

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES RICHARD STIEHL,

Defendant-Appellant.

UNPUBLISHED

September 15, 2009

No. 283641

Kent Circuit Court

LC No. 07-008151-FH

Before: Davis, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for operating a motor vehicle while intoxicated, third offense (OWI 3rd), MCL 257.625(1) and (9), and driving a motor vehicle with a suspended license (DWLS), MCL 257.904(1). We affirm.

I. Ex Post Facto Challenge

This Court has concluded that the amendment to MCL 257.625(9)(c) that eliminated the ten-year limitation on prior convictions for enhancement purposes does not violate due process or the prohibition against ex post facto laws. *People v Sadows*, 283 Mich App 65, 67-70; 768 NW2d 93 (2009); *People v Perkins*, 280 Mich App 244, 251-252; 760 NW2d 669 (2008), aff'd 482 Mich 1118 (2008). This challenge is without merit, MCR 7.215(C)(2).

II. Sufficiency of the Evidence

Defendant argues that there was insufficient evidence to support his conviction for OWI 3rd when the prosecutor relied upon circumstantial evidence, the credibility of the evidence was lacking, and the expert's "relation back" testimony was speculative. We disagree. When the sufficiency of the evidence to sustain a conviction is questioned, we review the evidence in the light most favorable to the prosecution to determine if a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). It is acceptable for the elements of the crime to be proven by circumstantial evidence and reasonable inferences that arise from the evidence. *People v Schumacher*, 276 Mich App 165, 167; 740 NW2d 534 (2007). The standard of review defers to the determination rendered by the jury. That is, we must draw all reasonable inferences and make credibility assessments in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The prosecutor must prove the elements of the crime beyond a

reasonable doubt; it is unnecessary for the prosecutor to disprove every reasonable theory consistent with innocence. *Id.* Therefore, the prosecutor need only convince the jury in light of whatever contradictory evidence that is presented by the defense. *Id.*

OWI requires proof beyond a reasonable doubt that defendant drove with a blood alcohol content (BAC) of .08 grams or more of alcohol per 100 milliliters of blood, or that defendant drove while under the influence of alcohol, controlled substances, or a combination of both. MCL 257.625(1). The prosecutor is permitted to allege both alternate theories, and the jury may return a general verdict. *People v Nicolaides*, 148 Mich App 100, 103-104; 383 NW2d 620 (1985). Viewing the evidence in the light most favorable to the prosecution, *Cline, supra*, there was sufficient evidence presented to enable a rational trier of fact to conclude that defendant was guilty of OWI under either alternate theory. The evidence indicated that defendant had a BAC of .06 two hours after the accident, and based on a standard elimination rate, as testified to by the prosecutor's expert, his BAC was .09 at the time of the accident. The challenge to the expert's testimony as speculative is without merit; rather, the weight and credibility of the evidence presented an issue for the jury to resolve. *People v Wager*, 460 Mich 118, 126; 594 NW2d 487 (1999). Further, defendant failed to avoid the collision that ultimately led the police to come into contact with defendant, despite the fact that a car further ahead of him was able to stop in time. Defendant's breath smelled strongly of alcohol, and he admitted that he drank beer and vodka until the early morning hours on the day of the accident. Blood tests revealed that defendant was taking a prescription antidepressant, which was known to enhance the effect of alcohol. Viewing the circumstantial evidence and reasonable inferences, *Schumacher, supra*, in the light most favorable to the prosecution, *Cline, supra*, there was sufficient credible evidence to support the OWI 3rd conviction.

III. Errors Committed at Trial

Defendant next raises several alleged errors made by the trial court. In light of the fact that defendant dismissed his counsel during trial and proceeded in propria persona, the issues were not preserved by objection at trial. Defendant's unpreserved instructional errors are reviewed for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 762-764; 597 NW2d 130 (1999).

The trial court's instructions did not violate defendant's right to a unanimous verdict. *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994); US Const, Am VI; Const 1963, art 1, § 14. Jury unanimity is not required for alternate theories when the statute under which a defendant is charged lists alternate ways to commit the offense, but do not constitute separate and distinct offenses. *People v Asevedo*, 217 Mich App 393, 397; 551 NW2d 478 (1996). Defendant was permissibly charged with one count of OWI predicated on alternate theories (unlawful BAC or operating under the influence of alcohol), and the jury returned a general verdict. *Nicolaides, supra* at 103-104. There was no plain error.

We reject defendant's contention that the trial court improperly instructed regarding additional theories without notice to the defense. US Const, Am VI; Const 1963, art 1, § 20; *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008). The trial court read MCL 257.625(1), the statute under which defendant was charged, to the jury. Defendant was not charged with driving while under the influence of a controlled substance, and the prosecutor never advanced that theory at trial. Moreover, the trial court instructed the jury that a

prescription drug is not a controlled substance, and the prosecutor merely argued that the prescription antidepressant enhanced the effect of the alcohol, not that it was a controlled substance. Viewing the instructions as a whole, we find no error requiring reversal because the jury was not improperly allowed to convict defendant on a theory that he drove under the influence of a controlled substance or a combination of alcohol and a controlled substance. *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999).

Furthermore, the trial court's instructions did not deprive defendant of a defense. US Const, Ams, VI, XIV; Const 1963, art 1, §§ 13, 17, 20; *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006). The trial court correctly instructed the jury that "under the influence" means that a defendant's ability to drive was substantially lessened. *Oxendine v Secretary of State*, 237 Mich App 346, 353-354; 602 NW2d 847 (1999); CJI 2d 15.3(2). Defendant has failed to show that his alleged unpreserved instructional errors constituted plain error that affected his substantial rights.¹ *Carines, supra* at 763-764.

Defendant next argues that the trial court erred in admitting the testimony of Dr. Felix Adatsi because his testimony was not reached through reliable principles and methodology and sufficient facts and data. MRE 702 provides that the trial court may admit helpful expert testimony if "(1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." See also *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779-780; 685 NW2d 391 (2004). Defendant failed to raise an objection on this ground in the trial court, and we reviewed it for plain error. *Carines, supra* at 763-764.

Adatsi was properly qualified as an expert in toxicology based on his extensive experience and knowledge of the interaction between drugs and the human body. Further, his testimony about the average elimination rate of alcohol was based on his scientific knowledge, and there is no indication that his mathematical estimate of defendant's BAC two hours before the blood draw using the well-known standard elimination rate was unreliable. Moreover, the *Antsey* Court held that a defendant may challenge the elimination rate and extrapolation evidence with a toxicology expert and methodology challenges. *Anstey, supra* at 454 n 20. See also *Wager, supra* at 124-125. Defendant offers no authority to support that Adatsi's testimony was unreliable because defendant alleged that he drank NyQuil. An appellant "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his

¹ Defendant also contends that he was denigrated by the trial court's instruction that fault was not an element of the crime. However, defendant also concedes that "[a]ll of this may be technically true, but the effect on the jury is devastating, and very unfair." In light of defendant's concession that the trial court's instruction was correct, we cannot conclude that defendant was denigrated as a result of a proper instruction. We also note that we have addressed the instructional issues in accordance with the plain error standard when defendant waived instructional error by failing to object with specificity. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Defendant objected to the instructions, and when the trial judge requested specifics, defendant told the judge that he had to go "smoke." The right of self-representation does not excuse one from compliance with relevant rules and procedural law. *People v Kevorkian*, 248 Mich App 373, 419; 639 NW2d 291 (2001).

claims, nor may he give only cursory treatment with little or no citation of supporting authority.” *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). We note, however, that NyQuil would have increased defendant’s BAC,² and defendant failed to establish at trial that he drank the Nyquil so close to the time of the accident that his BAC was actually increasing instead of decreasing after the accident.

We also hold that Adatsi was properly allowed to testify about the effect of the antidepressant in defendant’s bloodstream because of his extensive knowledge in toxicology, his specific knowledge of amitriptyline, the studies performed on the drug, and its known effects when combined with alcohol. *Gilbert, supra* at 780-781. Defendant has failed to establish that the testimony was unreliable. Adatsi specified the amount of alcohol and then merely indicated that the antidepressant was “present.” This fact was relevant because of the drug’s known interaction with alcohol, specifically that it would enhance defendant’s susceptibility to the influence of alcohol. Therefore, this evidence was relevant to whether defendant drove under the influence of alcohol. MRE 401. In addition, this challenged testimony was cumulative of Jennifer Waggoner’s testimony, to which defendant did not object. Cumulative evidence is not prejudicial even if erroneously admitted. *People v Rodriguez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996). There was no plain error requiring reversal.³

Finally, with respect to Adatsi, we hold that the trial court did not abuse its discretion in denying defendant’s motion and request for a hearing related to the alleged prosecutor’s discovery violation for failing to disclose the contents of Adatsi’s testimony. *People v Lemcool (After Remand)*, 445 Mich 491, 498; 518 NW2d 437 (1994). The statements of defendant’s trial counsel and the prosecutor indicate that the prosecutor properly provided defense counsel with the requisite information. Defendant cannot demonstrate the existence of a discovery violation based on the record, nor can he demonstrate that a hearing on this issue was necessary.

Defendant next argues that the trial court improperly handled the presentation of the videotape. This claim is abandoned because defendant failed to cite any authority in support of his position. *Kelly, supra* at 640-641. We note, however, that defendant actually agreed to the admission of the videotape, requested that the entire tape be played, and knew its contents. He cannot now claim impropriety. Further, “a trial court has the inherent power to control the admission of evidence in order to promote the interests of justice.” *People v Greenfield*, 271 Mich App 442, 455 n 10; 722 NW2d 254 (2006).

Defendant argues that the trial court violated his due process rights in refusing to excuse a juror. There is no constitutional right to exercise a peremptory challenge; Michigan grants the right to peremptory challenges by statute and court rule, but the right expires when the jury is sworn. *People v Daoust*, 228 Mich App 1, 7; 577 NW2d 179 (1998), overruled on other gds

² Medicinal alcohol is considered an “alcoholic liquor.” MCL 257.1d.

³ To the extent that defendant also argued that the admission of this evidence by the prosecutor constituted prosecutorial misconduct, we disagree. There can be no prosecutorial misconduct when evidence is properly admitted. *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007).

People v Miller, 482 Mich 540, 561; 759 NW2d 850 (2008). Defense counsel did not exercise a peremptory challenge to remove the juror, and defendant did not raise his challenge until after the jury was sworn. The trial court did not err in later ruling that there was no basis to find prejudice, where the juror indicated that her husband was a road patrol police officer in a different city and that this would not affect her judgment.

Defendant claims that the trial court improperly curtailed his questioning of the witness involved in the accident. The trial court has a duty to limit evidence and arguments to relevant matters. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). A defendant's right to cross-examine a witness is not unlimited; the trial court has wide discretion to limit cross-examination because of harassment, prejudice, confusion, repetitive or irrelevant questions, or concerns for the witness's safety. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). We conclude that the trial court properly limited defendant's questioning. The record reflects that defendant repeatedly posed inappropriate questions that amounted to testifying or arguing with the witness, and the trial court cautioned defendant that this was improper. The trial court also twice permitted defendant to resume questioning after he indicated that he was done with the witness. The trial court limited defendant when he continued to ask improper questions. *Ullah, supra* at 674. Further, the trial court's ruling that it was irrelevant who was at fault for the accident is correct; it was not an element of the crimes for which defendant was charged, and the prosecutor never argued that defendant was at fault in the accident. *Adamski, supra* at 138. Although defendant argues that the trial court violated due process by informing defendant that he could subpoena the witness to reappear if he wanted to ask more questions, defendant cites absolutely no authority to support this position, and therefore abandoned that argument. *Kelly, supra* at 640-641.

IV. Prosecutorial Misconduct

On appeal, defendant also argues that his constitutional rights were violated by the prosecution's plea offer.⁴ The prosecutor offered to allow defendant to plead guilty to OWI 3rd, and in turn, the DWLS and habitual offender charge would be dismissed. Defendant waived his preliminary examination in order to preserve the plea offer for later decision, and signed the waiver. The trial court thereafter held the plea offer open past the deadline. Ultimately, defendant rejected the offer. The prosecution upheld its promise to defendant by keeping the offer open. Defendant waived any claim that he was coerced into waiving his preliminary examination, and he cannot now raise it as an error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). The prosecutor's offer to dismiss two charges in exchange for a plea to one charge was not unduly coercive. *People v Ryan*, 451 Mich 30, 36; 545 NW2d 612 (1996). Further, any error would not amount to plain error requiring reversal where defendant was convicted as charged based on sufficient evidence, rendering any claim related to the preliminary examination harmless. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). Defendant's waiver of the preliminary examination authorized the prosecution to file the information, and defendant was properly bound over and went to trial. *People v Hunt*, 442 Mich 359, 362; 501 NW2d 151 (1993); MCR 6.110(A); MCR 6.112(B). Additionally, we cannot

⁴ This argument was raised in the supplement brief filed by defendant.

conclude that defendant was deprived of a fair trial based on the prosecutor's questioning of the witnesses, including the experts, when the evidence was relevant and admissible, MRE 401; MRE 403.

V. Defendant's Supplemental Brief

Although we cannot locate defendant's arraignment on the information in the circuit court in the record, his constitutional right to notice of the charges against him was not violated. *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998); US Const, Ams VI, XIV; Const 1963, art 1, § 20. Where a defendant "[goes] to trial as if an issue were formed, all participants acting as if all formalities had been complied with, [this] is equivalent to an arraignment and plea." *People v Weeks*, 165 Mich 362, 365; 130 NW 697 (1911) (citations omitted). The record reflects that defendant was arraigned in district court, he was advised of the charges against him at his preliminary examination waiver hearing, he moved to dismiss the charges, and he appeared before the trial court to reject the prosecution's plea offer. Defendant did not raise the arraignment issue until the third day of trial. Reversal is not required. *Id.* In addition, we conclude that the prosecution did not surpass its authority; the information adequately set forth the charges against defendant, and the prosecutor was authorized to file the information after the preliminary examination waiver. *Hunt, supra* at 362; MCR 6.112(D).

Lastly, defendant has failed to demonstrate that his due process, equal protection, or double jeopardy rights were violated when the trial court instructed the jury that the BAC evidence may be considered in relation to both the OWI charge and the lesser alternative offense of operating a vehicle while impaired. Defendant was not convicted of both crimes, and the BAC evidence was relevant to establishing each offense. *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004); CJI 2d 15.5. The trial court's instruction also did not classify defendant in a way that burdened a fundamental right. *People v McFall*, 224 Mich App 403, 413; 569 NW2d 828 (1997).

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Karen M. Fort Hood