STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEON J. ROBINSON,

Defendant-Appellant.

UNPUBLISHED
February 4, 1997

No. 178627
Oakland Circuit Court
LC No. 93-122931 FH

Before: Griffin, P.J., and McDonald and C. W. Johnson*, JJ.

PER CURIAM.

Defendant was convicted of violating § 625 of the Motor Vehicle Code, MCL 257.625; MSA 9.2325, under alternative theories of operating a motor vehicle under the influence of intoxicating liquor (OUIL) and operating with an unlawful blood alcohol level in excess of 0.10 percent by weight of alcohol (UBAL). He was sentenced to an enhanced sentence of two to five years in prison as a third offender in accordance with MCL 257.625(6)(d); MSA 9.2323(6)(d).[1]

On appeal, defendant argues that the trial court erred in amending the information to reflect that defendant violated MCL 257.625(1); MSA 9.2325(1) pursuant to a UBAL theory. We disagree. An information may be amended to add a new offense where the amendment does not result in "unfair surprise, inadequate notice, or an insufficient opportunity to defendant." *People v Hunt*, 442 Mich 359, 364-365; 501 NW2d 151 (1993); *People v Fortson*, 202 Mich App 13, 16-17; 507 NW2d 763 (1993). After a thorough review, we conclude that defendant was neither unfairly surprised nor prejudiced by the amendment.

Defendant was represented at the preliminary examination by the same attorney who represented him at trial. At that hearing, the prosecutor moved to amend the complaint to add an UBAL charge. Defense counsel responded, "Judge, that's no problem at all." Ultimately, defendant was bound over on both OUIL and UBAL theories. Although for some reason the general information

---

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

did not reflect the amendment, we find that defendant had adequate notice of the UBAL charge by virtue of what occurred at the preliminary examination.

Defendant argues that his trial counsel would have opposed the introduction of the blood alcohol test results had he known that an UBAL charge would be added to the information. This is a meritless argument. The jury is allowed to infer that a defendant was under the influence where the evidence shows that his blood alcohol level was 0.10 percent or more when he operated the vehicle. See CJI2d 15.5(7). Thus, the test results would have been damaging to defendant even if he was charged under the OUIL theory only. Moreover, defendant has never denied that he was drinking on the night of the incident or that his blood alcohol level was greater than 0.10 percent. Rather, he alleges that the stop was illegal and that he did not "operate" the vehicle within the meaning of §625. Therefore, it is unlikely that the amendment affected defendant's ability to present a defense.

Finally, error, if any, with regard to the amendment was harmless. OUIL and UBAL are merely alternate theories by which to prove a violation of § 625 of the Michigan Vehicle Code. See *People v Nicolaides*, 148 Mich App 100; 383 NW2d 620 (1985). The results of a conviction under either theory are indistinguishable in terms of the range of sentencing alternatives and restrictions on driving privileges. *Id.* at 101. Here, the jury found defendant guilty of violating §625 pursuant to both theories. Thus, defendant would have been in the same position had the trial court refused to amend the information. Accordingly, any error was harmless and defendant is not entitled to a new trial on this basis. *People v Considene*, 196 Mich App 160, 162-163; 492 NW2d 465 (1992).

Next, defendant contends that the repeat offender statute, MCL 257.625(6)(d); MSA 9.2325(6)(d), is unconstitutional. We disagree. Due process "neither compels a separate charge nor imposes trial type evidentiary burdens on the sentencing process" because § 625(6)(d) created a sentence enhancement scheme as opposed to establishing a separate substantive crime. *People v Weatherholt*, 214 Mich App 507, 511; 543 NW2d 34 (1995); see also *People v Eason*, 435 Mich 228; 458 NW2d 17 (1995).

Defendant argues that MCL 257.625(6)(d); MSA 9.2325(6)(d) is jurisdictionally defective. To the extent that defendant objects to having the instant OUIL/UBAL charge tried in circuit court, this contention is without merit. OUIL-third is a felony offense. MCL 257.625(6)(d); MCL 9.2325(6)(d). Where a defendant is charged with both a felony and a misdemeanor, the circuit court has jurisdiction over the entire case, even though it has no jurisdiction over misdemeanor charges alone. *People v Fish (On Remand)*, 207 Mich App 486, 489-490; 525 NW2d 467 (1994), vacated on other grounds, 451 Mich 891 (1996); *People v Bidwell*, 205 Mich App 355, 358; 522 NW2d 138 (1994).

To the extent that defendant challenges the circuit court's ability to consider the prior OUIL/UBAL offenses, this argument is also without merit. MCL 600.8311; MSA 27A.8311 vests the district court with jurisdiction over misdemeanors such as OUIL and UBAL. In enhancing defendant's sentence, however, the circuit court did not assert jurisdiction over the prior offenses. Nor was defendant tried for being a repeat offender in district court. Rather, he was tried in circuit court for being a third offender, a felony charge over which the circuit court has exclusive jurisdiction. MCL

257.625(6)(d); MCL 9.2325(6)(d); *People v Murphy*, 203 Mich App 738, 749; 513 NW2d 451 (1994). The prior offenses were merely considered as factors for purposes of sentencing. See *Eason*, *supra* at 247.

Finally, defendant contends that reversal is warranted on the basis of prosecutorial misconduct. Defendant alleges that the prosecutor made numerous prejudicial remarks during his closing and rebuttal argument. With two exceptions, however, defendant failed to cite the instance of misconduct which forms the basis of this challenge. A defendant may not leave it to this Court to search for a factual basis to sustain or reject his position. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). See also *People v Kean*, 204 Mich App 533, 536; 516 NW2d 128 (1994) (defendant waived review of the issue by failing to address it in his appellate brief). Thus, appellate review of these unspecified instances of alleged misconduct has been waived.

Defendant neither objected to the challenged remarks nor requested a curative instruction. Appellate review of allegedly improper remarks is generally precluded absent a timely objection by counsel unless a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Vaughn*, 186 Mich App 376, 384-385; 465 NW2d 365 (1990). In the instant case, any prejudice which may have resulted from the prosecutor's remarks could have been cured had defendant objected below. Accordingly, appellate review is precluded. *People v Austin*, 209 Mich App 564, 570; 531 NW2d 811 (1995).

Affirmed.

/s/ Richard Allen Griffin
/s/ Gary R. McDonald
/s/ Charles W. Johnson

[1] Sentencing occurred after the amendment of § 625 by 1991 PA 98, but before the amendments made by 1993 PA 359, 1994 PA 211, 1994 PA 448, and 1994 PA 449. See now MCL 257.625(7); MSA 9.2323(7).