STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 27, 2007
v	No. 271184 Cheboygan Circuit Court
MICHAEL ANDREW OMECINSKYJ, Defendant-Appellant.	LC No. 05-003186-FH

Before: Saad, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of third-degree fleeing and eluding a police officer, MCL 257.602a(3), operating a motor vehicle while intoxicated (OWI), MCL 257.625(1)(a), and reckless driving, MCL 257.626. Defendant was sentenced to 270 days in jail on the fleeing and eluding conviction, and to 45 days in jail on the OWI and reckless driving convictions. We affirm.

Defendant first challenges the trial court's ruling on his motion to suppress the results of his breath alcohol test. Defendant contends that the breath test results should have been suppressed on the ground that the state trooper who administered the test was driving his patrol car during a portion of the required 15-minute observation period prior to administering the test. The trial court found that there was no indication that the test results were invalid. We review the trial court's findings of fact on the motion to suppress for clear error, and we review the court's final decision on the motion de novo. *People v Williams*, 240 Mich App 316, 319; 614 NW2d 647 (2000).

At the time of defendant's arrest, the regulations controlling breath tests required the breath test operator to observe for the person to be tested for 15 minutes prior to the test. 2003 AACS, R 325.2655(1)(e).[1] The operator must ensure that the person to be tested does not regurgitate, smoke, or place anything in his mouth. *Id*. Here, the record demonstrates that defendant did not regurgitate or smoke, and that because he was handcuffed and seatbelted in the back of the patrol car, he could not have placed anything in his mouth. Further, defendant

[1] We note that the administrative rule has recently been amended. See 2007 AACS, R 325.2655(1)(e).

confirmed that he had no recollection of placing anything in his mouth during the 15 minutes prior to the test. As such, any technical violation of the administrative rule was harmless, and there is no basis for invalidating the test results. *People v Wujkowski*, 230 Mich App 181, 186-187; 583 NW2d 257 (1998).

Defendant next contends that the trial court erred in denying his motion to quash all charges. Defendant maintains that the stop at issue in this case was illegal because the troopers had no reasonable suspicion that he had committed a crime and had insufficient time to observe any traffic violation. We disagree. We review the court's ruling on the motion to quash for abuse of discretion. *People v Waltonen*, 272 Mich App 678, 683-684; 728 NW2d 881 (2006).

To conduct a lawful traffic stop, a police officer must have probable cause to believe that a traffic violation has occurred, or a reasonable and articulable basis for suspecting criminal activity. *People v Burrell*, 417 Mich 439, 441; 339 NW2d 403 (1983); *People v Davis*, 250 Mich App 357, 363; 649 NW2d 94 (2002). An officer need not have a reasonable or articulable suspicion if he actually observes a traffic violation. *People v Laube*, 154 Mich App 400, 407; 397 NW2d 325 (1986). A motorist's failure to dim his or her high-beam headlights in the presence of oncoming traffic is a traffic violation. MCL 257.700(b).

Having reviewed the record, we find that there is ample evidence to demonstrate not only that the troopers had sufficient time to observe defendant's violation of MCL 257.700(b), but also that defendant had sufficient time to comply with the statutory requirements. The record simply does not support defendant's contention that the troopers were traveling so fast that he could not respond to their signal to dim his lights. Because the troopers personally observed a violation of MCL 257.700(b), even after defendant had time to comply with the statutory requirements, they were justified in stopping defendant's vehicle. *Laube*, *supra* at 407. The trial court did not abuse its discretion by declining to quash the charges against defendant on the basis of the allegedly unlawful traffic stop.

Defendant lastly argues that the prosecutor committed various instances of misconduct, which when taken together, deprived him of a fair trial. Defendant preserved his challenges to the prosecutor's conduct by objecting at trial. However, we find that these preserved allegations of misconduct were harmless beyond a reasonable doubt. See *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

This Court explained the framework for analyzing claims of prosecutorial misconduct in *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007):

> Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial. A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the defendant's guilt or innocence. Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context. [Citations omitted.]

Defendant maintains that the police officers' credibility was a paramount issue in this case and that the prosecutor's alleged vouching for the officers' credibility denied him a fair trial.

However, the prosecutor did not suggest that he had some exclusive knowledge of the veracity of the officers' testimony. Rather, the prosecutor attempted to encourage the jury to draw upon their common sense to assess the testimony. A prosecutor is free to argue that the jury should believe a witness, so long as the prosecutor does not vouch for the witness's credibility. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). In any event, the trial court's admonishments to the prosecutor limited the effect of the prosecutor's statements. Further, the judge instructed the jury that they must base their decision on the evidence, and that lawyers' statements and arguments are not evidence. A curative instruction is generally sufficient to dispel the prejudicial effect of most inappropriate prosecutorial statements, *People v Humphreys*, 24 Mich App 411, 414-415; 180 NW2d 328 (1970), and jurors are presumed to follow their instructions, *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000).

Defendant also challenges the prosecutor's reference during his opening statement to the "felony stop" of defendant. Taken in context, the jury may not have even recognized the reference to the term felony stop. Even if the jury recognized the term "felony stop," the isolated reference does not warrant a finding of misconduct that denied defendant a fair trial. Prior to opening statement, the trial court had instructed the jury that opening statements are not evidence but are the lawyers' opportunity to give their theories about the case. An instruction that the lawyers' comments are not evidence is sufficient to dispel any possible prejudice. See *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

Defendant finally challenges an allegedly disparaging reference during cross-examination to his experience in car chases. Even assuming that the prosecutor's impromptu reference in this regard was disparaging, there is no indication of prejudice. "'[I]n the haste and heat of a trial it is humanly impossible to obtain absolute perfection, and of necessity some allowance must be made in determining whether impromptu remarks are to be held prejudicial.'" *People v Lawton*, 196 Mich App 341, 354; 492 NW2d 810 (1992) (citations omitted). The suggestion that defendant was experienced with car chases was an impromptu characterization, which the prosecutor promptly withdrew and for which he promptly apologized to the court. The question simply did not deprive defendant of a fair trial.

Any alleged prosecutorial misconduct in this case was harmless beyond a reasonable doubt. *Carines*, *supra* at 774. Nor was defendant denied a fair trial by the cumulative effect of the alleged errors. It is true that the cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not warrant reversal. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). However, "the effect of the errors must have been seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *Id*. In light of the timely the mitigation of the impact of any potential error, coupled with the court's clear instructions both at the beginning and end of trial, defendant has failed to establish that any of the alleged misconduct was seriously prejudicial.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Jane M. Beckering