STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 11, 2013
v	No. 307608 Calhoun Circuit Court
DONALD DALE SOUTHWELL, Defendant-Appellant.	LC No. 2010-002358-FH

Before: BOONSTRA, P.J., and SAAD and HOEKSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of operating while intoxicated, third offense, MCL 257.625. Defendant was sentenced as a fourth-offense habitual offender to three to ten years' imprisonment. For the reasons stated in this opinion, we affirm.

On March 13, 2010, at about 4:20 a.m., Officer Troy Estree, a road patrol officer with the Emmett Township Department of Public Safety, received a dispatch about a vehicle driving erratically on Taft Street. On his way to Taft Street, Officer Estree observed a vehicle matching the description he received from dispatch; he followed the vehicle and observed it violate traffic laws by failing to stop at a blinking red light, swerving, and speeding. Officer Estree activated his overhead lights, and the vehicle came to a stop after continuing to travel approximately one mile. Officer Estree testified that he first observed the traffic violations in Emmett Township, but that the vehicle eventually came to a stop in Battle Creek.

Officer Estree testified that he approached the vehicle and the driver, later identified as defendant, rolled down his window and uttered an expletive. Officer Estree smelled intoxicants and noted that defendant had bloodshot and glossy eyes. Officer Estree asked defendant to step out of his vehicle and arrested defendant on the basis of defendant's demeanor and the observed traffic violations. Once defendant was handcuffed and in the police vehicle, Officer Estree attempted to read defendant his chemical test rights, but was unable to complete the process because defendant was continuously talking. Thereafter, Officer Estree obtained a search warrant and defendant was transported to the hospital and held down while a blood draw was performed. Analysis of defendant's blood indicated that his blood alcohol content was .21 grams of alcohol per 100 milliliters of blood.

During trial, Officer Estree was questioned about his patrol vehicle's video camera. He testified that at the time of the traffic stop involving defendant, his vehicle was equipped with a

video camera and that he believed it would automatically begin recording when his overhead lights were activated. However, the camera did not turn on during the traffic stop involving defendant; consequently, there was no video recording of the stop.

Defendant testified in his own defense, and stated that he was not driving erratically, was not speeding, and did not run a flashing red light. Defendant stated that he told Officer Estree that he was outside of the officer's jurisdiction. Defendant testified that he did not remember being read his chemical rights. He admitted to uttering the expletive, but explained that he said what he said because his vehicle was not insured, had illegal plates, and he did not have a valid driver's license. Defendant denied that he was intoxicated.

On appeal, defendant first argues that the trial court erred by denying his motion to dismiss the charges because the arresting officer lacked jurisdiction.

"We review for an abuse of discretion a trial court's decision on a motion to dismiss." *People v Waclawski*, 286 Mich App 634, 645; 780 NW2d 321 (2009) (quotation marks and citation omitted). "A court abuses its discretion when it selects an outcome outside the range of reasonable and principled outcomes." *Id.* We review de novo questions of law, such as whether the police officer's arrest of defendant was outside his jurisdiction. *People v Hamilton*, 465 Mich 526, 529; 638 NW2d 92, 94-95 (2002), abrogated in part on other grounds *Bright v Ailshie*, 465 Mich 770; 641 NW2d 587 (2002).

After the parties completed their opening statements, the trial court heard arguments from both parties regarding whether Officer Estree, who is employed by the Emmett Township Department of Public Safety, had jurisdiction to arrest defendant when he observed erratic driving in Emmett Township, but followed defendant out of Emmett Township into Battle Creek before arresting defendant. On the basis of Officer Estree's preliminary examination testimony that he observed defendant fail to stop at a blinking red light in Battle Creek, defendant maintained that the officer was not in Emmett Township when he observed defendant's alleged erratic driving. The prosecutor argued that Officer Estree later learned that the area he first observed defendant driving erratically was within Emmett Township, and accordingly, that Officer Estree had jurisdiction to arrest defendant. The trial court noted that where Officer Estree observed defendant driving erratically was a question for the jury. The trial court cited MCL 762.3, and concluded that Officer Estree acted within his jurisdiction so long as he observed the traffic violations in Emmett Township.

During trial, defense counsel argued that Officer Estree did not witness defendant violate any traffic laws within Emmett Township, and that the events giving rise to defendant's arrest all occurred in Battle Creek. In his trial testimony, Officer Estree admitted that at the preliminary examination he testified that he observed defendant speeding and driving erratically within Emmett Township, but that defendant failed to stop at a blinking red light in Battle Creek. However, Officer Estree also testified that his preliminary examination testimony was incorrect, and that after researching the area where he observed defendant run the blinking red light he discovered it was actually within Emmett Township.

At the conclusion of the proofs, the trial court instructed the jury that the prosecution had to prove beyond a reasonable doubt that the crime occurred in Emmett Township, and consistent

with MCL 764.2a(c)[1], stated that the law permits a peace officer to make an arrest outside of their own jurisdiction when that officer witnesses a crime within their jurisdiction.

On appeal, defendant does not specifically challenge the trial court's instruction based on MCL 764.2a. Rather, defendant merely states that "the incidents giving rise to the stop occurred in Battle Creek," and argues that because Officer Estree is employed by Emmett Township, his arrest of defendant did not comply with MCL 764.2a, and he lacked the authority to effectuate the arrest. We find defendant's argument unavailing. While defendant maintained that the offenses did not occur in Emmett Township, Officer Estree clearly testified that he observed defendant violate traffic laws within in Emmett Township. It is up to the finder of fact to make decisions about the credibility of witnesses and the probative value of evidence. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). In this case, the factual dispute regarding where the officer observed defendant driving was submitted to the jury and resolved against him. Accordingly, defendant is not entitled to any relief.

Next, defendant argues that the trial court's instructions to the jury regarding probable cause to arrest were misleading and inaccurate. During trial, defendant objected to the given instruction on the basis that it was prejudicial. Consequently, this issue is not properly preserved for appellate review. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004) (holding "[a]n objection based on one ground is usually considered insufficient to preserve an appellate attack based on a different ground"). We review unpreserved errors for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Substantial rights are affected when the defendant is prejudiced, meaning the error affected the outcome of the trial. *Id.* at 763.

Jury instructions must clearly present the applicable law and "include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). We will not reverse a defendant's conviction "if the instructions adequately protected the defendant's rights by fairly

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[1] MCL 764.2a(c) provides:

> (c) If the officer has witnessed an individual violate any of the following within the geographical boundaries of the officer's county, city, village, township, or university and immediately pursues the individual outside of the geographical boundaries of the officer's county, city, village, township, or university:
>
> (*i*) A state law or administrative rule.
>
> (*ii*) A local ordinance.
>
> (*iii*) A state law, administrative rule, or local ordinance, the violation of which is a civil infraction, municipal civil infraction, or state civil infraction.

presenting to the jury the issues to be tried." *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997).

In this case, the issue before the jury was whether defendant operated a motor vehicle while intoxicated, contrary to MCL 257.625. The trial court instructed the jury regarding the elements of this offense, and defendant does not dispute that the trial court properly instructed the jury in this regard. During deliberations, although probable cause was not directly an issue before the jury, the trial court received this note from the jury:

> One, must a police officer have probable cause in order to stop a vehicle. Two, is the arrest invalid if the police officer does not have probable cause to stop the vehicle. And, three, please explain the relevance probable cause has with respect to this case.

Neither party objected to the trial court responding to the jury's inquiry by reading the first three paragraphs of § 11:10 "Probable cause to arrest without a warrant," from Michigan Criminal Law and Procedure. 1 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 11:10, p 586-590. The trial court read the three paragraphs, and also paraphrased a footnote, explaining that *People v Strelow*, 96 Mich App 182; 292 NW2d 517 (1980) "states arrest for a traffic violation is sufficiently immediate to commission of that violation to justify warrantless arrest where the police officer observed defendant's speeding and then followed defendant to his residence before effectuating arrest."

On appeal, defendant argues that the footnote was an inaccurate representation of *Strelow* and that reading the footnote was misleading. However, the footnote was an accurate representation of the *Strelow* case, which determined that an officer's actions and the warrantless arrest of the defendant "were sufficiently immediate [to permit the arrest] upon commission of the traffic violation" when the officer clocked defendant speeding and followed defendant to his residence where he arrested him. *Strelow*, 96 Mich App at 186. Although defendant also generally argues the footnote was misleading, defendant's arguments do not establish that the trial court failed to properly present the applicable law or that it failed to instruct the jury regarding all elements of charged offenses, material issues, defenses, or theories. *McGhee*, 268 Mich App at 606. Instead, we find that the instruction fairly responded to the question and did not constitute plain error affecting defendant's substantial rights. *Dumas*, 454 Mich at 396; *Carines*, 460 Mich at 763. Thus, defendant is not entitled to any relief on appeal.

Next, defendant argues that he was denied effective assistance of counsel because defense counsel failed to request a jury instruction after the prosecution did not produce the squad car video of the stop. No evidentiary hearing was held in regard to defendant's claims of ineffective assistance of counsel; accordingly, our review of defendant's claims is limited to errors apparent on the record. *People v Marcus Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). In order to prevail on an ineffective assistance of counsel claim, the burden is on the defendant to demonstrate that defense counsel's performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Prejudice occurs if there is a reasonable probability that, but for defense counsel's error, the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

The instruction defendant now claims should have been requested provides that "where the prosecution fails to make reasonable efforts to preserve material evidence, the jury may infer that the evidence would have been favorable to defendant." *People v David Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993), overruled on other grounds *People v Grissom*, 492 Mich 296, 320; 821 NW2d 50 (2012). This instruction is applicable only if the prosecution acts in bad faith when it fails to produce the evidence, and is not applicable when the missing evidence "simply did not exist or could not be located." *Id.* at 515. In this case, there was no evidence that the prosecution acted in bad faith, and the record makes clear that no video of the stop exists. "[D]efense counsel is not required to make frivolous or meritless motions or objections." *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001) (citations omitted). Defense counsel did not request the instruction, but to do so would have been frivolous or meritless when the instruction was not warranted, and defense counsel is not required to make frivolous motions. *Id.* Accordingly, we conclude that defendant has failed to demonstrate ineffective assistance of counsel. *Pickens*, 446 Mich at 302-303.

Next, defendant argues the trial court erred when it found that the prosecution exercised due diligence to locate Officer Rodney Marshall, who was Officer Estree's backup during the traffic stop that led to defendant's conviction. We review the trial court's determination of due diligence and whether the missing witness instruction should be given for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004) (citations omitted).

The prosecutor is obliged to exercise due diligence to produce a witness at trial when the prosecutor endorses that witness. *Id.* at 388. When the trial court finds there was a lack of due diligence, "the jury should be instructed that it may infer that the missing witness's testimony would have been unfavorable to the prosecution's case." *Id.* at 388-389 (citations omitted). Due diligence requires attempts to do everything reasonable, but not everything possible, to produce a witness. *Id.* at 391.

In this case, the prosecution listed Officer Marshall on a notice of intent to produce as a witness at trial, but he did not appear. At trial, defense counsel requested the missing witness instruction. The prosecutor represented, and defense counsel did not dispute, that there was a prior agreement between the parties that Officer Marshall would not be called and that the instruction would not be requested. The prosecutor indicated that he would have been prepared to present evidence of the efforts to locate Officer Marshall if there had not been this agreement. The prosecutor also represented that Officer Marshall had not worked for Emmett Township for over a year. The prosecutor did not initially know this information, but once he learned this, he contacted a lieutenant and made other efforts to learn Officer Marshall's address or telephone number. These efforts were unsuccessful.

We conclude that the prosecutor's representations are sufficient to establish due diligence. *Id.* Further, the record supports there were limited proofs regarding the efforts to locate Officer Marshall because of defense counsel's agreement with the prosecutor. "[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999), overruled on other grounds by *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007). Thus, we find that the trial court did not abuse its discretion when it found there was due diligence to produce Officer

Marshall and denied the request for the missing witness instruction. *Eccles*, 260 Mich App at 389, 391.

Next, defendant argues that the trial court erred when it sentenced defendant as a third offender for operating while intoxicated because one of his prior convictions was obtained without counsel.

Defendant was charged and convicted as a third-offense habitual offender. The amended information specifically alleges defendant was previously convicted of operating while intoxicated on August 28, 2002 and June 1, 2005. Defendant raised no objection regarding his habitual offender status during the proceedings in the trial court. However, on appeal, defendant now argues that he was not represented by counsel during the proceedings surrounding his August 28, 2002 conviction, and accordingly, his sentence for operating while intoxicated cannot be enhanced on that basis.

On October 16, 2012, defendant moved this Court for remand so that he could move for resentencing in the trial court on the basis of his claim that he could not be sentenced as a third-habitual offender when his 2002 conviction was obtained without counsel. This Court denied defendant's motion to remand "for failure to demonstrate a need for a remand" on November 19, 2012. In support of his argument for remand, defendant relied on his Presentence Investigation Report (PSIR), which indicates that defendant pleaded guilty to the offense, and also indicates that no attorney was present. Defendant similarly relies solely on the PSIR in support of his request for relief on appeal.

When a defendant challenges a conviction allegedly obtained in violation of the right to counsel, the defendant "bears the initial burden of establishing that the conviction was obtained without counsel or without a proper waiver of counsel." *People v Carpentier*, 446 Mich 19, 31; 521 NW2d 195 (1994). In *People v Zinn*, 217 Mich App 340, 343; 551 NW2d 704 (1996) (citation omitted), this Court explained that a defendant may satisfy this burden by:

> (1) presenting "prima facie proof that a previous conviction was violative of *Gideon*,[2] such as a docket entry showing the absence of counsel or a transcript evidencing the same," or (2) presenting evidence that the defendant requested such records from the sentencing court and that the court either (a) failed to reply to the request, or (b) refused to furnish copies of the records, within a reasonable time.

In this case, defendant relies only on his PSIR, which does not indicate whether he waived his right to an attorney. The PSIR's silence on the issue of waiver does not constitute prima facie proof that defendant's conviction was obtained without a valid waiver of counsel. *Zinn*, 217 Mich App at 344. Defendant offers no other documentation to support his claim that he did not waive counsel and makes no representations to suggest that appellate counsel has sought the records from the district court to ascertain whether counsel was waived. Thus, we

[2] *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).

again conclude that remand for resentencing is inappropriate because defendant has failed to show sufficient potential merit to his claim of error. Moreover, we conclude that defendant has not demonstrated entitlement to relief on appeal for the same reasons.

In his Standard 4 brief, defendant raises several claims of prosecutorial misconduct and argues that the cumulative effect of errors denied him a fair trial.

The majority of defendant's prosecutorial misconduct challenges are abandoned because defendant merely announces his position without arguing the merits of his assertion of error. *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009); *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). We will not address any of these abandoned assertions of error. Defendant presents two reviewable claims of prosecutorial misconduct. Defendant's first claim is a properly preserved claim of prosecutorial misconduct that we review de novo to determine whether the defendant was denied a fair and impartial trial due to the actions of the prosecutor. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003); *People v Dobeck*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Defendant's second claim is an unpreserved claim of prosecutorial misconduct that we review for plain error affecting defendant's substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

It is defendant's burden to establish that the prosecutorial misconduct resulted in a miscarriage of justice. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008) (citation omitted). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004) (citation omitted).

Defendant's preserved claim of alleged prosecutorial misconduct occurred when, after defense counsel completed his closing argument, the prosecutor stated, "How heartfelt. Even I was moved by it." Defense counsel objected, without specifying a basis for the objection, and the trial court sustained the objection. On appeal, defendant argues this statement was "blatantly denigrating."

Prosecutors "must refrain from denigrating a defendant with intemperate and prejudicial remarks." *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). This Court, in *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984) (citations omitted), explained:

> The prosecutor may not question defense counsel's veracity. When the prosecutor argues that the defense counsel himself is intentionally trying to mislead the jury, he is in effect stating that defense counsel does not believe his own client. This argument undermines the defendant's presumption of innocence. Such an argument impermissibly shifts the focus from the evidence itself to the defense counsel's personality.

We agree with defendant that the prosecutor's comment improperly questioned defense counsel's veracity and denigrated the defense. However, defense counsel's objection was sustained. Further, the trial court instructed the jury that the attorneys' statements and arguments were not evidence, that the verdict should be based only on evidence, and that sympathy and

prejudice should not influence their decision. Although the prosecutor's statement was misconduct, it does not warrant reversal when the prejudicial effect of the challenged comments could have been prevented by a timely instruction, as in this case. *Schutte*, 240 Mich App at 721. There is no indication that this statement prevented a fair and impartial trial; thus, defendant is not entitled to relief on appeal. *Dobeck*, 274 Mich App at 63.

Defendant next argues there was prosecutorial misconduct when the prosecutor stated in his opening statement that Officer Estree went to Taft Street. Defendant maintains that this constituted misconduct because Officer Estree never arrived at Taft Street. This claim is not properly preserved for appellate review.

Review of the record indicates that defendant isolates the prosecutor's comment out of context and misconstrues it. Considered in context, the prosecutor indicated Officer Estree started to go to Taft Street, but then saw defendant's truck and followed it. "Opening statement is the appropriate time to state the facts that will be proved at trial." *People v Eriksen*, 288 Mich App 192, 200; 793 NW2d 120 (2010). Defendant has not established that there was misconduct on this basis or that he was denied a fair trial. *Dobeck*, 274 Mich App at 63.

Finally, defendant argues there were "cumulative issues of error" and that the cumulative errors denied him a fair trial in violation of due process. "The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not. Reversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial." *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003) (citations omitted). To reverse based on cumulative error, "the effect of the errors must have been seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *Knapp*, 244 Mich App at 388 (citation omitted).

We conclude that there is no merit to defendant's claims of cumulative error on appeal. Accordingly, the cumulative effect of the nonexistent errors did not result in denial of a fair trial. *McLaughlin*, 258 Mich App at 649.

Affirmed.

/s/ Mark T. Boonstra
/s/ Henry William Saad
/s/ Joel P. Hoekstra