STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT WILLIAM GIBSON,

Defendant-Appellant.

UNPUBLISHED
May 12, 1998

No. 201605
Kalamazoo Circuit Court
LC No. 96-000859-FH

Before: Corrigan, C.J., and Hoekstra and Young, Jr., JJ.

PER CURIAM.

Defendant was convicted by a jury of operating a motor vehicle while under the influence of intoxicating liquor (OUIL), third offense, MCL 257.625; MSA 9.2325, and sentenced to five years' probation. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court should have granted his motions to dismiss the charges, for a mistrial, and for a directed verdict. Defendant's arguments, none of which we find persuasive, will be addressed seriatim.

The first of defendant's motions stemmed from Officer Timothy Randall's volunteered testimony that defendant told Officer Randall that he had previously been arrested for drunk driving in 1987 and 1991. Defendant objected to this testimony, and the trial court sustained the objection. Defendant immediately moved to dismiss the charges or, in the alternative, for a mistrial. The court denied the motion to dismiss, and also denied the motion for a mistrial, ruling that Officer Randall's comments were not a result of intentional prosecutorial misconduct and that a curative instruction to the jury would solve any potential problem.

Defendant argues on appeal that the trial court should have either dismissed the charges or declared a mistrial. Defendant has cited no authority to support his claim that dismissal of the charges was an appropriate remedy; therefore, we decline to address it. We will not search for authority to sustain a party's argument. *People v Hoffman*, 205 Mich App 1, 17; 518 NW2d 817 (1994).

With respect to defendant's motion for a mistrial, we review for an abuse of discretion the trial court's denial of that motion. *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997). Absent an affirmative showing of prejudice to the defendant's rights, such an exercise of discretion will not be reversed on appeal. *People v Holly*, 129 Mich App 405, 415; 341 NW2d 823 (1983). Error requiring reversal results only when the denial of a defendant's motion for mistrial "is so grossly in error as to deprive a defendant of a fair trial or to amount to a miscarriage of justice." *Id*.

Defendant contends that Officer Randall's statement that defendant admitted to having been twice arrested for drunk driving was so prejudicial that defendant was denied the right to a fair trial, and that a mistrial was the appropriate remedy. Generally, a volunteered and unresponsive answer to a proper question is not cause for granting a motion for mistrial. *Id*., p 415.

> "A witness cannot bring error into a case by volunteering inadmissible testimony which is immediately stricken out. It may be true that such remarks work a certain amount of mischief with the jury, but a conviction is to be tested on appeal by the rulings of the judge. A witness cannot put error into a case by an unauthorized remark, neither called out by a question nor sanctioned by the jury; and if what he or she says or does improperly is likely to do much mischief, it is presumed that the judge will apply the proper corrective measures in his or her instructions if requested to do so. Unresponsive testimony by a prosecution witness, although error, is not necessarily grounds for reversal." [*People v Barker*, 161 Mich App 296, 306; 409 NW2d 813 (1987), quoting 2 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 600, pp 203-204].

However, this Court has held that, because police witnesses have a "special obligation not to venture into such forbidden areas," this Court will scrutinize a police officer's volunteered and unresponsive remark more carefully. *Holly*, *supra*, p 416.

We find no merit in defendant's contention that a mistrial was warranted. The trial court examined the testimony given by Officer Randall and concluded that this statement was inadvertent and not intentionally injected into the proceedings. The trial court immediately gave an appropriate curative instruction. *Barker*, *supra*, p 307. Moreover, the evidence of defendant's guilt was so strong that, even absent any error, it is not reasonably possible that any jury would have voted to acquit defendant. *Holly*, *supra*.

Defendant next argues that the trial court erred in denying his motion for a directed verdict. Specifically, defendant maintains that there was insufficient evidence that he operated the vehicle in question or to prove that he had an unlawful alcohol content. We disagree. When reviewing a trial court's ruling on a motion for a directed verdict, this Court must consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime. *Id*.

Viewing the evidence in a light most favorable to the prosecution, we first conclude that there was sufficient evidence that defendant operated the car while intoxicated to withstand a motion for directed verdict. Regis Vorva, a private security officer for Retail Security, observed defendant's car parked on some railroad tracks. Vorva testified that when he asked defendant if he was hurt, defendant responded that he was worried about being "busted." Lieutenant Donald VerHage of the Kalamazoo Department of Public Safety testified that, when he arrived on the scene, he saw defendant in the car attempting to move it from the railroad tracks. Defendant then got out of the car and handed VerHage the car keys. Defendant also admitted to VerHage that he had been drinking and that it had affected his driving. Defendant also failed several field sobriety tests, and it was determined that defendant's alcohol content was .19 grams of alcohol per 210 liters of breath. From these facts, a rational jury could have found that defendant had driven the car onto the railroad tracks and that he was intoxicated when he did so.

We also reject defendant's claim that there was insufficient evidence that he had an unlawful alcohol content because Officer Randall misstated the measurement for breath tests as .19 grams of alcohol per *milliliters* of breath, rather than per *liters* of breath. The trial court took note of this, however, and reopened the evidence to allow the prosecutor to ask Officer Randall to correct his misstatement. Defendant's argument lacks merit. Nor was defendant entitled to a directed verdict on the ground that, when he was recalled to testify, Officer Randall mentioned a percentage by weight of alcohol, which is no longer used when referring to alcohol content. See MCL 257.625; MSA 9.2325. While Officer Randall did initially state that defendant's alcohol content was .19 "percent" per 210 liters of breath, he later clarified that he was actually referring to *grams* of alcohol. Defendant does not otherwise claim that the breath test was improperly administered or that the test result is inaccurate. The trial court did not err in denying defendant's motion for a directed verdict based on these misstatements.

Defendant next argues that the trial court erred in denying his motion for a new trial. Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *People v Lemmon*, ___ Mich ___; ___ NW2d ___ (Docket No. 105850, issued March 24, 1998), slip op at 28 n 27. Defendant's argument in his motion for new trial and on appeal is essentially that the trial court should have considered the juror affidavits as support for his position that the improper testimony by Officer Randall prejudiced the jury. However, the trial court properly refused to consider those affidavits, which were offered to challenge mistakes or misconduct inherent in the verdict. *People v Riemersma*, 104 Mich App 773, 785; 306 NW2d 340 (1981). Furthermore, because we have already concluded that defendant was not entitled to a mistrial based on Officer Randall's unresponsive testimony, we cannot say that the trial court abused its discretion in denying defendant's motion for a new trial.

Finally, defendant argues that the cumulative effect of errors at trial denied him a fair trial. Because we have concluded that none of defendant's asserted errors were meritorious, defendant is not entitled to reversal on this basis. *People v Anderson*, 166 Mich App 455, 473; 421 NW2d 200 (1988).

Affirmed.

/s/ Maura D. Corrigan
/s/ Joel P. Hoekstra
/s/ Robert P. Young, Jr.