STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON L. PATMAN,

Defendant-Appellant.

UNPUBLISHED
March 18, 1997

No. 191039
Oakland Circuit Court
LC No. 94-136634

Before: Hood, P.J. and Saad and T. S. Eveland*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unlawfully driving away a motor vehicle ("UDAA"), MCL 750.413; MSA 28.645; fleeing from a police officer, MCL 257.602a; MSA 9.2302(1); and driving with a suspended license ("DWLS"), MCL 257.904(1)(b); MSA 9.2604(1)(b). Following the jury's verdict, defendant admitted to being a habitual offender, fourth offense, MCL 769.12; MSA 28.1084. Defendant was sentenced for the UDAA conviction as a habitual offender to two to twenty years. In addition, defendant was sentenced to one year for fleeing from police and ninety days for the DWLS conviction. Defendant appeals as of right from the convictions and sentences. We reverse in part and affirm in part.

On appeal, defendant first argues that there was insufficient evidence presented to the jury to support his conviction for DWLS. We agree. In reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution to determine whether the evidence was sufficient to support a conclusion by the trier of fact that the essential elements of the crime were proved beyond a reasonable doubt. *People* v *Vaughn*, 186 Mich App 376, 379; 465 NW2d 365 (1990).

Conviction on a charge of DWLS requires proof that (1) the defendant was driving a motor vehicle; (2) the defendant's driver's license was suspended; and (3) the defendant had been notified of

* Circuit judge, sitting on the Court of Appeals by assignment.

the suspension. MCL 257.904(1); MSA 9.2604(1). Defendant disputes only the third element, whether any evidence was presented to establish that he was notified of the suspension of his license. The DWLS statute requires that the defendant be notified as provided in MCL 257.212; MSA 9.1912. MCL 257.904(1); MSA 9.2604(1). Section 212 provides that:

> Proof of the giving of notice . . . may be made by the certificate of an officer or employee of the secretary of state or of a person 18 years of age or older naming the person to whom notice was given and specifying the time, place, and manner of the giving of notice. [MCL 257.212; MSA 9.1912.]

Here, the prosecutor presented only evidence of defendant's certified driving record. Under the statute, this does not constitute proof of notice. Consequently, we conclude that there was insufficient evidence to support defendant's conviction on this charge and, therefore, it must be reversed.

Next, defendant asserts that the trial court erred by failing to sua sponte instruct the jury on a lesser included offense of unlawful use of an automobile, MCL 750.414; MSA 28.646. We disagree. Defendant failed to request this instruction, therefore, relief will only be granted to avoid manifest injustice. *People* v *Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Unlawful use of a motor vehicle involves the use of the vehicle by a defendant beyond the authority granted to him by the vehicle's owner. *People* v *Hayward*, 127 Mich App 50, 60-61; 338 NW2d 549 (1983). Here, there was no evidence suggesting that defendant was ever given authority to operate the vehicle. Because the offense was unsupported by the evidence, no instruction on that offense was required. *People* v *Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991).

Defendant also claims that the trial court failed to properly instruct the jury that their verdict must be unanimous. We disagree. Again, defendant failed to object at trial to the trial court's instructions. Therefore, review is waived unless necessary to avoid manifest injustice. *People* v *Turner*, 213 Mich App 558, 576; 540 NW2d 728 (1995). In its instructions, the trial court specifically instructed the jury that their verdict must be unanimous. On appeal, defendant cites cases from this Court which hold that where a defendant has committed more than one act which might provide the basis for a conviction on a single criminal charge, the trial court must instruct the jury that it must be unanimous with respect to which act constitutes the basis for the guilty verdict. *People* v *Yarger*, 193 Mich App 532, 537; 485 NW2d 119 (1992). This rule is inapplicable in the present case because each charged offense was premised on only a single act. Since the trial court gave the appropriate instruction on unanimity of verdict, defendant's claim of error is without merit.

Additionally, defendant argues that conviction on three offenses for the singular act of taking the motor vehicle violates double jeopardy. Again, we disagree. Both the federal and state constitutions prohibit placing a defendant in jeopardy more than once for a single offense. US Const, Am V; Const 1963, art 1, § 15; *People* v *Torres*, 209 Mich App 651, 658; 531 NW2d 822 (1994). These provisions are substantively identical, both protect "against successive prosecutions for the same offense, and against multiple punishment for the same offense." *People* v *Bewersdorf*, 438 Mich 55, 72; 475 NW2d 231 (1991). Here, defendant's argument is effectively that he is being subject to

multiple punishment for the singular act of taking the motor vehicle. We conclude that the offenses were not the same offense because each involved completely distinct elements, address completely distinct social norms, and they are not cumulative or hierarchical. *People* v *Wilson*, 180 Mich App 12, 16; 446 NW2d 571 (1989); *People* v *DeLeon*, 177 Mich App 306, 308; 441 NW2d 85 (1989). Hence, there was not double jeopardy violation.

Defendant next asserts that he was denied due process by the trial court's refusal to accept his guilty plea. We disagree. MCR 6.302(A) requires a trial court to determine whether a defendant's guilty plea is understanding, voluntary, and accurate, before the court accepts it. In the present case, at the conclusion of proofs and just prior to the start of closing arguments, defendant advised the court that he wished to plead guilty. The court placed defendant under oath and proceeded to question him and counsel in accordance with MCR 6.30(B)(E). Defendant indicated that he was pleading guilty, in part, due to his dissatisfaction with his attorney. The trial court did not err in concluding from this that the plea was not understanding, voluntary, and accurate. Moreover, defendant was not prejudiced by the court's action since he was convicted on the identical charges for which he expressed a desire to plead guilty. In fact, it can be argued that defendant has benefitted from the failure to accept his plea. We are reversing defendant's conviction for driving with a suspended license because no evidence was presented to the jury as to his knowledge of the suspension. In the aborted plea proceedings, however, defendant testified that he knew his license was suspended.

Next, defendant contends that remand is required to correct the reference in the judgment of sentence indicating that defendant was "convicted" of being a habitual offender. We agree. The 1994 amendment to MCL 769.13; MSA 28.1085 abolished the requirement that a habitual offender determination be made by trial pursuant to a separate information. *People* v *Zinn*, 217 Mich App 340, 344; 551 NW2d 704 (1996). Now the determination is made by the court pursuant to a notice by the prosecutor. Because the amended statute does not require a separate charging instrument and affords no right to trial, it is improper to refer to a finding that a defendant is a habitual offender as a "conviction."[1] Consequently, the judgment of sentence entered in this case must be corrected to remove the reference to the court's habitual offender determination as a conviction.

Finally, defendant claims that the trial court erred by failing to recognize that it possessed discretion in fixing defendant's maximum sentence as a habitual offender. We disagree. Appellate review of sentencing is for an abuse of discretion. *People* v *Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993). Where a trial court fails to recognize that it had discretion in setting a defendant's maximum sentence, resentencing is required. *People* v *Ash*, 128 Mich App 265, 269; 340 NW2d 646 (1983); *People* v *Mauch*, 23 Mich App 723, 730; 179 NW2d 184 (1970). In the present case, the court sentenced defendant to a maximum term of twenty years, when it could have imposed life. Clearly then, the trial court did exercise its discretion in sentencing. Therefore, defendant's assertion to the contrary is without merit.

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[1] Black's Law Dictionary, Sixth Edition (1990) defines "conviction" as follows: "In a general sense, the result of a criminal trial which ends in a judgment or sentence that the accused is guilty as charged."

Consistent with this opinion, this matter is affirmed in part and reversed in part, and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Henry William Saad
/s/ Thomas S. Eveland