STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID EARL WILDE,

Defendant-Appellant.

UNPUBLISHED
April 1, 1997

No. 191429
Grand Traverse Circuit
LC No. 95-006817-FH

Before: Hoekstra, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant appeals by right his convictions for operating a vehicle under the influence of alcohol (OUIL) third offense, MCL 257.625(7)(d); MSA 9.2325(7)(d); driving with a suspended license, MCL 257.904(1)(b); MSA 9.2604(1)(b), and habitual offender second, MCL 769.10; MSA 28.1082. Defendant was sentenced to four to seven and one-half years' imprisonment on the habitual offender second conviction and one year concurrent for driving with a suspended license. We affirm.

Defendant first argues that his trial counsel's representation was deficient, and that he was therefore denied effective assistance of counsel, in two respects. We disagree. First, defendant claims that his counsel failed to attempt to locate Michael Trapp, defendant's companion on the night he was arrested, to secure his testimony that allegedly would have supported defendant's assertion that he was not the driver of the car. Second, defendant claims that his trial counsel failed to request an adjournment to allow additional time to locate Trapp. Defendant cites *People v Tommolino*, 187 Mich App 14; 466 NW2d 315 (1991), as support for his assertion that his counsel's failings constituted deficient performance. However, while there may be a credible argument that defense counsel's performance was deficient, the record is devoid of any evidence that would support defendant's allegation that Trapp's testimony would have corroborated his allegation that he was not driving the car at the time he was arrested. Because defendant failed to raise this issue below, this Court will only consider defendant's claim to the extent that his counsel's mistakes are apparent from the record. *People v Johnson*, 174 Mich App 108, 113; 435 NW2d 465 (1989). The record does not support defendant's allegation and therefore there is no showing that defendant suffered prejudice. *Tommolino*,

supra, 148 Mich App 20. Without a showing of prejudice, defendant's ineffective assistance claim must fail. See *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant next argues that he was denied a unanimous verdict where the trial court instructed the jurors, pursuant to CJI 2d 15.6, that they could enter a general guilty verdict if some jurors believed defendant was operating the vehicle under the influence of alcohol and others believed he was operating the vehicle with an unlawful body alcohol content. MCL 257.625(1); MSA 9.2325(1) specifies two different theories of guilt. Subsection (a) indicates that § 625 is violated where a person operates a vehicle under the influence of alcohol. Subsection (b) indicates that § 625 is violated where a person operates a vehicle when their body alcohol content is equal to or greater than .10 percent. A prosecutor may not allege separate counts for violation of subsection (a) or (b) but must allege one count under § 625. *People v Nicolaides*, 148 Mich App 100, 103; 383 NW2d 620 (1985). When a statute lists alternative means of committing an offense which in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to these alternate theories. *People v Asevedo*, 217 Mich App 393; 397; 551 NW2d 478 (1996); *People v Johnson*, 187 Mich App 621, 629-630; 468 NW2d 307 (1991). See also *People v Fullwood*, 51 Mich App 476; 215 NW2d 594 (1974) (general verdict of guilty deprives a defendant of a unanimous verdict only when the offenses charged are separate and distinct in character, provable by substantially different evidence and punishable by different penalties). Therefore, the trial court did not err in instructing the jury.

Finally, defendant argues that his four- to seven-and-one-half-year sentence for OUIL third was disproportionate. We disagree. The trial court considered the circumstances surrounding the offense and the offender. The court noted that defendant had a history of drunk driving offenses occurring in 1979, 1982, 1987, two instances in 1989, 1990, and the instant offense in 1995. The court noted that defendant was incarcerated in 1990 for four months, released into a community resident placement program and then paroled for eighteen months. The court noted that defendant's habitual drunk driving was a danger to the public and his previous term of incarceration had not deterred him from drinking and driving again. The court opined that a longer prison term might force him to correct this trend and serve to protect the public. In light of defendant's extensive record of drunk driving, including the instance offense, defendant's sentence is not disproportionate and the trial court did not abuse its discretion in sentencing defendant. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Affirmed.

/s/ Joel P. Hoekstra
/s/ William B. Murphy
/s/ Michael R. Smolenski