

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES DOUGLAS HARRIS,

Defendant-Appellant.

UNPUBLISHED

January 27, 2009

No. 282691

Emmet Circuit Court

LC No. 07-002795-FH

Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of resisting a police officer, MCL 780.81d, and being a disorderly person, MCL 750.167(1)(e) (public intoxication). He was sentenced as a second habitual offender, MCL 769.10, to 24 months' probation, with 12 months to be served in jail. He appeals as of right. We affirm.

Defendant was observed riding a bicycle in public while intoxicated. He was arrested after officers learned that he was on probation and that his alcohol consumption violated the terms of his probation. Defendant physically resisted the officers' attempts to detain and restrain him.

At defendant's trial, the prosecutor stated during jury voir dire:

This case involves what I think is a common television theme, as far as people interacting with the police, and that's part of my problem when I try this case is that you're not going to see any television clips here. Does anybody here have a problem if you don't? I mean, would the fact that we're not recording this for purposes of television alone mean that you would find that there is a lack of evidence in this case? Let me start by asking does everybody here watch television and has everybody seen shows like Law & Order, or Cops, Strangest Police Videos? If there is anybody who hasn't, let's put it that way. Is there anybody here who has trouble with the proposition that not all police agencies and not all police officers have television cameras that follow them around? I'll just tell you there isn't going to be any television footage of Mr. Harris being arrested. Is that absence, alone, going to cause you to have a reasonable doubt?

After a prospective juror replied that he assumed that all police cars were equipped with cameras, the prosecutor added:

You're going to get an instruction that the only evidence that you can rely upon is the evidence that is brought to you in the Court. That evidence can be valid by way of live testimony, people who were present, things of that nature. Are you able to set aside your concerns about a lack of a television camera here and reach a verdict based upon the evidence that you hear in Court?

Defense counsel objected on the ground that the prosecutor's statement was contrary to the reasonable doubt standard. The trial court instructed the prosecutor to rephrase his question, following which the prosecutor asked:

If you find that the evidence is sufficient to convict this defendant beyond a reasonable doubt, is the absence of a video recording alone going to make you not follow your instincts regarding the evidence?

The prospective juror replied, "No sir. Not at all."

On appeal, defendant argues that the prosecutor's comments improperly shifted the burden of proof to him, denying jurors the option of basing reasonable doubt on the absence of video evidence. Although defendant objected to the original form of the prosecutor's question, he did not object to the prosecutor's reformulation of the question after the trial court initially sustained defendant's objection. Therefore, this issue is unpreserved. *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998). Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). To avoid forfeiture under the plain error rule, defendant must demonstrate that: (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected the defendant's substantial rights. *Id.*

A prosecutor must never shift the burden of proving that a defendant is guilty beyond a reasonable doubt. *People v Rosales*, 160 Mich App 304, 312; 408 NW2d 140 (1987). Here, viewed in context, the prosecutor's question cannot reasonably be construed as an attempt to shift the burden of proof to defendant. The question was aimed at determining whether jurors understood that the prosecutor is not obligated to produce a particular kind of evidence, i.e., video evidence, when the charged offense involves a defendant's conduct during arrest. The prosecutor was concerned that some jurors might harbor an unrealistic or unreasonable assumption that all police cars are equipped with video cameras or that all activity occurring around police cars is videotaped. The prosecutor's question was intended to identify jurors who would be hesitant to convict solely on the basis of the absence of video evidence, despite *otherwise being convinced* beyond a reasonable doubt of defendant's guilt. The question was not an attempt to lessen or shift the prosecutor's burden of proof. Furthermore, the trial court properly instructed the jury on the burden of proof, the reasonable doubt standard, and the

presumption of innocence. The jury is presumed to have followed the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, we find no plain error.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra