STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 19, 2009
v	No. 285635 Kalamazoo Circuit Court
AQUARIUS DEMOND WALKER, Defendant-Appellant.	LC No. 2007-001119-FH

Before: Borrello, P.J., and Whitbeck and K.F. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for third-degree fleeing and eluding, MCL 257.602a(3); two counts of resisting and obstructing a police officer, MCL 750.81d(1); and assault and battery, MCL 750.81. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 2 to 15 years' imprisonment for third-degree fleeing and eluding, 18 months to 15 years' imprisonment for each of the two counts of resisting and obstructing a police officer, and 90 days in jail with credit for 90 days for assault and battery. The sentences for third-degree fleeing and eluding and two counts of resisting and obstructing a police officer to be served concurrent to each other but consecutive to the prison sentence for which defendant was on parole. For the reasons set forth in this opinion, we affirm.

Defendant's first argument on appeal is that his counsel was ineffective where one element of third-degree fleeing and eluding, that the officer's vehicle be identified as an official police vehicle, was omitted from the jury instructions. To establish ineffective assistance of counsel, defendant must show that his trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; that but for his counsel's errors, there is a reasonable probability that the results of his trial would have been different; and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). We generally review de novo legal errors in jury instructions. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

We conclude that the jury instruction at issue did not correctly provide the elements of third-degree fleeing and eluding because the instruction did not include the fact that the officer's vehicle must be identified as an official police vehicle. MCL 257.602a(1), (3); *People v Grayer*, 235 Mich App 737, 741; 599 NW2d 527 (1999). This error is one of constitutional magnitude, *People v Carines*, 460 Mich 750, 761; 597 NW2d 130 (1999), but it can be harmless, *People v*

Duncan, 462 Mich 47, 54-57; 610 NW2d 551 (2000). Nevertheless, defense counsel's performance in not objecting to the jury instructions on this ground fell below an objective standard of reasonableness. The issue then arises as to whether defense counsel was ineffective even if there is no reasonable probability that the results of defendant's trial would have been different and the proceedings were not fundamentally unfair or unreliable. *Toma*, *supra*. We find that pursuant to *Toma*, the proceedings were not fundamentally unfair and that the result would have been the same even if the proper jury instruction had been given for the reasons discussed below.

Officer Anthony Morgan and Officer Robert Hug performed an initial traffic stop on the Cadillac that defendant was driving, but defendant thereafter tried to flee on foot. He later reentered the Cadillac, and Officer Morgan ended up inside that vehicle with defendant to try to stop him from fleeing. During closing arguments, the prosecutor argued that the third-degree fleeing and eluding occurred while Officer Morgan and defendant were in the Cadillac together. In *People v Green*, 260 Mich App 710, 717; 680 NW2d 477 (2004), the Court indicated that the plain language of MCL 750.479a(1), a statute with identical language to MCL 257.602a(1), does not require that the signal to stop be made from within the official police vehicle. Rather, the "statute merely requires that the officer giving the signal be in uniform and that the officer's vehicle must be identified as an official police vehicle." *Green*, *supra* at 718. "[T]he Legislature has not . . . placed any restriction on the time frame regarding the observation or the location of the officially marked police vehicle in relationship to the officer's signal to stop." *Id*. We adopt the interpretation of the Court in *Green* relating to MCL 750.479a(1) to MCL 257.602a(1). Thus, Officer Morgan's command to stop the vehicle did not have to occur while Officer Morgan was in his official police vehicle. *Id*. The pertinent inquiry, in this case, is whether the vehicle that Officer Morgan arrived on the scene in was identified as an official police vehicle. *Id.*

Although the jury was not instructed that it must find beyond a reasonable doubt that Officer Morgan's vehicle was identified as an official police vehicle, there was sufficient evidence for a reasonable jury to have found that Officer Morgan's vehicle was identified as an official police vehicle. See *People v Hardiman*, 466 Mich 417, 420-421; 646 NW2d 158 (2002). Officer Morgan testified that the vehicle was their police vehicle. In addition, it was an all black, four-door Crown Victoria with "emergency lights all the way around." It had "red blue strobe lights," blinking lights and sirens. The vehicle had emergency light flashers in the headlights, grill, mirrors, back window, and back taillights. Pursuant to MCL 257.698(5)(a), only police vehicles are permitted to be equipped with oscillating blue lights, and pursuant to MCL 257.706(b) and (d), only emergency vehicles may be equipped with a siren. In addition, the record supports the conclusion that Courtney Struble, the passenger in defendant's vehicle, thought the vehicle was an official police vehicle and communicated that to defendant when she stated that he got them pulled over. Defendant also apparently thought that it was an official police vehicle because he pulled the Cadillac over after the siren was briefly sounded. Defendant also admitted that he suspected that the men who pulled him over were the police because of the siren on their vehicle. Thus, Officer Morgan's vehicle clearly was equipped with sufficient indicia of an official police vehicle. Hence, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt based on overwhelming evidence that Officer Morgan's vehicle was identified as an official police vehicle. *Hardiman*, *supra*. Consequently, although defense counsel erred by not objecting to the jury instructions, defense counsel was not ineffective because there is not a reasonable probability that the results

of defendant's trial would have been different and the proceedings were not fundamentally unfair or unreliable. *Toma*, *supra*.

Defendant also argues that he should be granted 293 days of jail credit toward his minimum sentences in this case for time he was jailed between his arrest and sentencing, even though he was on parole, and jailed for a parole violation rather than the instant offenses. At sentencing, defendant was granted 90 days credit toward his 90-day sentence for assault and battery.[1]

This issue has been resolved by our Supreme Court in *People v Idziak*, 484 Mich 549, 562-563; ___ NW2d ___ (2009):

> [W]e hold that the jail credit statute does not apply to a parolee who is convicted and sentenced to a new term of imprisonment for a felony committed while on parole because, once arrested in connection with the new felony, the parolee continues to serve out any unexpired portion of his earlier sentence unless and until discharged by the Parole Board. For that reason, he remains incarcerated regardless of whether he would otherwise be eligible for bond before conviction on the new offense. He is incarcerated not "because of being denied or unable to furnish bond' for the new offense, but for an independent reason. Therefore, the jail credit statute, MCL 769.11b, does not apply. [Footnotes omitted.]

Pursuant to our Supreme Court's holding in *Idziak*, defendant is not entitled to jail credit on his sentences for the instant offenses because jail credit is applied exclusively to the parole sentence. See also *People v Stead*, 270 Mich App 550, 552; 716 NW2d 324 (2006). Therefore, defendant should not be granted credit toward his minimum sentences in this case.

Affirmed.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly

[1] The prosecutor does not argue on appeal that the 90 days credit was improperly ordered. As a consequence of the prosecutor failing to raise this issue, we will not address that issue in this opinion.