# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL JOHN NERAD,

Defendant-Appellant.

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UNPUBLISHED
January 6, 1998

No. 199897
St. Joseph Circuit Court
LC No. 95-008142

Before: Corrigan, C.J., and Doctoroff and Fitzgerald, JJ.

PER CURIAM.

Defendant was charged with one count of operating a vehicle under the influence of intoxicating liquor (OUIL), MCL 257.625(1)(a); MSA 9.2325(1), and one count of operating a vehicle with unlawful bodily alcohol content (UBAC), MCL 257.625(1)(b); MSA 9.2325(1)(b). Defendant was convicted by a jury of UBAC, and was sentenced to six days in jail, $615 in fines and costs, and revocation of his driver's license.[1] Defendant's conviction was affirmed on appeal to the circuit court. Defendant now appeals by leave granted. We affirm.

The sole witness to testify was Terry Broker, a police officer with the Sturgis Police Department. Broker testified that on August 5, 1995, at approximately 2 a.m., he stopped defendant for twice crossing the center line of the roadway. Broker noticed that defendant's eyes were bloodshot, and Broker detected the odor of intoxicants. After defendant admitted that he had consumed four drinks, Broker directed defendant to perform some dexterity tests. Defendant passed the alphabet recital test, but failed the test for counting backward from eighty to sixty-five. Broker then requested defendant to count forward to five, then backward from five as he pointed consecutively to each finger on his hand. Defendant failed in his first attempt, but passed in his second and third attempts. Broker then directed defendant to perform a test that required defendant to stand in a comfortable position and then close his eyes and tilt his head back. Defendant swayed from front to back, which Broker interpreted to mean that defendant's equilibrium was affected. At that point, Broker placed defendant under arrest for OUIL.

Broker transported defendant to the police station, where defendant agreed to perform breath tests using the "breath data master." Broker is a class II operator for this machine and receiving training to operate the machine in May 1994. The machine tested to be in working order on August 4 and August 7, 1995, shortly before and after defendant's breath sample was collected. After waiting the required fifteen-minute observation period, Broker collected two breath samples from defendant. Broker described the test results as ".13 BAC content," and then misspoke and stated, "BAC Blood Alcohol Content." A "ticket" printed by the breathalyzer showed the test results and was introduced into evidence.[2]

I

Defendant argues that the trial court's use of a computer-generated list of jurors violates MCR 2.511 because the selection of jurors by this method is not random. We review the jury selection process for an abuse of discretion. *Willoughby v Lehbrass*, 150 Mich App 319, 331; 388 NW2d 688 (1986).

Defendant bases his argument on MCR 2.511(A)(2), which provides, "In an action that is to be tried before a jury, the names or corresponding numbers of the prospective jurors shall be deposited in a container, and the prospective jurors must be selected for examination by a random blind draw from the container."

After the jury was selected, but before they were sworn, defense counsel stated:

> Counsel would respectfully place an objection on the record under 2.511, the Michigan Court Rule regarding impaneling of the jury based on the manner in which the jury was selected in that it was selected in rank order by computer as opposed to being a random draw from a box as required by 2.511. [Tr, 26.]

This is the sum total of discussion on this issue. No offer of proof was made and no evidentiary hearing was held regarding the manner in which the computer-generated list was compiled or whether it was done so randomly, and the record fails to demonstrate any prejudice suffered by defendant as a result of the jury selection procedure. This Court's review is limited to the record on appeal, and therefore, allegations not supported by the record presented will not be considered. *Hawkins v Murpy*, 222 Mich App 664, 670; 565 NW2d 674 (1997). Moreover, defendant has failed to support his argument with any authority which supports the notion that the trial court's selection process violates MCR 2.511(A)(4), which provides in part that prospective jurors "may be selected by any other fair and impartial method directed by the court." An appellant may not merely announce his position and then leave to the appellate court the task of rationalizing the basis for his claim. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). On the record presented, defendant has failed to demonstrate that the trial court's method of jury selection was not fair and impartial.[3]

II

Defendant next claims that the trial court erred by denying his motion for directed verdict of both counts. Defendant's argument with respect to the OUIL count is moot because the jury acquitted defendant on that count. With regard to the UBAC count, defendant argues that there was not sufficient evidence that defendant was unable to drive normally. The UBAC statute provides, however, that a person shall not operate a vehicle if the person has an alcohol content exceeding certain levels in the person's blood, breath, or urine. MCL 257.625(1)(b); MSA 9.2325(1)(b). Abnormal driving is not an element of the offense.

III

Defendant next claims that the trial court erred when it instructed the jury regarding the alcohol content of defendant's breath and by admitting the breath test results. We disagree.

Before its amendment, [4] the UBAC statute provided for unlawful bodily alcohol content to be measured by blood and prohibited a person from driving if the person had "a blood alcohol content of 0.10% or more by weight of alcohol." As a result of the amendment, the UBAC statute explicitly provides for unlawful bodily alcohol content to be measured by the amount of alcohol in breath or urine as well as blood and prohibits a person from driving if the person has:

> an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine."

Standard jury instructions were prepared in this case based upon the pre-amendment statutory language.[5] Although the trial judge recognized that the statute had been amended, he opined that the new statutory language was "merely the scientific explanation by the Legislature" of their definition of unlawful bodily alcohol level." The court phrased a portion of its instructions to the jury in terms of whether "defendant operated the vehicle with a bodily alcohol content of .10 percent or more," without further specifying whether that was measured by blood, breath, or urine. Defendant objected to the instruction because it did not inform the jury that it was to convict if it found .10 "percent [sic] grams or more per 210 liters of breath" Defense counsel also objected to the introduction of the "ticket" showing the breathalyzer test results. Defense counsel declined to voir dire the officer at the time the ticket was admitted.

Defendant correctly notes that the jury instruction did not incorporate the statutory language ".10 grams or more per 210 liters of breath." We are cognizant of the fact that the instruction may have been misleading if, in fact, a .13 breathalyzer reading does not correlate to at least .10 grams of alcohol for 210 liters of breath. However, we are confident that such a correlation exists, since the Legislature presumably used a level of alcohol in a person's breath equal to a .10 percent blood alcohol level. In other words, whether measured in terms of blood, breath, or urine, the culpable level is uniform -- .10 percent. Hence, we conclude that the instruction as given adequately protected defendant's rights, *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993), and that the jury reached the right result in light of the evidence presented. *People v Vaughn*, 447 Mich 217, 226; 542 NW2d 217 (1994).

With regard to admission of the ticket, defendant's objection to the admission of the ticket into evidence was vague (defense counsel objected to admission of the ticket on the basis of "general foundation"). A vague objection is not sufficient to preserve an evidentiary issue for appeal. *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). Nonetheless, even assuming that the admission of the ticket into evidence was error, that error was harmless because the jury was already aware of the test results through Broker's unobjected-to testimony revealing the test results.

IV

Defendant next argues that the court's final instruction to the jury was tantamount to directing the jury to return a guilty verdict. We have read the court's final instruction to the jury and find it to be a neutral and an evenhanded instruction. We reject defendant's argument, based on *People v Cole*, 382 Mich 695, 718; 172 NW2d 354 (1969), because we see no similarity between this instruction and the instruction which was the subject of *Cole*.

V

Defendant next argues that the trial court erred by refusing to allow the videotape depicting defendant's driving and his performance of dexterity tests to be taken into the jury room. We disagree. Although defendant showed the tape to the jury during cross-examination of the officer, defendant never moved for admission of the tape into evidence. *People v Allen*, 94 Mich App 539, 543-544; 288 NW2d 451 (1980).

VI

Defendant next claims that the prosecutor, in her closing argument, improperly bolstered Broker's testimony. We disagree. The rule against bolstering prohibits a prosecutor from conveying a message to the jury that the prosecutor has some special knowledge or facts indicating the witness' truthfulness. *People v Bahoda*, 448 Mich 261, 277; 531 NW2d 659 (1995). The rule does not prohibit a prosecutor from informing the jury that an officer's conclusions and opinions regarding a defendant's performance of dexterity tests were based on that officer's observations experience. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

VII

Defendant next argues that the trial court erred when it permitted the prosecutor to question Broker on redirect examination about prior contacts with defendant because this was a new area of inquiry not broached in either direct- or cross-examination. The admission of testimony on rebuttal that should have been offered on direct examination is within the discretion of the trial court unless such discretion is abused to the prejudice of the defendant. *People v Bettistea*, 173 Mich App 106, 126; 434 NW2d 138 (1988). While generally it is improper to allow redirect examination to enter a new area of inquiry, where the testimony in question merely expands upon or supports previously admitted testimony, there is no prejudice. *People v* Smith, 15 Mich App 173, 176; 166 NW2d 504 (1968).

Broker testified on direct examination that when he stopped defendant he was surprised because he knew defendant and did not recognize the car that he was driving. Thus, the officer had already testified essentially that he had had previous contact with defendant. Because the testimony on redirect comparing defendant's demeanor on the night of his arrest with that on other occasions merely expanded on the officer's direct testimony, defendant suffered no prejudice as a result of the redirect examination. *Id*.

We also reject as unsupported defendant's claim that the prosecutor was obliged to elicit the circumstances of these prior contacts. An appellant may not merely announce his position, leaving to this Court the task of supporting that position. *Mitcham, supra* at 203. For the same reason we reject defendant's claim that expert testimony was necessary. We also reject defendant's comparison of this case to *People v LaPorte*, 103 Mich App 444; 303 NW2d 222 (1981), because here the officer did not specify that he knew defendant from prior arrests.

VIII

Finally, defendant claims that he was unfairly prejudiced by cumulative error. However, there can be no finding of cumulative prejudicial effect where no errors have been demonstrated. *People v Anderson*, 166 Mich App 455, 473; 421 NW2d 200 (1988).

Affirmed.

/s/ Maura D. Corrigan
/s/ Martin M. Doctoroff
/s/ E. Thomas Fitzgerald

[1] The circuit court stayed defendant's sentence pending appeal.

[2] At trial, the jury was shown the video tape of defendant's driving, the traffic stop, and defendant's performance of the dexterity tests that was produced by a video camera in Broker's patrol car.

[3] We urge the Supreme Court to amend the "name in a container" method of jury selection set forth in MCR 2.511(A)(2) in favor of a more technologically advanced method of jury selection.

[4] 1994 PA 449, effective May 1, 1995. Before the amendment, the statute was referred to as "UBAL," which refers to "unlawful bodily alcohol level."

[5] At the time of trial, instructions reflecting the new language had not been distributed to the trial court.