

[Cite as *State v. Moore*, 2010-Ohio-518.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93042

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

AARON MOORE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-512575

BEFORE: Kilbane, P.J., Jones, J., and Cooney, J.

RELEASED: February 18, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Aaron Moore (“Moore”), appeals his conviction for failure to comply with the order or signal of a police officer, a third degree felony, in violation of R.C. 2921.331(B).¹ Moore argues that there was insufficient evidence to convict him, that he was denied a fair trial because of prosecutorial misconduct, and that his conviction should be overturned because his indictment failed to charge that he willfully caused a substantial risk of serious physical harm to person or property. After a careful review of the law and facts, we affirm.

Procedural History

{¶ 2} On January 30, 2008, the Cuyahoga County Grand Jury indicted Moore on one charge of failure to comply with the order or signal of a police officer. Moore allegedly caused a high speed chase in the westbound lanes of Interstate 90, between McKinley Avenue in Lakewood and Crocker Road in Westlake, after he ignored a Rocky River police officer’s lights, sirens, and signals to pull over while riding his motorcycle at a high rate of speed.

{¶ 3} On February 3, 2009, the case proceeded to jury trial.

¹Ordinarily, violations of R.C. 2921.331(B) are first degree misdemeanors. However, the indictment carried a “furthermore” specification that Moore’s operation of his motorcycle caused a substantial risk of serious physical harm to persons or property, which elevated the offense to a third degree felony.

{¶ 4} On February 6, 2009, the jury found Moore guilty as charged in the indictment.

{¶ 5} On February 27, 2009, Moore was sentenced to 12 months of incarceration.

{¶ 6} On March 26, 2009, Moore filed the instant appeal.

Statement of Facts

{¶ 7} At trial, the State relied on the testimony of Rocky River Police Officer Ronald Flowers (“Officer Flowers”) and Westlake Police Officer John Mauer (“Officer Mauer”).

Testimony of Officer Flowers

{¶ 8} Officer Flowers testified that on Saturday, June 14, 2009, at approximately 9:00 p.m., he was performing traffic enforcement and, as he entered Interstate 90 westbound at the McKinley ramp in Lakewood, Ohio, he saw three motorcycles traveling in a “V” formation. He decided to pull behind the motorcycles and conduct a random check of the license plates for valid motorcycle endorsements. Officer Flowers learned that Moore’s motorcycle did not have a valid motorcycle endorsement. Officer Flowers activated the lights and sirens on his police cruiser to signal Moore to pull over. According to Officer Flowers, Moore gestured to his companions and looked back at the police cruiser several times before rapidly accelerating away, causing a high-speed chase to ensue.

{¶ 9} Officer Flowers testified that Moore continuously weaved in and out of traffic, swerving from the far left lane to the berm on the right-hand side of Interstate 90, while accelerating to over 80 miles per hour. Officer Flowers testified that when Moore was blocked by vehicles in each lane, he decelerated to approximately 60 miles per hour in order to cut in between the lanes of traffic, at one point nearly colliding with the rear end of a semi-truck, while almost losing control of his motorcycle. Officer Flowers testified that Moore passed between vehicles utilizing the lane markers on the highway, straddling the lanes of traffic with his motorcycle. After this, Moore cut in front of an automobile in the far right lane, causing that vehicle to swerve off the road and into the berm. According to Officer Flowers, Moore then cut back from the far right lane in front of another vehicle, causing that vehicle to nearly collide with a semi-truck. Officer Flowers testified that at the Columbia Road overpass the road opened up and Moore accelerated at a rate of speed between 110-120 miles per hour.

{¶ 10} Eventually, Officer Flowers was able to pull alongside Moore. Officer Flowers testified that Moore looked at him several times while he was ordering him to pull over; however, Moore did not comply.

Testimony of Officer Mauer

{¶ 11} Officer Mauer testified that he heard the pursuit on his radio as he neared the entrance to Interstate 90 westbound at Crocker Road. He

positioned his police cruiser approximately two-thirds of the way down the ramp, with a clear view of approaching traffic, in order to assist with the pursuit. Officer Mauer testified that he activated his lights and sirens when he heard Officer Flowers broadcast that Moore was approaching Crocker Road. He then proceeded down the Crocker Road entrance to Interstate 90, ahead of Moore and Officer Flowers, at approximately 50-60 miles per hour. After entering Interstate 90 westbound, Officer Mauer was able to “box” Moore in, at which point Moore immediately yielded to Officer Mauer’s lights and sirens and pulled over.

Apprehension and Arrest

{¶ 12} The pursuit ended nearly seven miles after Officer Flowers initially signaled for Moore to pull over. Moore was arrested, Mirandized, and placed in the back of the police cruiser of Officer Flowers. Officer Flowers testified that when questioned, Moore admitted that he fled because he realized that he did not have a motorcycle endorsement and he was scared.

{¶ 13} Moore’s first assignment of error states:

“The trial court erred in denying appellant’s motion for acquittal pursuant to criminal rule 29 where there is insufficient evidence.”

{¶ 14} When an appellate court reviews a claim of insufficient evidence “the relevant inquiry is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the

essential elements of the crime proven beyond a reasonable doubt.” *State v. Leonard*, 104 Ohio St.3d 54, 67, 2004-Ohio-6235, 818 N.E.2d 229, at ¶31, quoting *State v. Jenks* (1991), 60 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. “Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proven beyond a reasonable doubt.” *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 212, at syllabus.

{¶ 15} The evidence presented at trial was sufficient to sustain Moore’s conviction for failure to comply with the order or signal of a police officer.

Competency of Officer Flowers under Evid.R. 601

{¶ 16} Moore asserts that the evidence was insufficient to convict him of this offense with the “furthermore” specification because Officer Flowers was not wearing a distinctive uniform or driving a distinctive vehicle. Moore argues that Officer Flowers is an incompetent witness under Evid.R. 601. We disagree.

{¶ 17} Evid.R. 601 provides that every person is competent to be a witness except, in pertinent part:

“(C) An officer, while on duty for the exclusive or main purpose of enforcing traffic laws, arresting or assisting in the arrest of a person charged with a traffic violation punishable as a misdemeanor where the officer at the time of the arrest was not using a properly marked motor vehicle as defined by statute or was not wearing a legally distinctive uniform as defined by statute.”

{¶ 18} The Supreme Court discussed the rationale for this rule in *State v. Heins* (1995), 72 Ohio St.3d 504, 651 N.E.2d 933, stating that “[i]t requires little imagination to contemplate the unfortunate consequences should a frightened motorist believe that he [or she] was being forced off the road by a stranger. The General Assembly sought to avoid such mischief by requiring police officers on traffic duty to be identified clearly.” *Id.* at 506. The defendant bears the burden of proving the circumstance resulting in the officer’s incompetency, e.g., that the officer was wearing a nondistinct uniform. *State v. Rau* (1989), 65 Ohio App.3d 478, 480, 584 N.E.2d 788.

{¶ 19} Outside of the assertions in his brief, the record bears no evidence that Officer Flowers was not in a distinctive uniform or driving a distinctive vehicle. Here, as in *Rau*, “the absence of any evidence concerning the uniform or motor vehicle used by the arresting officer [leaves] no facts before the court upon which a finding of incompetency could be based.” *Id.* at 481. Moore “was obliged to present evidence, either by cross-examination of the [officer] or by testimony of other witnesses, that the conditions which disqualify an arresting officer, i.e., an unmarked motor vehicle or a non-distinctive uniform, existed at the time of arrest.” *Id.* at 480-481, quoting *Milnark v. Eastlake* (1968), 14 Ohio Misc. 185, 186-87, 237 N.E.2d 921.

{¶ 20} Moore has offered no proof of incompetency. Therefore, the trial court did not err in overruling appellant’s motion for acquittal. *Id.* See *Westlake v. Krebs* (Dec. 19, 2002), Cuyahoga App. No. 81382, 2002-Ohio-7073; see, also, *Brooklyn v. Blake* (Feb. 7, 2002), Cuyahoga App. No. 79032, 2002-Ohio-499.

Failure to Comply with the Order or Signal of Police Officer

{¶ 21} Moore also challenges the sufficiency of the evidence convicting him of the “furthermore” specification of R.C. 2921.331(B).

{¶ 22} R.C. 2921.331(B) states: “No person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or

audible signal from a police officer to bring the person's motor vehicle to a stop." The "furthermore" specification in this charge states that "[t]he operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property."

{¶ 23} When reviewing the evidence in a light most favorable to the State as the law requires, we conclude that there was sufficient evidence to convict Moore of the "furthermore" specification contained in R.C. 2921.331(B). Officer Flowers testified at length and in great detail concerning Moore's operation of the motorcycle on the night in question, including how he nearly caused several serious traffic accidents while leading the police on a seven-mile chase at speeds of up to 120 miles per hour. It is reasonable to conclude that Moore caused substantial risk of serious physical harm to persons or property based upon this testimony. Moore's first assignment of error is overruled.

{¶ 24} Moore's second assignment of error states:

"Appellant was denied a fair trial due to prosecutorial misconduct."

{¶ 25} Moore alleges that the prosecutor made improper remarks to the jury during the State's closing argument that prejudicially affected his substantial rights. The test for prosecutorial misconduct during opening statements and closing arguments is whether the remarks made by the

prosecutor were improper and, if so, whether they prejudicially affected a substantial right of the accused. *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, 793 N.E.2d 446, ¶44, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883. We review a prosecutor’s closing argument in its entirety to determine whether the allegedly improper remarks were prejudicial. *State v. Treesh* (2001), 90 Ohio St.3d 460, 466. “The touchstone of the analysis ‘is the fairness of the trial, not the culpability of the prosecutor.” *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, ¶92, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78.

{¶ 26} Moore’s counsel never objected to these statements at trial. He therefore waives all but plain error on appeal. Crim.R. 52(B); *State v. Bey* (1999), 85 Ohio St. 3d 487, 794 N.E.2d 484; *State v. Slagle* (1992), 65 Ohio St.3d 597, 604, 605 N.E.2d 916. “We may invoke the plain error rule only if we find that (1) the prosecutor’s comments denied appellant a fair trial, (2) the circumstances in the instant case are exceptional, and (3) reversal of the judgment below is necessary to prevent a miscarriage of justice.” *State v. McGee*, Washington App. No. 05CA60, 2007-Ohio-426, ¶15, citing *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus.

The State’s Remarks

{¶ 27} The State’s remarks in its closing argument referenced Moore’s prior convictions, specifically his conviction for having a weapon while under disability. Evid.R. 609 governs the admission of prior convictions to impeach the accused. Subject to the threshold test of relevancy under Evid.R. 403, Evid.R. 609 states that evidence of prior convictions is “admissible if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the accused was convicted and if the court determines that the probative value of the evidence outweighs the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.” Evid.R. 609(B) states that such evidence is inadmissible if a period of more than ten years has elapsed, “unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.” The crimes at issue here — a felony domestic violence conviction from August 2004, and convictions for drug possession and having a weapon under disability from July 2004 — clearly are within the ten-year time frame of Evid.R. 609.

{¶ 28} The State inferred in its closing argument that the prior convictions were important because they showed Moore’s propensity for dishonesty and also showed Moore’s indifference to the laws of Ohio. According to Moore, the State’s argument constituted prosecutorial misconduct and deprived him of a fair trial. See *State v. Fears* (1999), 86

Ohio St.3d 329, 332, 715 N.E.2d 136; *State v. Apanovich* (1987), 33 Ohio St.3d 19, 24, 514 N.E.2d 394. This aspect of Moore’s argument hinges on the assumption that the prior convictions were improperly admitted under Evid.R. 403,² 404(B),³ and 609. Outside of this assumption, Moore makes no argument that the convictions were improperly admitted, and there is no evidence of their improper admission in the record.

{¶ 29} At trial, Moore’s counsel objected to the admission of Moore’s prior convictions based upon their timeliness, not their relevance. (Tr. 418.) After the State certified that both prior convictions were within the ten-year window of Evid.R. 609, the trial court admitted certified copies of the journal entries of the convictions into evidence. (Tr. 418-419.) Evidence of the prior convictions was thus properly admitted.

{¶ 30} Moore further argues that the State committed prosecutorial misconduct by twice informing the jury that other motorists are put at risk of

²Evid.R. 403(A) states that even if evidence is relevant, it is “not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.” Further, Evid.R. 403(B) states that even if evidence is relevant, it “may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.”

³Evid.R. 404(B) prohibits the admissibility of other crimes, wrongs, or acts to “prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

harm when someone drives without a motorcycle endorsement. We disagree with this argument.

{¶ 31} First, we note that there is no evidence in the record suggesting that Moore's prior convictions were improperly admitted under Evid.R. 403, 404(B) or 609. Second, we have reviewed the State's closing argument in its entirety and we do not believe that the prosecutor's comments, taken together, deprived Moore of a fair trial. A prosecutor may comment in closing argument on what the evidence has shown and what reasonable inferences he believes may be drawn from it. *State v. Lott* (1990), 51 Ohio St.3d 160, 165, 555 N.E.2d 293. Here, the prosecutor's argument focused on the evidence properly admitted at trial and suggested reasonable inferences for the jury to draw from that evidence. Such suggestions do not require reversal on the basis of prosecutorial misconduct. Moore's second assignment of error is overruled.

{¶ 32} Moore's third assignment of error states:

“The indictment failed to charge that appellant willfully caused a substantial risk of serious physical harm to ppersons [sic] or property.”

{¶ 33} Within this assignment of error, Moore argues that the State was required to demonstrate beyond a reasonable doubt that Moore “willfully” or “purposely” caused a substantial risk of harm to persons or property as an element of the offense of failure to comply with the order or signal of a police

officer. Although these terms were mentioned in the “furthermore” specification of R.C. 2921.331(B), Moore argues that since the specification raises the degree of offense from a misdemeanor to a felony, the “furthermore” specification constitutes more than a mere penalty enhancement, and should be considered an element of the underlying offense.

On this basis, Moore further argues that neither the indictment nor the jury instructions included these terms as an element of the offense that must be proven by the State, thus constituting structural and reversible error under *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-3749, 893 N.E.2d 169. We disagree.

{¶ 34} In holding inter alia that the “furthermore” specification of R.C. 2921.331 is not a lesser included offense of failure to comply with the order or signal of a police officer, the Supreme Court rejected an identical argument in *State v. Fairbanks*, 117 Ohio St.3d 543, 2008-Ohio-1470, 885 N.E.2d 888, when it held that a penalty enhancement under R.C. 2921.331(C)(5)(a)(ii) — the same penalty enhancement at issue here — is not an element that has a culpable mental state for commission of failure to comply with the order or signal of police officer under R.C. 2921.331(B). *Id.* at 546.

{¶ 35} In so holding, the *Fairbanks* court specifically rejected Moore’s current argument, reasoning as follows:

“The section of the Revised Code at issue in this case, R.C.

2921.331, specifies the degree of culpability as willful: ‘No person shall operate a motor vehicle so as *willfully* to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person’s motor vehicle to a stop. [Emphasis in original]’ R.C. 2921.331(B). Because the General Assembly specified the culpable mental state of willfulness in R.C. 2921.331(B), but excluded mention of any mental state in the accompanying enhancement provision, R.C. 2921.331(C)(5)(a)(ii), this omission ‘plainly indicates a purpose to impose strict criminal liability’ with respect to that provision. R.C. 2901.21(B). We have noted that ‘different elements of the same offense can require different mental states.’ Thus, we conclude that even an analysis under R.C. 2901.21(B) supports the conclusion that a culpable mental state is excluded from R.C. 2921.331(C)(5)(a)(ii).” Id. at 547 (Internal citations omitted.)

{¶ 36} Moore presents no evidence in the record that distinguishes the present case from *Fairbanks*. His third assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant’s conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

LARRY A. JONES, J., and
COLLEEN CONWAY COONEY, J., CONCUR