

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KIM LESLIE GLADDING,

Defendant-Appellant.

UNPUBLISHED

November 12, 2009

No. 285295

Ionia Circuit Court

LC No. 07-013770-FH

Before: Servitto, P.J., and Bandstra and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating a vehicle while intoxicated, third offense (OWI 3d), MCL 257.625(1) and (9), operating a motor vehicle without a license, MCL 257.904(1), and possession of marijuana, MCL 333.7403(1). Defendant was sentenced under MCL 769.10 to 14 to 60 months imprisonment for OWI 3d, and 21 days in jail with credit for time served for both operating a motor vehicle without a license and possession of marijuana. Defendant appeals by right and we affirm.

Defendant argues that he was deprived of a fair trial due to prosecutorial misconduct. Specifically, defendant argues that the prosecutor intentionally violated a trial court order prohibiting references to foul language defendant used after his arrest. We review prosecutorial misconduct claims de novo, evaluating the prosecutor's conduct in context to determine whether the defendant was denied a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

Prior to opening statements, defendant challenged the admissibility of testimony regarding several statements he had made after his arrest while en route to jail. These statements, defendant argued, were irrelevant and overly prejudicial because they merely involved defendant's using foul language with the arresting officer and only showed that defendant was intoxicated, a fact to which he had stipulated. Plaintiff argued that the statements were relevant and admissible because in several of the statements defendant discussed whether he operated the moped. The trial court granted defendant's motion.

Defendant's claim of error focuses on the prosecutor' asking him the following question to demonstrate his motive to lie: "Do you recall in the vehicle that you continued to go on about this case and how whether you had a defense attorney or not you were going to beat this and that [the arresting officer] would then walk out of here and he'd be known as a punk bitch?" The

trial court sustained defense counsel's objection, instructed the jury to disregard the question, and admonished the prosecutor for intentionally violating the court's evidentiary ruling. Defendant argues that the prosecutor's conduct deprived him of a fair trial.

The fact that the trial court admonished the prosecutor for violating the court's order does not mean that the prosecutor necessarily engaged in misconduct, however. Indeed, after considering carefully the court's stated reasoning in its entirety, we believe that the prosecutor could have reasonably determined that evidence referencing the curse words was potentially admissible for purposes other than to prove intoxication. We note that before asking the question, the prosecutor stated on the record that he was posing the question to demonstrate defendant's motive to lie. Thus, we believe that the record supports the conclusion that the prosecutor acted in good faith. A prosecutor's good faith effort to introduce evidence does not constitute prosecutorial misconduct. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Further, we are convinced that no serious argument can be made that the prosecutor's question using the words "punk bitch" so prejudiced defendant's case that he would not have been convicted had they not be used. Further, immediately following its ruling, the court gave a curative instruction directing the jury to disregard plaintiff's question. We presume that juries follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and defendant has not shown anything to rebut this presumption.

Defendant also argues that he was deprived of effective assistance of counsel when his trial counsel failed to move for a mistrial after the alleged prosecutorial misconduct. Because effective counsel is presumed, a defendant who challenges his counsel's assistance bears a heavy burden of overcoming that presumption. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Defendant failed to preserve this issue by moving for a new trial or a *Ginther*¹ hearing; our review is therefore limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

A mistrial is only appropriate when the prejudicial effect of an error cannot be cured in any other way. *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). Here, defendant has failed to demonstrate that the court's curative instruction failed to remove any possible prejudicial effect. See *id.* ("[I]nstructions are presumed to cure most errors."), and *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008) ("Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements."). Accordingly, had defense counsel moved for a mistrial, the trial court should have denied the motion as meritless. "It is well established that defense counsel is not ineffective for failing to pursue a futile motion." *People v Brown*, 279 Mich App 116, 142; 755 NW2d 664 (2008). Defendant has not overcome the presumption of effective assistance of counsel. *LeBlanc, supra* at 578.

Defendant further argues that if this Court were to reverse his convictions based on the above arguments, a retrial would violate double jeopardy protections. US Const Am V; Const 1963, art 1 § 15. As we have rejected those arguments, this claim is moot.

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant next argues that the trial court erred by denying his motion for directed verdict because there was insufficient evidence to support his convictions for OWI 3d and operating a motor vehicle without a license. We disagree. We review “the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt.” *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). This Court must draw all reasonable inferences and resolve all credibility issues in favor of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

To properly convict a defendant of OWI, the prosecutor must prove beyond a reasonable doubt that the defendant was: (1) operating a motor vehicle, (2) on a highway, public road, or place accessible by motor vehicle, (3) while intoxicated. MCL 257.625(1). The Michigan Vehicle Code defines “motor vehicle” as any self-propelled vehicle, MCL 257.33, and “operate” or “operating” as being in actual physical control of a vehicle, MCL 257.35a. A person is intoxicated under the statute if he or she has a blood alcohol content level of .08 grams or more per 100 milliliters of blood. MCL 257.625(1)(b). To properly convict a defendant of operating a motor vehicle without a license, the prosecution must show that (1) the defendant was operating a motor vehicle, (2) upon a highway, public road, or other place accessible by motor vehicle, (3) while the defendant’s license was suspended or revoked, and (4) the defendant had been notified of the suspension or revocation as provided by law. MCL 257.904(1); MCL 257.212.

Defendant does not dispute that he was intoxicated at the time of his arrest, that a moped is a motor vehicle, nor that at the time of his arrest his license was suspended, and he had notice of the suspension. Instead, defendant argues that there was no evidence adduced to show that he was operating the moped while intoxicated.

“Once a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk.” *People v Wood*, 450 Mich 399, 404-405; 528 NW2d 351 (1995). At trial, a witness testified that he saw a man, who was later identified as defendant, riding down the street on a moped. The witness was certain defendant was riding the moped and not walking it because he could hear the moped’s motor running. The witness also testified that defendant was traveling between 20 to 25 miles per hour. Moreover, the arresting officer testified that defendant told him that he had driven the moped to the gas station and that it had stalled on his way back home. Viewing this evidence in the light most favorable to plaintiff, a rational trier of fact could reasonably infer that defendant had been operating the moped while he was intoxicated. That the jury was presented with conflicting evidence does not change this conclusion. “It is for the trier of fact, not the appellate court, to determine what inferences may fairly be drawn from the evidence and to determine the weight to be accorded to those inferences.” *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

We affirm.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Jane E. Markey