

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARJORIE LYNN DEHNER,

Defendant-Appellant.

UNPUBLISHED

April 26, 2011

No. 296075

St. Clair Circuit Court

LC No. 09-000560-FH

Before: BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Defendant Marjorie Lynn Dehner was convicted by jury of one count of operating a motor vehicle while intoxicated (OWI), third offense, MCL 257.625. She was sentenced to 90 days in jail and two years' probation. She now appeals her conviction and sentence as of right. We affirm.

I. FACTUAL BACKGROUND

On the evening of November 15, 2008, police officers Paul Smith and William Tackonis were on road patrol together. At around 10:00 or 10:30 p.m., they observed a car stopped beside the road on the grass. It appeared that the car had struck a fence, a metal pole, and a sign. The rear end of the car was buried in mud. Officer Smith believed, based on the ruts in the mud, that the car had been rocking back and forth. It also appeared that the tires had been spinning. There were two people inside the car, defendant and her brother Kenneth Coe. When the officers approached the car, they saw keys in the ignition. Officer Smith testified that although he did not specifically recall the car running, he believed that it was. Officer Tackonis recalled the car running. As defendant got out of the driver's seat, she stumbled and fell backwards. Officer Smith asked defendant if she had been driving, and she said that she had been. She appeared highly intoxicated. After again confirming with defendant that she had been driving the car, Officer Smith administered a series of sobriety tests. He ultimately determined that defendant's blood alcohol level was three times the legal limit. After arresting defendant for drunk driving, the officers had Coe get out of the passenger seat of the car. He needed assistance because of a medical condition. The officers questioned Coe, and he never indicated that he had been driving the car. At trial, the prosecution played a video recording of the officers' interaction with defendant and Coe, which had been recorded by a camera mounted to their police car.

On behalf of defendant, Steven Warnick testified that he is an acquaintance of defendant and Coe, and that on the night of the accident, he spent time with them at a bar. Over the course of the evening, defendant became intoxicated. Although Warnick was concerned about Coe driving because of his medical condition, defendant was too intoxicated to drive. Warnick helped defendant to her car and she got into the passenger seat. Coe got into the driver's seat. When Warnick pulled out of the parking lot, the headlights on defendant's car were on, and he believed the car pulled out behind him, although he was not certain that it did. When Warnick arrived home, defendant and Coe were not behind him, and he assumed they had continued driving to their own house, rather than stopping at his house as they had planned. The next morning, Warnick learned of the accident, which took place just down the street from his driveway, and of defendant's arrest. Warnick testified that although he was aware defendant had been arrested for drunk driving, he never went to the police to report that she was not driving the car when he left the bar parking lot.

Coe testified that he has several health problems and that defendant helps to care for him. He had not driven in 12 to 15 years before the night of the accident and did not have a driver's license. That night, defendant drove them to the bar. When it was time for them to leave, Warnick helped defendant to the car because she was intoxicated, and she got into the passenger seat. Coe got into the driver's seat, started the car, followed Warnick out of the parking lot, and then lost sight of him. Coe continued driving toward Warnick's house, and then the car slid off of the road and got stuck in the mud. He woke defendant up and had her push the car from behind while he "gave it gas." When the car would not move, defendant got into the driver's seat, and Coe looked for something to put under the tire. Coe eventually got into the passenger seat. Thereafter, the police arrived on the scene. Defendant told Coe not to say anything to the police, so he waited in the car while she spoke to them. According to Coe, defendant never drove the car, and when the police arrived, the car was not running and the keys were not in the ignition. He never told the police that he had been driving. He kept quiet because defendant had instructed him to do so, and he believed that she was trying to protect him.

Defendant testified that she protected Coe when they were children and that she still helps to care for him. On the night of the accident, Warnick put her in her car, and she fell asleep. She did not recall anything more happening until Coe woke her up. Defendant attempted to push the car out of the mud while Coe pressed on the gas. When the car did not move, Coe got out of the car and she sat in the driver's seat. The car was not running and the keys were not in the ignition. When the police arrived, defendant told Coe "to keep his mouth shut" because she knew that he did not have a driver's license, she was afraid he would be sent to jail, and she wanted to protect him. Neither defendant nor her husband ever told the police that she had not been driving.

Defendant was convicted of OWI, third offense. She subsequently moved for a new trial and to stay sentencing. The trial court denied defendant's motion to stay and sentenced her as indicated. Thereafter, defendant moved to correct her sentence. At a December 28, 2009, hearing, the trial court denied defendant's motion for a new trial and scheduled a supplemental hearing for January 11, 2010, to allow the prosecution to present proofs in support of defendant's enhanced sentence. At the January 11, hearing, the trial court denied defendant's motion to correct her sentence.

II. DEFENDANT’S MOTION FOR A NEW TRIAL

Defendant first argues that the trial court improperly denied her motion for a new trial. We disagree.

“On the defendant’s motion, the [trial] court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice.” MCR 6.431(B). This Court reviews a trial court’s grant or denial of a new trial for an abuse of discretion. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). “A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes.” *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

A. THE PROSECUTOR’S ALLEGED MISSTATEMENT OF THE LAW

Defendant argues that she is entitled to a new trial because the prosecutor misstated the law with regard to the elements of OWI and the jury relied on the misstatement in convicting her of the offense.

To convict a defendant of OWI, the prosecutor must prove beyond a reasonable doubt that the defendant was: (1) operating a vehicle, (2) on a highway or “other place open to the general public or generally accessible to motor vehicles,” (3) while intoxicated. MCL 257.625(1). MCL 257.35a defines “operate” and “operating” as “being in actual physical control of a vehicle” MCL 257.36 defines “operator” as “every person, other than a chauffeur, who is in actual physical control of a motor vehicle upon a highway.”

In addressing the elements of OWI during her closing argument, the prosecutor stated:

What I have to prove to you first of all, is that the Defendant on the date in question was operating a motor vehicle. Now this means either driving, which is what we all think of as going down the road within the lanes, steering, making turns, or having actual physical control of the vehicle. What that takes into account are areas like parking lots where you’re not actually moving, but you may have your car in gear, your car turned on. Any time that you have actual physical control over that vehicle where you can set it into motion, that’s what we’re talking about when we say operating while intoxicated.

Defense counsel immediately objected to the statements. The trial court responded: “I’ll give the instruction as it relates to what the law is on the drunk driving that this jury is to consider, and if any attorney tells you what they think the law is, it’s contrary to what I say, follow what I say.” The trial court later instructed the jury on the elements of OWI in accordance with CJI2d 15.2, stating, in relevant part:

To prove that the Defendant operated while intoxicated, the Prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the Defendant was operating a motor vehicle on or about November 15th of 2008. Operating means driving or having actual physical control of the vehicle.

After the court's instructions, defense counsel again objected to the prosecutor's statements and renewed his request for a curative instruction. The court stated that the prosecutor had said nothing improper and, even if she had, the standard jury instructions given to the jury were sufficient to cure any error.

In her motion for a new trial, defendant renewed her argument that the prosecutor misstated the law in regard to the "operation" element of OWI. In denying defendant's motion, the trial court again stated that it had properly instructed the jury on the elements of the offense and held that there was no miscarriage of justice warranting a new trial.

Defendant preserved her claim of prosecutorial misconduct by making a contemporaneous objection and requesting a curative instruction. See *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). To the extent that a preserved claim of prosecutorial misconduct is a constitutional issue, it is reviewed de novo, but a trial court's factual findings are reviewed for clear error. *Id.* "[I]n order for prosecutorial misconduct to constitute constitutional error, the misconduct must have so infected the trial with unfairness as to make the conviction a deprivation of liberty without due process of law." *People v Blackmon*, 280 Mich App 253, 269; 761 NW2d 172 (2008) (emphasis omitted). Nonconstitutional error, even if preserved, is not a ground for reversal unless, after an examination of the entire case, it affirmatively appears that it is more probable than not that the error was outcome determinative. *Id.* at 270. "A prosecutor's clear misstatement of the law that remains uncorrected may deprive a defendant of a fair trial." *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002).

On appeal, defendant argues that the prosecutor blatantly and intentionally misstated the law in explaining to the jury that "[defendant] was operating the vehicle if she was behind the wheel." But the prosecutor did not state that merely sitting behind the wheel of a vehicle was sufficient to establish the "operation" element of OWI. Rather, in an attempt to explain the phrase "actual physical control of [a] vehicle," as opposed to driving a vehicle, the prosecutor essentially stated that it was sufficient for the vehicle to be running and in gear, with the person positioned to set the vehicle in motion. In *People v Wood*, 450 Mich 399, 404-405; 538 NW2d 351 (1995), our Supreme Court held that "[o]nce a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk." In that case, police officers found the defendant unconscious in his van at a drive-through window. *Id.* at 402. The defendant was slumped forward, with his head resting on the steering wheel. *Id.* The van's engine was running, and the automatic transmission was in drive. *Id.* The defendant's foot, which was resting on the brake pedal, kept the van from moving. *Id.* The Court held that the defendant continued to operate the van because "[w]ere [the defendant], who had then become unconscious, to have slipped to the side, his foot might have moved off the brake, putting the vehicle in motion," thereby posing a safety risk to nearby persons and objects. *Id.* at 405. Thus, a person may have actual physical control over a vehicle that is stationary, but is running and in gear, and where the person leaves the vehicle in a position posing a significant

risk of causing a collision. Accordingly, we find that the prosecutor's statements in this case did not constitute a clear misstatement of the law.

Furthermore, even if the prosecutor's statements could be considered erroneous, any error was harmless because the trial court correctly instructed the jury regarding the elements of OWI. See *Grayer*, 252 Mich App at 358-359 (stating that "if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can potentially be cured"). The court instructed the jury in accordance with the standard jury instructions for the offense, stating that "[o]perating means driving or having actual physical control of the vehicle." The court also instructed the jury several times that it must follow the law as stated by the court and to disregard any contrary statements of law by the attorneys. These instructions were sufficient to cure any erroneous statement that the prosecutor may have made. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors," *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003), and defendant has not presented any proof that the jury relied on anything but the court's instructions.¹ She has not been deprived of a fair trial.

B. THE PROSECUTOR'S ALLEGED DISPARAGEMENT OF DEFENSE COUNSEL

Defendant further argues that she is entitled to a new trial on the basis of the prosecutor's disparagement of defense counsel.

On appeal, defendant challenges numerous statements made by the prosecutor during her closing argument and rebuttal. These are the statements cited by defendant, in context:

The law prohibits people from being in actual physical control of a vehicle. Clearly she was. She's caught and she admitted it on tape.

So when you're in the position of the Defendant, what do you do at this point? You wake up the next morning, probably with a pretty terrible hangover, and you realize you've just made yourself quite a mess. So what do you do? You get together with the people who can help you come up with a way to work backwards, to explain away the things you can't deny. Like the two times she's admitted on the video that she was operating that vehicle.

Now, the next morning instead of going and telling the police department that she had been untruthful, or instead of taking her brother to the police department, they don't do any of that. They figure out and they do what people

¹ At the hearing on defendant's motion for a new trial, defense counsel stated that he spoke with members of the jury after the trial and determined that the jury relied upon the prosecutor's alleged misstatement of the law, rather than the trial court's instructions, in reaching its verdict. Defense counsel indicated that he was in the process of obtaining affidavits from those jury members. But defendant never submitted such affidavits or any other proof of defense counsel's assertions to the trial court, nor has she on appeal.

who have had a night of drinking and bad decision-making always do, they get up in the morning and they do damage control.

That's exactly what this entire case has been—presented by the Defense has been to you. . . .

* * *

Don't be distracted by the fact that there are inconsistencies. Don't be distracted by the fact that a defense has been presented here. That was the goal all along. That's the damage control.

If you buy into this defense, then you find reasonable doubt. But there is no reasonable doubt here. You've seen the video and you can assess whether or not this defense of I was just covering for my brother makes any sense to you, and I submit to you that it doesn't. . . .

* * *

Defense counsel talks about number of witnesses and says that the score here is three to one? We don't keep score with number of witnesses. Because things happen without people seeing them. It doesn't mean that a crime didn't occur. And I guess I would submit to you that it takes a whole lot more when it comes to numbers of people to manufacture a story, to cover up a bad decision, to do damage control the day after this happens than it does to testify as to what the evidence really shows.

Defense counsel said she [the prosecutor] can pick at our story, and then quickly corrected himself and said: Or our testimony. And I think that's the most telling thing we've heard during this trial. She can pick at our story. Because that's what it is, it's a story.

If you think that it is reasonable that this woman who is steps away from being a nurse would go through a series of field sobriety tests, would be arrested, would be facing criminal conviction, would be incurring the expenses of lawyers, would be sitting here going through this trial just to spare her brother, you need to think twice about how reasonable that is. . . .

But the reason I spent so much time talking about the Defense case is because they've brought this story together and you have to decide whether or not you buy it.

When you're deciding whether or not you buy the story, the Defense wants you to focus on the fact that they've presented three witnesses who all told you that this was the driver. Not her. But think about that. Who told you? Who told you that? The Defendant told you that? . . . Her brother told you that? . . .

* * *

Does it make any sense . . . ? Doesn't make any sense. And if she made that error in judgment to admit to something she didn't do, she would have been in there with her brother, with her husband, with everybody she could find to try and straighten it out. That didn't happen. **She hired a lawyer, they made up a story.** [Emphasis added by defendant.]

Defense counsel did not object to the prosecutor's statements. In her motion for a new trial, however, defendant argued that the statements constituted improper disparagement of defense counsel and denied her a fair trial, citing *People v Burton*, unpublished opinion per curiam of the Court of Appeals, issued January 20, 2004 (Docket Nos. 230894, 239185, 245627). In denying the motion, the trial court simply stated that it disagreed with defendant on this issue.

Prosecutorial misconduct claims are reviewed on a case-by-case basis, examining remarks in context to determine if the defendant received a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Because defendant failed to object to the prosecutor's statements at trial, she must establish plain error affecting her substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Once this is established, a new trial may be granted if the error resulted in the conviction of an actually innocent defendant or "seriously affected the fairness, integrity or public reputation of judicial proceedings independent of defendant's innocence." *Id.* at 448-449, citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

When a prosecutor interjects issues beyond the guilt or innocence of the accused at trial, the defendant's opportunity for a fair trial may be jeopardized. See *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). Therefore, a prosecutor may not personally attack defense counsel or suggest in closing argument that defense counsel intentionally attempted to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001); *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). However, otherwise improper remarks may not amount to error requiring reversal if the remarks are responsive to the defense counsel's argument. *Kennebrew*, 220 Mich App at 608. A prosecutor may comment on the weakness of a defense theory advanced at trial and the failure to offer evidence in support of a defense theory. *People v Fields*, 450 Mich 94, 115-116; 538 NW2d 356 (1995). A prosecutor may also argue from the facts in evidence that the defendant or another witness is not worthy of belief. See *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007).

Defendant compares this case to *Burton*, wherein this Court held that the prosecutor "personally and deliberately attacked defense counsel's intelligence," not just his arguments, and asserted that defense counsel "should not be listened to because he had to mislead the jury since he did not believe his own client and knew he was guilty." *Burton*, unpub op at 5. In light of the prosecutor's statements, this Court affirmed the trial court's decision to award the defendant a new trial. *Id.*

It must be noted that *Burton* is unpublished and, therefore, not precedentially binding on this Court. See MCR 7.215(C)(1). Moreover, the facts in *Burton* are materially distinguishable from those in this case. In *Burton*, the prosecutor's statements were not responsive to any defense arguments and he made blatant, personal attacks on defense counsel; whereas, in this

case, the prosecutor's statements were not directed at defense counsel personally and were responsive to defense counsel's statements and witness testimony. At least twice during his closing argument, defense counsel referenced defendant's "story."² The prosecutor's statements during her rebuttal were responsive to those references. A prosecutor is not limited to the blandest of all possible terms during closing arguments, see *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996), and in this case, the prosecutor, in her rebuttal, played up the theme of "story telling" first referenced by defense counsel. But, more than that, the prosecutor's statements during her closing and rebuttal arguments were responsive to the defense witnesses' testimony, particularly defendant's. All three defense witnesses testified that although they were aware Coe had been driving the car, and not defendant, they never told the police. Coe testified that he kept silent because defendant told him to do so. Defendant testified that she told Coe to "keep his mouth shut" when the police arrived because he had been driving without a license and she wanted to protect him. During cross-examination, she testified:

Q. . . . And at what point did you decide that it was time for your brother not to keep his mouth shut?

² Defense counsel stated, during closing argument:

What did she [the prosecutor] do in her closing? She didn't spend a whole lot of time talking about their evidence because they don't have any. She spent a lot of time trying to say, well, I don't think you should rely on their witnesses; there's a little inconsistency here, there's a little inconsistency there.

Ladies and gentlemen, be wary of stories with no inconsistencies. Those are rehearsed. There's always going to be events that occurred a year ago, it's like deviations in a story, but you know what, this story does make sense. . . .

* * *

Ladies and gentlemen, if you're keeping score at home, the score here is three to nothing. There were three Defense witnesses, eyewitnesses who testified that [defendant] was not driving

They have the burden of proof. We do not. So she can pick at our story—or our testimony, but it doesn't get her anywhere in terms of where she's got to go. . . .

* * *

Ladies and gentlemen, this is extreme doubt. This is elephant-sized giant doubt here. There are two completely plausible explanations for what occurred that night

A. When my husband and I talked about it the next day and decided to get an attorney.

Q. That was when you realized you were going to have some consequences for this incident, wasn't it?

A. That's when I realized that because of my actions it had got blown out of proportion.

Q. What was blown out of proportion?

A. If I had of just [let Coe] take the, the fine or the driving without, we wouldn't be here.

* * *

Q. Okay. Well, did you take your brother to the police department to make a statement about what actually happened?

A. Ma'am, I was—I got me a lawyer. That's what I knew, I knew to do.

Officers Smith and Tackonis testified that when they approached defendant's car, she got out of the driver's seat and said that she had been driving. Before taking the sobriety tests, defendant again stated that she had been driving. The video recording of the incident also established that defendant admitted to driving. Further, all three defense witnesses testified that they never told the police Coe had actually been driving, even after defendant's arrest and after they became aware Coe would not go to jail for driving without a license. In light of this evidence, the prosecutor properly argued that the defense witnesses' version of the events was not credible. See *Dobek*, 274 Mich App at 67. The prosecutor pointed out that according to defendant's testimony, rather than telling the police the truth about who was driving the car, and having Coe and Warnick do the same, defendant chose to hire an attorney to represent her. The prosecutor argued that defendant hired an attorney and then, along with Coe and possibly Warnick, fabricated a story about what occurred the night of the accident in order to explain her video-recorded admissions to the police. Considering the prosecutor's statements in context, it does not appear that she was suggesting defense counsel had intentionally misled the jury. Thus, we find that the prosecutor's statements were not improper attacks on defense counsel, but were properly responsive to the testimony and arguments presented by the defense. See *Fields*, 450 Mich at 115-116; *Kennebrew*, 220 Mich App at 608. There was no plain error.

The trial court did not abuse its discretion in denying defendant's motion for a new trial.

III. DEFENDANT'S MOTION TO CORRECT HER SENTENCE

Next, defendant argues that the trial court improperly denied her motion to correct her sentence. We disagree.

Defendant was convicted of and sentenced for OWI, third offense, based on two prior, out-of-state convictions. Defendant's presentence investigation report (PSIR) states that she

pleaded nolo contendere to driving under the influence of alcohol (DUI) in Georgia in 1987 and pleaded guilty to DUI in Alabama in 2000. The information in this case lists the same convictions.³ At sentencing, defense counsel stated that he never received certified records of those convictions from the prosecution and asserted that there was also no proof that the DUI laws of Georgia and Alabama were substantially similar to Michigan's laws at the time of the convictions. The trial court stated that defendant had admitted at trial, after the jury rendered its verdict, that she had been convicted of those two prior offenses. Defense counsel said he had no recollection of such an admission. Nonetheless, the court stated that it was satisfied defendant had admitted the convictions and that the sentence enhancement was, therefore, appropriate.

Thereafter, defendant filed a motion to correct her sentence, arguing that she never admitted to the prior convictions and that the prosecution had presented no basis for the enhanced sentence. At the December 28, 2009, motion hearing, the trial court acknowledged that defendant had not admitted the prior convictions at trial and that the court had mistakenly believed otherwise. The court granted the prosecution two weeks to prepare proofs in support of defendant's enhanced sentence and scheduled a supplemental hearing for presentation of those proofs. Defendant objected to the "prosecution having the opportunity to present new proofs." Before the hearing, the prosecution filed a memorandum arguing that defendant's PSIR was sufficient evidence of her prior convictions. The prosecution attached copies of Georgia and Alabama's current DUI laws to the memorandum. Defendant filed a written objection to the supplemental proceedings on the morning of the January 11, 2010, hearing, arguing that the prosecution should not be permitted to present new proofs. At the hearing, the prosecution relied on defendant's PSIR as proof of her prior convictions, but also presented a certified letter and judgment issued by an Alabama district court judge evidencing defendant's guilty plea in 2000.⁴ The trial court held that defendant's PSIR and the statutory material presented by the prosecution were sufficient under MCL 257.625 to support defendant's sentence enhancement. Accordingly, the court denied defendant's motion to correct her sentence.

On appeal, defendant argues that the trial court abused its discretion in denying her motion because it was improper for the prosecution to be permitted the opportunity to supplement the record after sentencing, and even when given the opportunity to present supplemental proofs, the prosecution failed to support the enhanced sentence. A trial court's ruling on a motion for resentencing is reviewed for an abuse of discretion. *People v Puckett*, 178 Mich App 224, 226-227; 443 NW2d 470 (1989). Questions involving the interpretation or application of a statute are reviewed de novo as questions of law. *People v Martin*, 271 Mich App 280, 286-287; 721 NW2d 815 (2006).

³ We note that the PSIR lists a 1986 conviction in Georgia and a 2000 conviction in "Russell County," without referencing the state where Russell County is located. But the information stated, and the prosecution later established with a certified letter and judgment, that the conviction was in Russell County, Alabama.

⁴ The prosecution indicated that it was presenting the certified record to clarify in which state Russell County was located.

MCL 257.625 provides, in relevant part:

(9) If a person is convicted of violating subsection (1) or (8), all of the following apply:

* * *

(c) If the violation occurs after 2 or more prior convictions, regardless of the number of years that have elapsed since any prior conviction, the person is guilty of a felony and shall be sentenced to pay a fine of not less than \$500.00 or more than \$5,000.00 and to either of the following:

(i) Imprisonment under the jurisdiction of the department of corrections for not less than 1 year or more than 5 years.

(ii) Probation with imprisonment in the county jail for not less than 30 days or more than 1 year and community service for not less than 60 days or more than 180 days. Not less than 48 hours of the imprisonment imposed under this subparagraph shall be served consecutively.

* * *

(15) If the prosecuting attorney intends to seek an enhanced sentence under this section or a sanction under section 625n based upon the defendant having 1 or more prior convictions, the prosecuting attorney shall include on the complaint and information, or an amended complaint and information, filed in district court, circuit court, municipal court, or family division of circuit court, a statement listing the defendant's prior convictions.

* * *

(17) A prior conviction shall be established at sentencing by 1 or more of the following:

(a) A copy of a judgment of conviction.

(b) An abstract of conviction.

(c) A transcript of a prior trial or a plea-taking or sentencing proceeding.

(d) A copy of a court register of actions.

(e) A copy of the defendant's driving record.

(f) Information contained in a presentence report.

(g) An admission by the defendant.

* * *

(25) Subject to subsection (27), as used in this section, “prior conviction” means a conviction for any of the following, whether under a law of this state, a local ordinance substantially corresponding to a law of this state, a law of the United States substantially corresponding to a law of this state, or a law of another state substantially corresponding to a law of this state:

(a) Except as provided in subsection (26), a violation or attempted violation of any of the following:

(i) This section

The statute provides that if a defendant has two prior convictions, the prosecution may seek an enhanced sentence. MCL 257.625(9)(c). A prior conviction includes a conviction under “a law of another state substantially corresponding to a law of this state.” MCL 257.625(25). Prior convictions “shall be established at sentencing” by one of several means, including information contained in a PSIR. MCL 257.625(17)(f).

As indicated, both the information and defendant’s PSIR referenced her DUI convictions in Georgia in 1987 and in Alabama in 2000. In imposing defendant’s enhanced sentence, the trial court did not rely on the information in her PSIR. Neither the court nor the parties referenced the PSIR at sentencing. Instead, the court mistakenly believed that defendant had admitted to the prior convictions, which the court later acknowledged was an error. MCL 257.625(17) provides that prior convictions must be established at sentencing. But, given the trial court’s confusion on the issue, it was not improper for the court to hold additional hearings to clarify what proofs the prosecution was presenting in support of the enhanced sentence.

In her motion for resentencing and on appeal, defendant argues that the prosecution never presented any proof of her prior, out-of-state convictions. But under MCL 257.625(17)(f), information contained in a PSIR is sufficient proof of a prior conviction. According to defendant, the information in her PSIR was not sufficient in this case because she challenged that information at sentencing and the prosecution failed to present evidence proving the accuracy of the PSIR. When the accuracy of a PSIR is challenged, the trial court must allow the parties to be heard and must make a finding as to the challenge or determine that the finding is unnecessary because the court will not consider it during sentencing. *People v Waclawski*, 286 Mich App 634, 689-690; 780 NW2d 321 (2009), citing MCR 6.425(E)(2). Once a defendant effectively challenges a factual assertion, the prosecution has the burden to prove the fact by a preponderance of the evidence. *Id.* at 690. Importantly, however, defendant never challenged the accuracy of the PSIR. Defense counsel made no reference to the PSIR at sentencing. Nor did defendant raise a challenge to the PSIR in her motion for resentencing. She only argued that the prosecution should not be permitted to present any supplemental proofs. In her written objection to the supplemental proceedings, which was filed on the morning of the January 11, 2010, hearing, defendant argued that defense counsel’s statements at sentencing constituted a challenge to the PSIR. She reiterates that argument on appeal. But defendant has still never stated that the information in the PSIR is inaccurate or cannot, for any other reason, be relied upon. Therefore, we find that defendant has failed to effectively challenge the factual assertions in her PSIR and, therefore, that the trial court properly relied on the PSIR as proof of her prior convictions.

Defendant additionally argues that the prosecution failed to establish that the DUI laws of Georgia and Alabama were substantially similar to Michigan's laws at the time of her prior convictions. MCL 257.625(25) provides that a prior conviction includes a conviction under "a law of another state substantially corresponding to a law of this state." The statute does not indicate what proof is necessary to establish that a defendant was convicted under an out-of-state law "substantially corresponding" to a Michigan law. In *People v Wolfe*, 251 Mich App 239, 245; 651 NW2d 72 (2002), this Court stated:

Because the term "substantially corresponding" is not defined in MCL 257.625(23),⁵ we consult dictionary definitions for aid in construing this term in accordance with its ordinary and generally accepted meaning. The word "substantial" is defined as "being such with respect to essentials: two stories in substantial agreement; pertaining to the substance, matter, or material of a thing; pertaining to the essence of a thing." The word "corresponding" is defined as "similar in position, form, etc: corresponding officials in two states." In addition, Merriam Webster's Collegiate Thesaurus (2002) lists the words "like," "akin," "alike," "analogous" and "comparable" as being synonymous to the word "corresponding." [Citations omitted.]

The *Wolfe* Court agreed with the prosecution in that case that the plain language of MCL 257.625 and the Texas statute at issue were substantially corresponding statutes that required "no judicial gloss to show [their] similarity." *Id.* It was clear that each of the statutes in question used similar subjective criteria to prohibit similar conduct pertaining to the same essence, namely, drunk driving, and both statutes set forth identical blood alcohol thresholds, measured in identical ways, as an objective method of proving a violation. *Id.* at 245-246. MCL 257.625(25) "requires that the law of the other state 'substantially correspond' to a law of this state; it does not require an identical match." *Id.* at 246.

In this case, the prosecutor submitted copies of Georgia and Alabama's current DUI laws to the trial court and represented to the court, based on his review of the relevant statutory history, that the DUI laws of those states were substantially similar to Michigan's DUI law at the time of defendant's convictions. In its memorandum on the issue, the prosecution pointed out that Alabama, Georgia, and Michigan had all modified their drunk driving statutes from requiring a 0.10 or greater bodily alcohol content to requiring a 0.08 or greater content. The prosecution further noted that the entire history of the statutes at issue had "been retained by the People," and would be provided to the court upon request. In concluding that the out-of-state laws substantially corresponded to MCL 257.625, the trial court stated:

And in this case here [the prosecutor] was kind enough to attach for the Court's convenience the Lexis printout of the Official Court of Georgia Annotated, 40-6-391 dealing with driving under the influence of alcohol, and

⁵ Now MCL 257.625(25).

Michie’s Alabama Code Annotated, Section 32-5A-191, which is also part of the driving under the influence of alcohol.

There’s some slight differential in regards to detail, but both this Court’s reading of the statutes satisfies this Court that they substantially tracked Michigan’s MCL 257.625, and represents in this Court’s opinion, both statutes at the time of the respective offenses were substantially similar to the Michigan MCL 257.625 at that time.

And it is true, and I think it was true across the nation more than anything else, both states, both Alabama and Georgia and Michigan, and eventually modified their—to the “per se” offense consideration from the .10 bodily alcohol content to the .08 or greater bodily alcohol content

On appeal, defendant essentially argues that the prosecution failed to meet the “substantially corresponding” requirement of MCL 257.625(25) because it did not present the trial court with copies of the prior versions of Georgia and Alabama’s DUI laws. But defendant has not cited any authority indicating that the prosecution was required to do so. Moreover, defendant has never suggested, either before the trial court or on appeal, that there was any material distinction between the DUI laws of those jurisdictions and Michigan’s law at the time of her convictions. Defendant has not given this Court any basis on which to conclude that Georgia and Alabama’s DUI laws did not substantially correspond to Michigan’s law at the relevant time, when the term “substantially corresponding” is accorded its ordinary and generally accepted meaning as articulated in *Wolfe*. We need not search for a reason to reverse the trial court’s conclusion that the laws at issue were substantially corresponding. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) (“An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.”).

The trial court did not abuse its discretion in denying defendant’s motion to correct her sentence.

Affirmed.

/s/ Jane M. Beckering
/s/ William C. Whitbeck
/s/ Michael J. Kelly