STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee	UNPUBLISHED November 18, 2003
v	No. 240734 Ogemaw Circuit Court
DARRELL BRYAN DADY, Defendant-Appellant	LC No. 01-001813-FH

Before: Gage, P.J., and White and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant Darrell Dady was convicted of unlawfully driving away an automobile (UDAA), MCL 750.413; and driving with a suspended license, MCL 257.904(1). The trial court sentenced defendant as a third habitual offender, MCL 769.11, to concurrent terms of 30 to 120 months' imprisonment for each conviction. He appeals as of right. We affirm defendant's convictions, but vacate defendant's sentence for driving with a suspended license and remand for resentencing on that offense.

This appeal arises out of a vehicle theft that occurred during the early morning hours of August 17, 2001. Nathan Trout testified that he observed his parents' van pull out of their driveway. He informed his parents that the van was gone and the police were called. Defendant was subsequently arrested at a West Branch gas station. The attendant at the station testified that she saw defendant get out of the van. The van at the gas station matched the description of the Trout van and had the same license plate number.

I. Prosecutorial Misconduct

Defendant argues on appeal that he was denied a fair trial because the prosecutor improperly introduced testimony that defendant had stolen another vehicle, unrelated to the charged offenses. We disagree. Prosecutorial misconduct claims are reviewed case by case, examining any remarks in context, to determine if the defendant received a fair and impartial

trial.[1] "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction."[2]

Evidence was presented at trial that defendant abandoned a vehicle that became stuck in a driveway, and then stole a van from a neighboring house. Defendant was only charged with the theft of the van. Sergeant Cappell testified that he was initially called to the scene of the abandoned vehicle, but then left that scene because "[w]e were advised that another a [sic] vehicle had been stolen not too far away from that, from where we were." Later, during direct examination, the prosecutor asked Sergeant Cappell if the investigation of the "accident" where the vehicle became stuck progressed into an investigation of "a stolen vehicle." Sergeant Cappell responded in the affirmative. Defendant immediately objected to the prosecutor's question and the objection was sustained. Defendant later moved for mistrial based on these two occurrences. The trial court denied the motion, but offered to give a cautionary instruction to the jury, which defendant refused.

The prosecutor's question plainly referred to the van taken from the second residence, not the vehicle that was stuck in the driveway. As such the question was proper. Moreover, Sergeant Cappell's reference to "another" stolen vehicle did not involve a deliberate injection by the prosecutor of other crimes committed by defendant, but was an explanation of the officer's conduct during his investigation. To the extent there was any suggestion that the abandoned vehicle was stolen, the trial court's offer to give a curative instruction in this regard was declined. In this context, the brief reference to another stolen vehicle did not deny defendant a fair trial. Further, to the extent defendant is arguing that it was improper to put forth any evidence regarding the abandoned vehicle, we disagree. This evidence was necessary to explain defendant's presence and motive for taking the van; i.e., that he needed a vehicle because the vehicle he was driving was stuck. The evidence was therefore relevant to establish the offense with which defendant was charged, the theft of the van. The trial court did not abuse its discretion in denying defendant's request for a mistrial.

II. Evidence

Defendant next argues that he was denied a fair trial because the trial court allowed two nonexpert police witnesses to testify regarding shoeprint evidence. We review a trial court's decision to admit evidence for an abuse of discretion.[3]

MRE 702 allows a court to recognize certain witnesses as experts who may testify in the form of opinion or otherwise "[i]f the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." But MRE 701 also allows lay witnesses to give testimony "in the form of opinions or inferences[,]" when such testimony is "limited to those opinions or

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[1] *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

[2] *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

[3] *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Under this rule, "lay witnesses are qualified to testify about the opinions they form as a result of direct physical observation."[4]

Here, Sergeant Cappell testified regarding shoe impressions found in the driveway near the abandoned vehicle. Similarly, Trooper Short testified regarding shoe impressions found on both the driveway of the residence where the van was stolen and on a trail behind a second residence that led to the location of the abandoned vehicle. Notably, neither officer stated definitively that defendant's shoes made the footwear impressions but only that, in each officer's opinion, the pattern on the bottom of defendant's shoes was "similar" or "consistent with" the pattern observed in the footwear impressions at each location. Sergeant Cappell testified that both the imprint and defendant's shoe bore an "F" impression in the middle of the sole. Trooper Short noted that the impressions he saw were similar to defendant's shoes, having the same round ball type marks on the heel and a diamond shape within the heel. The testimony of each officer was limited to opinions rationally based on their observations, and were helpful to determine facts at issue. The trial court did not abuse its discretion in admitting the opinion testimony of these two officers.

III. Sentencing

Defendant ultimately argues that his sentence for driving with a suspended license, second offense, is invalid because it exceeds the statutory maximum. We agree.

Driving with a suspended license is a misdemeanor, and is punishable upon a second conviction by up to one year in prison, or a fine of not more than $1,000, or both.[5] The judgment of sentence reflects that defendant was sentenced to a term of 30 to 120 months' imprisonment for this offense. Because his sentence exceeds the statutory maximum, it is invalid.[6] We therefore vacate defendant's sentence for driving with a suspended license and remand for resentencing on that offense. Because the sentencing error does not affect defendant's sentence for UDAA, that sentence is affirmed.[7]

[4] *People v Hanna*, 223 Mich App 466, 475; 567 NW2d 12 (1997).

[5] MCL 257.904(3)(b).

[6] *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997).

[7] MCL 769.24; *People v Williams (After Second Remand)*, 208 Mich App 60, 64; 526 NW2d 614 (1994).

Affirmed in part, vacated in part, and remanded for resentencing on the driving with a suspended license conviction. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Helene N. White
/s/ Jessica R. Cooper