

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOEL PHILLIP WARNEMUENDE,

Defendant-Appellant.

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UNPUBLISHED

April 18, 2006

No. 259165

Oakland Circuit Court

LC No. 2004-195372-FH

Before: Whte, P.J., Whitbeck, C.J., and Davis, J.

PER CURIAM.

Defendant was charged with operating a motor vehicle while intoxicated (OUIL), third offense, MCL 257.625(1) and (9), and operating a vehicle in violation of a driver's license restriction, MCL 257.312. Following a jury trial, he was convicted of the lesser offense of operating a motor vehicle while visibly impaired (OWI), MCL 257.625(3). He pleaded guilty of operating a vehicle in violation of a license restriction. He appeals his OWI conviction as of right. We affirm.

Defendant first argues that the trial court improperly denied his motions for a directed verdict. We disagree. We review the record de novo to determine whether the evidence, when viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

MCL 257.625(1) forbids operation of a vehicle on a highway while the operator is intoxicated. The statute defines "operating while intoxicated" either as "under the influence of alcoholic liquor" or as having an alcohol content of at least .08 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine. In the context of an OUIL charge, the phrase "under the influence" means that the defendant's ability to drive is substantially and materially affected by consumption of intoxicating liquor or that the defendant is substantially deprived of his normal control or clarity of mind at the time he operates a vehicle. *Oxendine v Secretary of State*, 237 Mich App 346, 353-354; 602 NW2d 847 (1999)

Officer Michael Prough of the Novi Police Department observed defendant driving at approximately 2:00 a.m. without his headlights, make an abrupt lane change, drive over the gore of an entrance ramp, and cut in front of another vehicle attempting to enter the freeway. Defendant failed several roadside sobriety evaluations. Officer Prough testified that he smelled

intoxicants when he conversed with defendant and that defendant admitted to consuming alcoholic beverages. A subsequent breathalyzer test revealed a blood alcohol content of .18 grams. Defendant argues that the breathalyzer result was suspect because it was taken more than one hour after he was observed driving and that the roadside sobriety tests were not substantiated or validated, but it is improper for a trial court to weigh the evidence or determine credibility in resolving a motion for a directed verdict. *People v Peña*, 224 Mich App 650, 659-660; 569 NW2d 871 (1997). There was ample evidence from which a rational trier of fact could find the essential elements of OUIL, under any theory, proven beyond a reasonable doubt.

After the jury retired for deliberation, defendant renewed his motion for a directed verdict on the ground that the prosecution failed to establish venue. “Venue is part of every criminal case and must be proved by the prosecutor beyond a reasonable doubt.” *People v Fisher*, 220 Mich App 133, 145; 559 NW2d 318 (1996). However, while venue is a necessary portion of the prosecution’s case, it is not an element of the crime. *People v Swift*, 188 Mich App 619, 620; 470 NW2d 491 (1991). This Court has previously held that, “[n]o error lies in the prosecution’s failure to affirmatively prove venue in view of defendant’s failure to object.” *People v Carey*, 36 Mich App 640, 641; 194 NW2d 93 (1971). MCL 767.45(1)(c) specifically provides that “[n]o verdict shall be set aside or a new trial granted by reason of failure to prove that the offense was committed in the county or within the jurisdiction of the court unless the accused raises the issue before the case is submitted to the jury.” Defendant only raised the issue after the case was submitted to the jury, and in any event there was evidence that the crime occurred in Novi, Michigan, which is located in Oakland County. Under the circumstances, defendant was not entitled to a directed verdict based on insufficient evidence of venue.

Defendant next argues that the trial court erred by instructing the jury on the lesser offense of driving while impaired (OWI), MCL 257.625(3), because he did not request it and because the prosecutor argued to the jury against compromising on the verdict. We disagree. Claims of instructional error are reviewed de novo. *People v Apgar*, 264 Mich App 321, 326; 690 NW2d 312 (2004). A prosecutor is entitled to request lesser included offense instructions, *People v Torres (On Remand)*, 222 Mich App 411, 416; 564 NW2d 149 (1997), and necessarily included lesser offense instructions properly may be given upon request. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). OWI is a necessarily included lesser offense of OUIL. *Oxendine, supra* at 354. Moreover, MCL 257.625(3) provides that “[i]f a person is charged with violating subsection (1) [MCL 257.625(1)], a finding of guilt under this subsection may be rendered.” Under the circumstances, the trial court did not err by instructing the jury on the requested lesser OWI offense.

Finally, defendant argues that the prosecutor engaged in misconduct during closing argument when he made impermissible references to defendant’s silence and failure to testify. We disagree. Unpreserved allegations of prosecutorial misconduct are reviewed for plain error affecting the defendant’s substantial rights. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

The challenged comments were made during the prosecutor’s rebuttal argument, so they must be considered in light of defense counsel’s arguments. *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993). “[A]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel’s argument.” *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

In his closing argument, defense counsel pondered why Officer Prough disbelieved defendant's assertion that he only consumed two beers when defendant was "honest and believable on everything else." In response, the prosecutor argued:

Now, what he [defense counsel] wants to say is my client's been honest. He's not testified. There's no honesty here. Does it make sense that a person is going to say I had ten drinks? No. You're going to minimize when the police are there at your door. Two drinks, I had two drinks. Does it make sense he had two drinks with a .18? No. We know that by his own expert, Mr. - - Dr. Simpson. That makes no sense.

The prosecutor's argument, when viewed in context, was a proper response to defense counsel's attempt to vouch for defendant's credibility regarding the number of alcoholic beverages he had consumed. Moreover, a timely instruction could have cured any prejudice, and in fact, the trial court instructed the jury that the lawyers' statements and arguments were not evidence that could be considered in reaching a verdict. We find no plain error requiring reversal.

We likewise do not find the second challenged comment improper. Defense counsel cross-examined Officer Prough about defendant's breathalyzer test result and established that two samples are usually taken. Officer Prough indicated that defendant refused to provide a second sample. Defense counsel then unsuccessfully attempted to establish that defendant's single .18 result could therefore not be validated. Defense counsel later elicited from defendant's expert witness that a second, confirming test validates and demonstrates the reliability of the first test. During closing argument, defense counsel argued that the .18 breathalyzer result was not reliable, in relevant part, because there was no second sample or confirming test. In rebuttal, the prosecutor addressed defendant's argument along with defendant's related argument that Officer Prough had rushed to judgment about defendant's guilt. The prosecutor argued:

When they give the Defendant twenty minutes to make a phone call, where's the clock ticking? They're not rushing to judgment.

Then he gets on there and makes one blow and they want to hide behind the second test not being taken. When you look at the evidence ticket there's absolutely nothing on there to say that that test was invalid. .18, we're not even talking about being close.

Viewed in context, the challenged remark was not an impermissible attack on defendant's right to remain silent. It was a fair and proper response to defense counsel's argument regarding the validity of the breathalyzer result and was based on evidence elicited by defendant during trial. *Vaughn, supra*. See also *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003) ("a prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial"). There was no plain error requiring reversal.

Affirmed.

/s/ Helene N. White  
/s/ William C. Whitbeck  
/s/ Alton T. Davis