STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY ALAN ADISKA,

Defendant-Appellant.

UNPUBLISHED
June 25, 1996

No. 174100
LC No. 92-007366-FH

Before: Hoekstra, P.J., and M.J. Kelly and J.M. Graves, Jr.,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating a motor vehicle while under the influence of liquor, third offense (OUIL-3rd), MCL 257.625(7)(d); MSA 9.2325(7)(d), driving while license suspended, second offense (DWLS-2nd), MCL 257.904(1)(b); MSA 9.2604(1)(b), and resisting and obstructing a police officer, MCL 750.479; MSA 28.747. He thereafter pleaded guilty to being an habitual offender, second offense, MCL 769.10; MSA 28.1082. He was sentenced to one hundred eighty days' imprisonment for the DWLS-2nd conviction and ninety days' imprisonment for the resisting and obstructing a police officer conviction. He was also sentenced to an enhanced term of forty to ninety months' imprisonment for the OUIL-3rd and habitual offender convictions. Defendant now appeals as of right. We affirm.

Defendant first claims that he was denied effective assistance by his trial counsel's failure to challenge his arrest on the ground that there was no evidence of an accident. This argument was without merit. Defendant was properly arrested without a warrant at the scene of an accident. MCL 764.15(1)(j); MSA 28.874(1)(j); *People v Keskimaki*, 446 Mich 240, 255-256; 521 NW2d 241 (1994). The incident was clearly neither expected nor desired by defendant. *Id*. Therefore, defendant was not denied effective assistance by his trial counsel's failure to raise the issue below. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 687-688; 521 NW2d 557 (1994).

* Circuit judge, sitting on the Court of Appeals by assignment.

The trial court did not err by denying defendant's motion to suppress his inculpatory statement. Admissions of fact which do not amount to statements of guilt are not protected by the corpus delecti rule. *People v Porter*, 269 Mich 284, 289-291; 257 NW2d 705 (1934); *People v Rockwell*, 188 Mich App 405, 407; 470 NW2d 673 (1991). Here, defendant admitted that he was the driver of the off-road vehicle (ORV), which is just one element of the crime for which he was convicted. See MCL 257.625(1) and (7)(d); MSA 9.2325(1) and (7)(d). Thus, his confession was merely an admission of fact, not of guilt. *Porter, supra*; *Rockwell, supra*.

Defendant's claim that the trial court allowed improper rebuttal testimony from Tracy and Stacey London is also without merit. There was no abuse of discretion because testimony was properly offered to rebut defendant's claim on direct examination that he was not the driver of the ORV. *People v Figgures*, ___ Mich ___; ___ NW2d ___ (Docket No. 98856, issued May 21, 1996).

The trial court did not reversibly err by instructing the jury that an ORV was a motor vehicle for purposes of the OUIL statute. See *People v O'Neal*, 198 Mich App 118, 120; 497 NW2d 535 (1993).

The trial court also properly denied defendant's request for an instruction on the misdemeanor offense encompassed in MCL 257.1620a; MSA 9.3300(20a). There is no inherent relationship between the charged offense and the requested misdemeanor. *People v Hendricks*, 446 Mich 435, 444-445; 521 NW2d 546 (1994); *People v Steele*, 429 Mich 13, 19-20; 412 NW2d 206 (1987).

The trial court's instructions to the jury did not violate defendant's right to a unanimous verdict, contrary to Const 1963, art 1, 14. When a statute lists alternative means of committing an offense, which in an of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternative theory. *People v Johnson*, 187 Mich App 621, 629-630; 468 NW2d 307 (1991). See also *Schad v Arizona*, 501 US 624; 111 S Ct 2491; 115 L Ed 2nd 555 (1991). MCL 257.625(1) and (2) list two alternative theories under which a defendant may be found guilty of drunk driving. Because they are not separate and distinct offenses, it was sufficient for the jury to agree that defendant was either operating a vehicle under the influence of liquor or driving with an unlawful blood alcohol level. *Schad, supra; Johnson, supra*.

Defendant failed to preserve his final objection to the jury instructions and has accordingly waived review of the issue. *People v Woods*, 416 Mich 581, 608-610; 331 NW2d 707 (1982). We are satisfied that a failure to review this issue will not result in manifest injustice to defendant. *People v Van Dorsten*, 441 Mich 540, 545; 494 NW2d 737 (1993); *People v Ferguson*, 208 Mich App 508, 510; 528 NW2d 825 (1995).

Although a defense witness was improperly impeached with a second-degree retail fraud misdemeanor conviction, MCL 750.356d; MSA 28.588(4), defendant is not entitled to relief on appeal because any prejudicial effect could have been cured by a cautionary instruction and our failure to

consider the issue will not result in manifest injustice to defendant. *People v Austin*, 209 Mich App 564, 570; 531 NW2d 811 (1995).

Finally, defendant's offense and sentence were properly enhanced from OUIL to OUIL-3rd. *People v Weatherhold*, 214 Mich App 507, 510-512; 543 NW2d 35 (1995). Furthermore, his sentence is proportionate to the seriousness of the circumstances surrounding the offenses and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Michael J. Kelly
/s/ James M. Graves, Jr.