

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS WAYNE PETHERS,

Defendant-Appellant.

UNPUBLISHED

June 22, 2010

No. 290392

Kent Circuit Court

LC No. 08-007045-FH

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Defendant Marcus Pethers appeals as of right his bench trial conviction of second-degree fleeing and eluding.¹ The trial court sentenced Marcus Pethers as an habitual offender, fourth offense,² to four years' and six months to 25 years' imprisonment. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

During the afternoon hours on June 23, 2008, as Officer Mark Terpstra of the Kentwood Police Department (KPD) drove his patrol route near 28th Street and the East Beltline, he noticed a white 1993 Mercury Villager minivan that had a cracked front windshield. Officer Terpstra and the minivan both stopped at a traffic light. When the light turned green, Officer Terpstra then maneuvered his police cruiser into position behind the minivan and activated his overhead lights. The minivan pulled into a parking lot, but then sped away, headed westbound on 28th Street, passed multiple vehicles, and then turned north onto Broadmoor Avenue. While Officer Terpstra pursued the minivan, he used his police radio to notify other officers in the area that he was in pursuit of the white minivan.

On Broadmoor, the minivan sped through a construction zone and passed vehicles that were slowed by the roadwork. Officer Terpstra continued onto Broadmoor, but he quickly terminated the pursuit to prevent danger to the construction workers. Officer Terpstra deactivated his overhead lights and followed the minivan at a slower rate of speed. He then

¹ MCL 257.602a(4)(c).

² MCL 769.12.

watched as the vehicle hit a curb and turned onto a side street. The vehicle began smoking and spilled fluids onto the roadway after it hit the curb. Officer Terpstra's in-car video camera recorded the incident and the recording was introduced at trial.

At about 1:30 p.m. that day, Nestora Guzman was sitting on her front porch when she saw a white minivan stop on the road in front of her house, located on Rowland Street in Kentwood. Guzman watched as the male driver of the minivan quickly got out of the vehicle and ran away. Five minutes later, Guzman saw two male passengers get out of the vehicle and slowly walk down the road in a different direction. Guzman did not see the men's faces, but she described them as "white Americans."

A few moments later, Officer Greg Isenhoff of the KPD arrived and "cleared" the vehicle. Officer Isenhoff testified that, when he located the vehicle, it was running and there were no occupants inside. Officer Isenhoff searched the vehicle and found drug paraphernalia that he explained was commonly associated with the use of crack cocaine. After Officer Isenhoff searched the vehicle and spoke with Guzman, he radioed other officers and provided a description of the possible suspects. Officer Isenhoff then waited for a tow truck to arrive and impound the vehicle.

Officer Paul Johnson of the Grand Rapids Police Department (GRPD) was dispatched to Rowland Street to assist Officer Isenhoff. A few minutes later, Officer Johnson received a police dispatch, and he drove to Camelot Road to look for two of the potential suspects. On Camelot Road, Officer Johnson stopped and questioned Timothy Pethers and John Luscombe as they walked near a strip-mall. Officer Johnson arrested the two men and turned them over to Officer Terpstra and KPD Officer Ryan VanderVeen.

Based on their questioning of Timothy Pethers and John Luscombe, the officers concluded that the two men were the passengers in the minivan. Immediately thereafter, Officers Terpstra, VanderVeen, and Johnson drove to a nearby parking lot where GRPD Captain VanderKooi had apprehended Marcus Pethers. Officer Johnson testified that Marcus Pethers was wet and acted evasive about his name. When Officers Terpstra and VanderVeen arrived, they brought Timothy Pethers and Luscombe to a GRPD police cruiser where Marcus Pethers was sitting, and they identified him as the driver of the minivan.

After the identification, police arrested Marcus Pethers for fleeing and eluding and for operating a vehicle with a suspended license.³ Officer Terpstra then escorted Marcus Pethers from the GRPD cruiser to a KPD cruiser. Officer Terpstra testified as follows regarding a statement Marcus Pethers made while he was walking to the KPD cruiser:

As I was walking [Marcus Pethers] over to my patrol vehicle, he passed where his what he called "cousin," Timothy Pethers was in handcuffs. He stated, "He didn't have shit to do with it. I was driving." He then stated, "I was the driver," and "take the handcuffs off Timothy."

³ MCL 257.904(3)(a).

Officer VanderVeen was standing close by when Marcus Pethers confessed to driving the minivan, and he testified that Marcus Pethers stated, “[I]et my cousin go. They didn’t have anything to do with it. I was driving. Take the handcuffs off him.” Officer VanderVeen explained, “[Marcus Pethers] was actually pretty upset when he was saying that[, and was] kind of making a scene.”

As set forth above, the trial court convicted Marcus Pethers of second-degree fleeing and eluding a police officer. [Sometime during the proceedings, the prosecutor dropped the charge of operating a vehicle with a suspended license.] Marcus Pethers now appeals.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Marcus Pethers argues that he was denied the effective assistance of counsel when his defense counsel failed to object to the introduction of drug evidence that police found inside his vehicle after he attempted to elude police. However, Marcus Pethers failed to preserve this issue for review because he did not first move for a *Ginther*⁴ hearing or a new trial on the same basis.⁵ Therefore, our review is limited to mistakes apparent on the record.⁶ Whether a defendant was denied his right to effective assistance of counsel generally presents a mixed question of fact and constitutional law.⁷ We review a trial court’s findings of fact, if any, for clear error, and we review de novo issues of constitutional law.⁸

B. LEGAL STANDARDS

In order to demonstrate that he was denied the effective assistance of counsel under either the federal or state constitutions, a defendant must first show that trial counsel’s performance was “deficient,” and second, a defendant must show that the “deficient performance prejudiced the defense.”⁹ “To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.”¹⁰

⁴ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

⁵ *People v Hurst*, 205 Mich App 634, 641-642; 517 NW2d 858 (1994).

⁶ *Id.*

⁷ *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

⁸ *Id.*

⁹ *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

¹⁰ *Id.*

C. APPLYING THE STANDARDS

Here, evidence that an officer found drug paraphernalia inside Marcus Pethers' vehicle was relevant and admissible to show his motive to flee and elude police.¹¹ In addition, because the evidence was highly relevant to Marcus Pethers' guilt or innocence in this case, the evidence was not inadmissible under MRE 403 because of unfair prejudice.¹² Therefore, because the evidence was properly admitted at trial, defense counsel did not act deficiently in failing to raise an objection.¹³

III. RIGHT TO PRESENT A DEFENSE

A. STANDARD OF REVIEW

Marcus Pethers argues that he was denied his constitutional right to present a defense. At trial, defense counsel argued that the police officer who attempted to make the traffic stop of Marcus Pethers' vehicle did so on an improper pretext. During closing argument, the prosecutor stated that the "pretext" theory was not a recognized defense in Michigan, and the trial court indicated that it was unsure whether the theory was proper in Michigan. Marcus Pethers, therefore, claims that he was denied his right to present a defense. However, Marcus Pethers failed to preserve this issue for review because he did not raise a contemporaneous objection on the same basis in the trial court.¹⁴ We review de novo the question whether a defendant was denied his constitutional right to present a defense.¹⁵ We review unpreserved constitutional errors, however, for plain error affecting defendant's substantial rights.¹⁶

B. LEGAL STANDARDS

A defendant is entitled to have his counsel present all "substantial defenses."¹⁷ "A substantial defense is one that might have made a difference in the outcome of trial."¹⁸

¹¹ See *People v Sabin*, 463 Mich 43, 68; 614 NW2d 888 (2000) (stating that evidence of motive can be relevant to prove a defendant committed an act); *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996) ("Evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime.") (quotation and citation omitted).

¹² See *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995) (stating that evidence is not unfairly prejudicial simply because it is damaging to a defendant's case).

¹³ See *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004) ("Counsel is not ineffective for failing to make a futile objection.").

¹⁴ *People v Grant*, 445 Mich 535, 545-546, 553; 520 NW2d 123 (1994).

¹⁵ *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

¹⁶ *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

¹⁷ *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

¹⁸ *Id.*

C. APPLYING THE STANDARDS

Here, we conclude that Marcus Pethers was not deprived of a substantial defense. The evidence showed that the police officer was acting in his lawful duty when he effectuated the traffic stop of Marcus Pethers' vehicle. The officer observed that Marcus Pethers' vehicle had a cracked windshield. Thus, the officer had a proper basis on which to stop the vehicle.¹⁹ There was no evidence to support Marcus Pethers' theory that the officer made an illegal traffic stop based on an improper pretext. Thus, it is irrelevant whether such a defense was permissible.

IV. PROSECUTORIAL MISCONDUCT

A. STANDARD OF REVIEW

Marcus Pethers argues that the prosecutor committed three separate acts of misconduct in this case. However, Marcus Pethers did not preserve any of his claims for appellate review because he did not raise objections in the trial court.²⁰ We review unpreserved challenges to alleged instances of prosecutorial misconduct for outcome-determinative plain error.²¹ "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."²² Generally, the test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial.²³

B. MISSTATEMENT OF LAW

Marcus Pethers argues that the prosecutor committed misconduct when he "misstated the law" during rebuttal argument when he claimed that Marcus Pethers' "pretext" theory was not a recognized defense. As we discussed above, there was no evidence to support Marcus Pethers' pretext defense at trial. Therefore, we conclude the prosecutor's statements concerning the theory did not deny Marcus Pethers a fair and impartial trial.²⁴

C. PRIOR CONVICTIONS

Marcus Pethers argues that the prosecutor committed misconduct when he referred to Marcus Pethers' prior convictions of fleeing and eluding during closing argument after he failed

¹⁹ See MCL 257.683(2); MCL 257.715(1) (stating that a uniformed police officer may effectuate a traffic stop upon reasonable grounds shown to inspect a motor vehicle and may issue a citation if any defects in the vehicle's equipment are discovered).

²⁰ *Grant*, 445 Mich at 545-546, 553.

²¹ *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

²² *Id.*

²³ *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

²⁴ *Id.*

to introduce proof of the convictions during his case-in-chief. MCL 257.602a provides in relevant part:

(1) A driver of a motor vehicle who is given . . . a visual or audible signal by a police . . . officer, acting in the lawful performance of his or her duty, directing the driver to bring his or her motor vehicle to a stop shall not willfully fail to obey that direction by increasing the speed of the motor vehicle . . . or otherwise attempting to flee or elude the officer.

* * *

(4) . . . [A]n individual who violates subsection (1) *is guilty of second-degree fleeing and eluding*: [if]

* * *

(c) *The individual has any combination of 2 or more prior convictions for fourth-degree fleeing and eluding.*^[25]

The trial court charged and convicted Marcus Pethers pursuant to subsection (4)(c) of the statute. However, at trial, the prosecutor did not actually introduce evidence of Marcus Pethers' prior convictions of fourth-degree fleeing and eluding. Rather, during closing argument, the prosecutor stated that defense counsel would stipulate to Marcus Pethers' prior convictions, and defense counsel did not object. The trial court, thereafter, indicated that it would review Marcus Pethers' prior criminal record in the presentence investigative report, and it ultimately convicted Marcus Pethers of second-degree fleeing and eluding.

We conclude that even assuming any impropriety on the part of the prosecutor, it did not deny Marcus Pethers a fair and impartial trial.²⁶ The trial court essentially took judicial notice of Marcus Pethers' prior convictions. Judicial notice can be a substitute for actual proofs entered by the parties.²⁷ MRE 201(b) provides:

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

²⁵ Emphasis added.

²⁶ *Dobek*, 274 Mich App at 63.

²⁷ *Winekoff v Pospisil*, 384 Mich 260, 268; 181 NW2d 897 (1970).

A trial court can take judicial notice on its own accord at any time during the proceedings.²⁸ “A court takes judicial notice of its own files and records.”²⁹ Additionally, if a court takes judicial notice of facts contained in its own records, a party need not introduce the original record.³⁰

Here, there is no dispute that Marcus Pethers had two prior convictions of fourth-degree fleeing and eluding. These prior convictions were not subject to “reasonable dispute” because they were “capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.”³¹ Proof of these prior convictions was readily ascertainable by reference to his criminal record, the accuracy of which cannot reasonably be in question. We conclude, therefore, that the trial court properly took judicial notice of Marcus Pethers’ prior convictions without objection.

D. PERJURED TESTIMONY

Marcus Pethers argues that the prosecutor knowingly used the perjured testimony of a police officer at trial. “[A] conviction obtained through the knowing use of perjured testimony offends a defendant’s due process protections guaranteed under the Fourteenth Amendment.”³² However, we conclude that Marcus Pethers has failed to show that the police officer offered perjured testimony. The fact that there was contradictory testimony in this case, standing alone, does not support a claim of perjury.³³ Here, Marcus Pethers has not shown the existence of a plain error.

Because the prosecutor did not commit any misconduct of consequence in this case, Marcus Pethers’ argument that the cumulative affect of the prosecutor’s misconduct denied him a fair trial, also fails.³⁴

V. RIGHT OF CONFRONTATION; DUE PROCESS RIGHTS

A. STANDARD OF REVIEW

Marcus Pethers argues that the trial court denied him his right of confrontation and his due process rights when the court improperly administered an oath to an interpreter and failed to

²⁸ MRE 201(c) and (e).

²⁹ *Prawdżik v Heidema Brothers, Inc*, 352 Mich 102, 112; 89 NW2d 523 (1958).

³⁰ *In re Stowe*, 162 Mich App 27, 33; 412 NW2d 655 (1987).

³¹ MRE 201(b).

³² *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009).

³³ *People v Kozyra*, 219 Mich App 422, 429; 556 NW2d 512 (1996) (stating that mere proof of conflicting testimony is insufficient to support a claim of perjury).

³⁴ See *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995) (“[O]nly actual errors are aggregated to determine their cumulative effect.”); *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001) (stating that the combined effect of errors must result in serious prejudice to warrant reversal and a new trial).

provide him with a “verbatim transcript” of a witness’ Spanish testimony and the corresponding translation in English. Whether admission of evidence constitutes a violation of a defendant’s Confrontation Clause rights involves a question of constitutional law this Court reviews de novo.³⁵ Whether a defendant was deprived of his due process rights also involves a constitutional question that this Court reviews de novo.³⁶ We review unpreserved constitutional issues for plain error affecting a defendant’s substantial rights.³⁷

B. APPLYING THE STANDARDS

Here, our review of the record indicates that the trial court properly administered an oath to the interpreter that complied with the substantive requirements of MRE 604. The administration of the oath did not deny Marcus Pethers his right of confrontation or his due process rights. We find no merit in Marcus Pethers’ argument that he was prejudiced because he was not provided a verbatim transcript of the Spanish and corresponding English translation. In addition to failing to make a request in the trial court, he has failed to show that there were any inconsistencies in the witness’ testimony or the interpreter’s translation that amounted to anything more than an “occasional lapse that did not render the trial fundamentally unfair.”³⁸

In this regard, Marcus Pethers also raises several unpreserved claims of ineffective assistance of counsel. He argues that defense counsel was ineffective because he failed to object when the trial court administered an oath to the interpreter and failed to object to the alleged instances of prosecutorial misconduct. As we have discussed above, there were no instances of prosecutorial misconduct in this case that denied Marcus Pethers a fair trial, and the trial court properly administered an oath to the interpreter. Defense counsel was not deficient in failing to raise futile objections.³⁹

VI. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Marcus Pethers argues there was insufficient evidence to support his conviction of second-degree fleeing and eluding. We review de novo a challenge to the sufficiency of the evidence in a bench trial.⁴⁰

³⁵ *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

³⁶ *People v Steele*, 283 Mich App 472, 478; 769 NW2d 256 (2009).

³⁷ *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

³⁸ *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996) (“As a general rule, the proceedings or testimony at a criminal trial are to be interpreted in a simultaneous, continuous, and literal manner, without delay, interruption, omission from, addition to, or alteration of the matter spoken . . .”; however, “occasional lapses will not render a trial fundamentally unfair . . .”).

³⁹ *Thomas*, 260 Mich App at 457.

⁴⁰ *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

B. LEGAL STANDARDS

In determining whether the prosecution has presented sufficient evidence to sustain a conviction, we construe the evidence in a light most favorable to the prosecution and consider whether there was sufficient evidence to justify a rational trier of fact in finding all of the elements of the crime beyond a reasonable doubt.⁴¹

C. APPLYING THE STANDARDS

As we stated above, Marcus Pethers was charged and convicted of second-degree fleeing and eluding pursuant to MCL 257.602a. A review of the record indicates that there was sufficient evidence to allow a rational trier of fact to conclude beyond a reasonable doubt that Marcus Pethers was guilty of the charged offense in this case. Officer Terpstra testified that he was acting in his official capacity as a police officer when he attempted to stop the white minivan that had a cracked windshield. Officer Terpstra testified that the minivan refused to stop and attempted to elude him. Other police officers testified that the minivan stopped a short distance away and that Marcus Pethers and the two passengers were located nearby. The passengers identified Marcus Pethers as the driver of the van, and he admitted to police that he was the driver.

In addition, as we discussed above, Marcus Pethers' prior convictions of fourth-degree fleeing and eluding were indisputable, and the trial court properly took judicial notice of his criminal record in this case. In sum, the record supports that Marcus Pethers was guilty of second-degree fleeing and eluding beyond a reasonable doubt.

Marcus Pethers argues that the cumulative effect of the errors in this case denied him his due process right to a fair trial. Here, there were no errors of consequence in this case, and Marcus Pethers' argument, therefore, fails.⁴²

We affirm.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ William C. Whitbeck

⁴¹ *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

⁴² *Bahoda*, 448 Mich at 292 n 64; *Knapp*, 244 Mich App at 387.