

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID BRYAN STEWART,

Defendant-Appellant.

UNPUBLISHED

June 14, 2011

No. 297180

Kalamazoo Circuit Court

LC No. 2009-000227-FH

Before: SHAPIRO, P.J., and O'CONNELL and OWENS, JJ.

PER CURIAM.

Following a jury trial, defendant appeals as of right his convictions for second-degree fleeing and eluding, MCL 257.602a(4), and operating a vehicle with license suspended, MCL 257.904. We affirm.

Defendant's convictions arose out of his failure to respond to police officers while driving in Kalamazoo on February 3, 2009. Several officers attempted to stop defendant by activating their squad car lights and sirens, by pulling in front of defendant's car, and by placing spike strips in the path of defendant's car. Defendant did not stop until he reached a dead end road. Officers testified that defendant then attempted to flee on foot, and that he resisted arrest.

At trial, defendant stipulated that he had a prior conviction of third-degree fleeing and eluding. He argued that based upon his stipulation, the jury instructions should exclude any reference to his prior conviction. Defendant also argued that the trial court should instruct the jury on the misdemeanor crime of failure to obey a traffic order as a lesser included offense. The trial court rejected defendant's argument, but gave the jury a limiting instruction with regard to defendant's prior conviction.

On appeal, defendant maintains that the trial court erred by refusing to instruct the jury on failure to obey a traffic order, MCL 257.602. Defendant first argues that this was an error of constitutional proportion, on the ground that the error violated a due process right to a properly instructed jury. We disagree. The failure to instruct on a lesser included offense is non-constitutional error and is subject to harmless error review. *People v Gillis*, 474 Mich 105, 140 n 18; 712 NW2d 419 (2006).

Defendant next argues that the lack of a jury instruction on failure to obey a traffic order is nonetheless an error requiring reversal. Again, we disagree. We need not decide whether

failure to obey a traffic order is a lesser included offense of second-degree fleeing and eluding, because the record demonstrates that any error with regard to a lesser included instruction was harmless. The overwhelming evidence supported the fleeing and eluding conviction. Two officers testified to following defendant with their lights and sirens activated. Further, another officer testified to standing in front of defendant's vehicle and attempting to place spike strips on the roadway. Another officer testified that defendant drove around a police vehicle that was positioned in front of defendant's vehicle. Defendant has not shown that it was more probable than not that the failure to provide the requested misdemeanor offense instruction undermined the reliability of the verdict. See *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Therefore, any error by the trial court is harmless and defendant is not entitled to reversal.

Defendant also argues that the trial court erred by failing to omit the prior conviction element of the fleeing and eluding jury instruction. We disagree. A trial court's instructions must clearly present the case and the applicable law to the jury, and the instructions "must include all elements of the charged offenses." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). Here, the prior conviction element of second-degree fleeing and eluding is stated in the controlling statute, MCL 257.602a(4)(b), which reads: "The individual has 1 or more prior convictions for first-, second-, or third-degree fleeing and eluding, attempted first-, second-, or third-degree fleeing and eluding, or fleeing and eluding under a current or former law of this state prohibiting substantially similar conduct." Thus, the trial court was required to instruct the jury that it must find that defendant had a prior conviction, because whether defendant had a prior conviction was an element of the charged offense. See, *People v Reed*, 393 Mich 342, 350-351; 224 NW2d 867 (1975).

Affirmed.

/s/ Douglas B. Shapiro
/s/ Peter D. O'Connell
/s/ Donald S. Owens