

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES EDWARD SPANGLER,

Defendant-Appellant.

UNPUBLISHED

June 28, 2011

No. 297107

Marquette Circuit Court

LC No. 09-047292-FH

Before: RONAYNE KRAUSE, P.J., and SERVITTO and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant Charles Spangler of operating while intoxicated (OWI), third offense, MCL 257.625(1) and (9)(c), and driving with a suspended or revoked license, MCL 257.904(1). For the OWI conviction, the trial court imposed a three-year term of probation that included 360 days in jail, which term the court suspended pending defendant's completion of an extended residential treatment program. The court sentenced defendant to 93 days in jail for driving with a suspended or revoked license. We affirm.

Defendant initially challenges the sufficiency of the evidence supporting both his convictions on the ground that the prosecutor failed to show that defendant "had been operating the [all-terrain vehicle] ATV in which the police found . . . [him] sleeping." We review de novo a challenge to the sufficiency of the evidence. *People v Solmonson*, 261 Mich App 657, 661; 683 NW2d 761 (2004).

When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial. Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. [*People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).]

Our review of the record reveals that ample evidence supported the jury's rational determination beyond a reasonable doubt that defendant had driven the ATV while intoxicated to its place of rest when the police and paramedics discovered him attached to the ATV. The testimony of two paramedics and a police officer agreed that when they arrived at the scene of a reported ATV accident, they discovered defendant lying in the road, in the wrong lane of travel, next to a parked ATV; defendant's right pant leg had caught on the right foot peg of the ATV, while his left leg lay underneath him or the ATV. The two paramedics and the police officer also consistently described that defendant emanated an aroma of alcohol and appeared intoxicated, as evidenced by his inability to rise and walk without assistance, redness in his eyes, and slurred and belligerent speech. The paramedics and the police officer ascertained that defendant was uninjured, and none of the responding personnel noticed in or along the dirt road any indicia that the ATV had abruptly stopped. The police officer detected no footprints or other signs left by defendant around the ATV, in the path the ATV had taken from "a two-track road up onto the main road," or in the surrounding area. Although none of the responding personnel found in the vicinity of the ATV alcohol or alcohol containers, one paramedic recalled that defendant had admitted "to alcohol use." The police officer recounted that he asked defendant whether he had driven the ATV and at some point defendant declared, "FU, I can walk. I can drive, how do you think I got this far, crawl[,]" and that after defendant's arrest and placement in the back of the police car he announced, "[H]e wasn't doing anything wrong, he was just driving home."

Defendant testified that he had driven the ATV to purchase a fifth of vodka,¹ but denied having drunk the alcohol before or while driving the ATV, which had just stopped working. Defendant maintained that he became upset after the ATV stopped and he could not move it, and he subsequently started consuming the vodka he had just purchased and walking around the vicinity of the stopped ATV:

I got off and . . . I tried to shift the gears and it just . . . wouldn't go forward, it wouldn't go backwards. And when I was looking at it, the cover on the . . . storage compartment had . . . come off.

* * *

I walked back in the direction I came, as far as I could—I can't walk real far, I had boots on. And . . . in that kind of terrain I just can't walk very far.

* * *

. . . I was upset. I took a bottle out of the back of the machine and I started walking back, started drinking. . . .

¹ Defendant recalled that he had taken from his parents' house two plastic pop bottles, one of which contained water and one of which was empty, and that after buying vodka that day he poured it into the empty pop bottle and discarded its original packaging.

The absence of footprints in the area undercut defendant's insistence at trial that he did not imbibe alcohol before driving the ATV, a position that the jury apparently rejected. *Nowack*, 462 Mich at 400. The facts that defendant remained attached to the ATV in the wrong lane of traffic, having simply come to a stop, together with the substantial evidence of defendant's intoxication, justified the rational jury's finding beyond a reasonable doubt that defendant had operated the ATV while intoxicated before the paramedics and police arrived on the scene. To the extent that defendant cites *People v Wood*, 450 Mich 399, 404-405; 538 NW2d 351 (1995), and *People v Burton*, 252 Mich App 130; 651 NW2d 143 (2002), for the proposition that the instant circumstances do not sufficiently show that he operated the ATV, as explained in *Solmonson*, 261 Mich App at 662, *Wood* and *Burton* are distinguishable:

In *Wood*, our Supreme Court limited *People v Pomeroy (On Rehearing)*, 419 Mich 441, 444; 355 NW2d 98 (1984), which held, "a person sleeping in a motionless car cannot be held to be presently operating a vehicle while sleeping." In *Burton* the prosecutor charged that defendant was attempting to drive while intoxicated at the time the police found him unconscious in his lawfully parked vehicle with its engine running. This Court held that the prosecution failed to prove its theory that the unconscious defendant specifically intended to operate the vehicle while intoxicated at some point in the future but the police intervened before he could do so. *Id.* at 143-144. *But here, the prosecutor did not claim that the evidence established defendant was operating the vehicle at the point the police found him unconscious or that the police found defendant attempting to operate a vehicle while intoxicated. Here, the prosecutor argued that the evidence at trial presented a compelling circumstantial case that defendant had driven while intoxicated to the location where the police found him. [Emphasis added.]*

Defendant additionally submits that prosecutorial misconduct deprived him of a fair trial, specifically the prosecutor's elicitation of "the improper implication that defendant acted improperly by executing his constitutional right to plead 'not guilty.'" Defendant objected at trial to the prosecutorial inquiries on the basis that they embodied "a procedural factor about how we plead to get to a day of trial," but defendant did not raise a timely constitutional objection.² "Because the challenged prosecutorial . . . [questions] in this case were not preserved by contemporaneous objections and requests for curative instructions, appellate review is for outcome-determinative, plain error." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* (internal quotation omitted).

² After defendant's testimony concluded, defense counsel moved for a mistrial on the basis of prosecutorial misconduct in asking defendant "about his constitutional rights right in front of the jury." The trial court concurred that the prosecutor had acted improperly, but denied the motion because it had sustained the earlier defense objection and instructed the jury not to consider references to the not guilty plea.

This Court generally reviews claims of prosecutorial misconduct according to the following standards:

Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), criticized on other grounds in *Crawford v Washington*, 541 US 36, 64; 124 S Ct 1354; 158 L Ed 2d 177 (2004).]

“[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial.” *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

Defendant complains of the following colloquy during the prosecutor's cross-examination of him:

Prosecutor: Now, you pled not guilty to the charges here today, did you not?

Defendant: Yes.

Prosecutor: And you pled not guilty to driving on a revoked license, did you not?

Defendant: Yes.

Prosecutor: And you drove that day did you not?

Defendant: Yes.

Prosecutor: And you had a revoked license, did you not?

Defendant: Yes.

Prosecutor: So when you pled not guilty to that charge, you lied, didn't you?

Defense counsel: Objection, your Honor. It's a procedural factor about how we plead to get to a day of trial.

The Court: I'll sustain the objection. The jury is to draw no inference from the entry of a plea on the case.

Prosecutor: I guess, your Honor, he denied the charge, but today . . . he's admitting it on the stand.

* * *

So I'm saying it's a falsehood to deny the charge and then later to take the witness stand and say, well, yes, I did it.

The Court: Well I'll ask the jury, disregard the last question and answer of the witness. You're to draw no inference from the plea entered by defendant in response to the charges as filed.

Federal and Michigan courts recognize that a defendant in a criminal case possesses a "constitutional right to plead not guilty." *Brookhart v Janis*, 384 US 1, 7; 86 S Ct 1245; 16 L Ed 2d 314 (1966); *People v Harmelin*, 176 Mich App 524, 535; 440 NW2d 75 (1989), aff'd sub nom *Harmelin v Michigan*, 501 US 957; 111 S Ct 2680; 115 L Ed 2d 836 (1991).

A plea of "not guilty" has at least two dimensions recognizable by this court. First, in pleading "not guilty" a defendant reserves in toto those constitutional rights fundamental to a fair trial. Included in this category of constitutional rights is the accused's right to a trial by jury, his privilege against self-incrimination, and his right to confront his accusers. Second, in pleading "not guilty," a defendant exercises his right to make a statement in open court that he intends to hold the government to strict proof beyond a reasonable doubt as to the offense charged. [*Wiley v Sowders*, 647 F2d 642, 650 (CA 6, 1981) (internal quotation and citation omitted).]

See also *People v Fisher*, 119 Mich App 445, 447; 326 NW2d 537 (1982), quoting *Wiley*, 647 F2d at 650.

The plea on arraignment has its proper function. It is necessary to inform the court how to proceed with the trial. Hence the court has unquestioned power to compel the defendant to plead. *But the plea is not evidence. Nor is it testimonial. It is not under oath. Nor is it subject to cross-examination. When it is "not guilty," it has no effect as testimony or as evidence in behalf of the accused. . . .* The function of that plea is to put the Government to its proof and to preserve the right to defend. It does not go to prove that the defendant is innocent. Likewise the plea of guilty is not evidence for the Government. Mere fair play would seem to dictate this. What is more to the point, the plea is not demanded or made with intention that it be testimonial or evidentiary. It is rather a formal criminal pleading, a waiver of trial and defense, a submission without contest. It does not create, it dispenses with evidence. . . .

. . . If the plea were testimonial or evidentiary, the court would have no power to demand it. . . .

As we have said, the court has the right to do this. But if, having used its power to extract the plea for its proper purpose, it can go further and over the defendant's objection convert or pervert it into evidence, in substance if not in form it compels the defendant to testify in his own case. That it has no power to do. The objection is not to elicitation of the plea. It is to abuse of its function by treating it as evidence of guilt. . . . [*Wood v United States*, 128 F2d 265, 273-274 (DC Cir, 1942) (emphasis added).]

The prosecutor's characterization of defendant's not guilty plea as embodying a substantive declaration of innocence, inconsistent with defendant's subsequent testimony at trial, plainly mischaracterized the significance of defendant's plea. See *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002) (observing that a prosecutor's "clear misstatement of the law . . . may deprive a defendant of a fair trial"). Thus, the prosecutor's cross-examination of defendant concerning his not guilty plea qualified as improper. "However, if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can potentially be cured." *Id.*; see also *Unger*, 278 Mich App at 235 ("Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, and jurors are presumed to follow their instructions."). Immediately after the prosecutor's inappropriate inquiry, the trial court sustained a defense objection, advised the jury to "disregard the last question and answer of the witness," and twice instructed the jury to the effect that it should "draw no inference from the plea entered by defendant in response to the charges as filed."³ Furthermore, taking into account the plain error standard of review of defendant's constitutional claim of error, although we detect a plain error, we cannot conclude that it adversely impacted defendant's substantial rights. As we have summarized, substantial, properly admitted evidence proved defendant's guilt of the charges. The prosecutor's improper suggestion that defendant lied by pleading not guilty then testifying in a fashion incriminating himself might have warranted reversal had this case turned entirely on the jury's assessment of defendant's credibility during his testimony. But defendant also introduced at trial (1) testimony by a recreational vehicle mechanic confirming defendant's account that the ATV's brakes had locked and required replacement, and (2) testimony by defendant's father, who confirmed several details in defendant's account of the events on the day of his arrest, including that (a) defendant had taken the ATV on that day, (b) the father later that day received information that defendant was "really drunk" and may have had an accident, (c) when the father arrived to retrieve his ATV "it wouldn't move," and he later took it in for repair, and (d) while loading the ATV into a pickup on the day of defendant's arrest, the father spotted nearby two plastic pop bottles, one of which appeared to contain water, although the father suspected the bottles likely contained "booze."

³ Following the close of proofs, the court instructed the jury not to consider as evidence "the fact that . . . defendant is charged with a crime and is on trial," the attorneys' statements, questions and arguments, and excluded or stricken matters. The court then added, "To repeat once and [sic] final time, you must decide the case based only on the evidence admitted during the trial of this case."

In summary, we conclude that in light of the trial court's curative instructions and the properly admitted evidence of defendant's guilt, the prosecutor's inappropriate questioning did not affect "the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Affirmed.

/s/ Amy Ronayne Krause
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher