunbar*, *supra* at 254-255, this Court elaborated as follows on the trial court's responsibility when ordering a defendant to reimburse attorney fees:

The crux of defendant's claim appears to be that the trial court should have made a specific finding on the record regarding his ability to pay. We do not believe that requiring a court to consider a defendant's financial situation necessitates such a formality, unless the defendant specifically objects to the reimbursement amount at the time it is ordered, although such a finding would provide a definitive record of the court's consideration. However, *the court does need to provide some indication of consideration, such as* noting that it reviewed the financial and employment sections of the defendant's presentence investigation report, *or even more generally, a statement that it considered the defendant's ability to pay.* [Emphasis added.] The amount ordered to be reimbursed for court-appointed attorney fees should bear a relation to the defendant's *foreseeable* ability to pay. [Emphasis in original.] A defendant's apparent inability to pay at the time of sentencing is not necessarily indicative of the propriety of requiring reimbursement because a defendant's capacity for future earnings may also be considered.

In this case, the trial court concluded its imposition of sentence as follows:

This is not a guideline departure.

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<sup>1</sup> Defendant makes the related contention that his trial counsel was ineffective because he failed to object to the alleged instances of prosecutorial misconduct. Because the prosecutor did not commit misconduct, however, defendant's claim of ineffective assistance must fail. *Thomas*, *supra* at 457 (noting that counsel "is not ineffective for failing to make a futile objection").

<sup>2</sup> The prosecution's suggestion on appeal that defendant prematurely has objected to the imposition of fees fails to take into account the trial court's June 1, 2006 "Final order of reimbursement of attorney fees," which directs that "[d]efendant shall pay forthwith the sum of \$760.00."

Any other matters on behalf of either—and then there’s \$6,640.00 in restitution, which he ought to be able to pay over the next 25 years, and there’s 600 in court costs, 760 in attorney’s fees, 60 in crime victim assessment fee, state minimum costs of 180, 600 in court costs.

The sentencing hearing transcript thus demonstrates that the trial court failed to reiterate after each monetary amount imposed, including attorney fees, that it found defendant able to pay them. Our review of the remainder of the trial court record also reveals that at no point did the trial court expressly consider defendant’s ability to pay the \$760 in attorney fees imposed. Defendant’s obligation to reimburse the \$760 in attorney fees is mentioned within the judgment of sentence, a separate “Order of conviction and sentence,” a “Final order for reimbursement of attorney fees,” and an “Order to remit prisoner funds for fines, costs, and assessments,” but none of these refer to defendant’s financial condition or even mention his ability to pay. The trial court’s order of attorney fee reimbursement absent consideration of defendant’s ability to pay constitutes a plain error affecting defendant’s substantial rights.<sup>3</sup> *Dunbar, supra* at 254-255.

Because “the record is devoid of any indication that the court recognized that defendant’s ability to pay needed to be considered when imposing a reimbursement requirement, unlike fines and costs,” “we remand this case for the court to reconsider its reimbursement order in light of defendant’s current and future financial circumstances.” *Dunbar, supra* at 255. We also “vacate that portion of defendant’s judgment of sentence requiring defendant to pay [\$760] for his court-appointed attorney. If, in its discretion, the trial court determines that reimbursement is appropriate, it should establish the terms pursuant to which repayment is required in a separate order.” *Id.* at 255-256.

We affirm defendant’s convictions, but vacate the trial court’s attorney fee reimbursement order and remand for further proceedings consistent with this opinion and *Dunbar, supra* at 251-256. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly  
/s/ Patrick M. Meter  
/s/ Elizabeth L. Gleicher

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<sup>3</sup> In light of our finding that the trial court committed outcome determinative plain error with respect to the order of attorney fee reimbursement, we need not specifically address defendant’s claim that his counsel should have objected to the imposition of attorney fees.