

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 19, 2012

v

MICHAEL JAMES SEIFFERLY,

Defendant-Appellant.

No. 303397
Bay Circuit Court
LC No. 10-010444-FH

Before: FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Defendant was convicted of operating a vehicle while intoxicated, MCL 257.625(1), failing to stop at the scene of an accident causing property damage, MCL 257.618, and operating a vehicle without a license, MCL 257.904(1)(b). He received an enhanced sentence because he was previously convicted of (1) operating impaired (10/02/2002), (2) operating while intoxicated (05/10/2004), (3) operating while intoxicated (07/15/05), and (4) operating impaired (05/25/07). He appeals as of right. We affirm.

On April 14, 2010, defendant rear-ended a vehicle stopped at a red light, pushing that vehicle into a third vehicle, and then fled the scene. He was later arrested and charged, in relevant part, with operating a vehicle while intoxicated, MCL 257.625(1), because he was either under the influence of a combination of alcoholic liquor and a controlled substance or had an unlawful blood alcohol level. At the close of proofs, the jury was instructed that the following elements must be proved beyond a reasonable doubt:

First, that the defendant was operating a motor vehicle on or about April 14, 2010. “Operating” means driving or having actual physical control of the vehicle.

Second, that the defendant was operating a vehicle on a highway or other place open to the public or generally accessible to motor vehicles.

Third, that the defendant was either under the influence of a combination of alcohol and a controlled substance while operating the vehicle or that the defendant operated the vehicle with a bodily alcohol level of .08 grams or more per 100 milliliters of blood.

After the court read the jury instructions, both the prosecutor and defense counsel were asked if there were any objections and both replied in the negative. Eventually the jury returned its guilty verdict and this appeal followed.

Defendant argues that he was denied the effective assistance of counsel because his attorney did not request a special verdict or a bifurcated jury instruction that would have required the jurors to conclude unanimously that he either (1) operated a vehicle while under the influence of a combination of intoxicating liquor and a controlled substance or (2) that he operated a vehicle with an unlawful blood alcohol level. We disagree.

To succeed on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's error, the result would have been different. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). In this case, our review is limited to errors apparent on the record because a *Ginther*¹ hearing was not held. See *id.*

First, defendant argues that he was entitled to a special verdict under MCL 257.625(18). MCL 257.625 provides, in relevant part:

(1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public . . . within this state if the person is operating while intoxicated. As used in this section, "operating while intoxicated" means any of the following:

(a) The person is under the influence of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance.

(b) The person has an alcohol content of 0.08 grams or more per 100 milliliters of blood

* * *

(18) Except as otherwise provided in subsection (20), if a person is charged with operating a vehicle while under the influence of a controlled substance or a combination of alcoholic liquor and a controlled substance in violation of subsection (1) . . . the court shall require the jury to return a special verdict in the form of a written finding . . . as to whether the person was under the influence of a controlled substance or a combination of alcoholic liquor and a controlled substance at the time of the violation.

* * *

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

(20) A special verdict described in subsections (18) and (19) is not required if a jury is instructed to make a finding solely as to either of the following:

(a) Whether the defendant was under the influence of a controlled substance or a combination of alcoholic liquor and a controlled substance at the time of the violation.

A plain reading of the statute² indicates that a special verdict is only required under MCL 257.625(18) when the jury is asked to decide whether MCL 257.625(1)(a), the OUIL statute, was violated because the defendant was either (1) under the influence of a controlled substance or (2) under the influence of a combination of alcoholic liquor and a controlled substance—two theories for establishing OUIL.

Here, the jury was asked to decide whether the OUIL statute was violated because defendant was under the influence of a combination of alcohol and controlled substance. The jury was not asked to determine whether defendant was, in the alternative, under the influence of a controlled substance, only. Thus, the special verdict exception set forth in MCL 257.625(20) applied. With regard to the OUIL allegation, the jury was instructed to make a finding solely as to whether defendant was under the influence of a combination of alcoholic liquor and a controlled substance at the time of the violation. See MCL 257.625(20). Although the jury was also asked to determine whether defendant violated MCL 257.625(1)(b), the UBAL statute, because he had an unlawful blood alcohol level, that statutory provision is not implicated by MCL 257.625(18). Accordingly, defendant was not entitled to a special verdict as set forth in MCL 257.625(18).

Second, defendant argues that he was denied his constitutional right to a unanimous jury verdict because “[n]othing in the record indicates that the jury was ever told that each member had to agree that Defendant either was under the influence of alcohol and a controlled substance or had an unlawful blood alcohol level (UBAL).” We disagree.

A jury verdict must be unanimous in criminal cases and a jury must be properly instructed on that requirement. Const 1963, art 1, § 14; *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). Typically, the trial court fulfills its duty through a general instruction on unanimity. *Id.* Juries are not required to unanimously agree on every fact supporting a guilty verdict. *People v Gadomski*, 232 Mich App 24, 30-31; 592 NW2d 75 (1998). “It is well settled that when a statute lists alternative means of committing an offense, which means in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theories.” *Id.* at 31. But, a specific unanimity instruction is necessary in some cases. “[W]hen the state offers evidence of multiple acts by a defendant, each of which would satisfy the actus reus element of a single charged offense, the trial court is required to instruct the jury that it must unanimously agree on the same specific act if the acts are materially

² The rules of statutory interpretation require us to enforce clear and plain statutory language according to its ordinary meaning. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005).

distinct or if there is reason to believe the jurors may be confused or disagree about the factual basis of the defendant's guilt." *Cooks*, 446 Mich at 530.

Defendant claims that he was entitled to a specific unanimity instruction, but we disagree. Generally, MCL 257.625(1) prohibits the act of operating of a vehicle in a public place while intoxicated. The actus reus of the offense prohibited by this statute is operating a vehicle in a public place while intoxicated. Intoxication is an element of the offense. MCL 257.625(1) lists alternative means of establishing the element of intoxication including that the defendant was either "under the influence" (OUIL), as set forth in subsection (1)(a), or had an unlawful bodily alcohol content (UBAL), as set forth in subsection (1)(b). These are different ways of defining the element of intoxication. They do not constitute separate and distinct offenses because, even if the prosecution proved both theories, OUIL and UBAL, defendant could only be charged with one count of operating while intoxicated in violation of MCL 257.625(1) for this one driving incident. That is, the actus reus prohibited by the statute was only committed once; there were not multiple acts of operating a vehicle in a public place while intoxicated. Thus, jury unanimity is not required with regard to these alternate theories. See *Gadomski*, 232 Mich App at 30-31.

Defendant's reliance on *Cooks*, 446 Mich 503, in support of his claim is misplaced. In that case, the defendant was charged with one count of first-degree criminal sexual conduct arising from three separate incidents of sexual penetration on three different days. *Id.* at 505-507. Nevertheless, our Supreme Court held that "a specific unanimity instruction is not required in *all* cases in which more than one act is presented as evidence of the actus reus of a single criminal offense." *Id.* at 512. However, in the case before us, defendant was charged with one count of operating a vehicle while intoxicated arising from a single driving incident; thus, the *Cooks* case is factually distinguishable from this case that does not involve multiple acts.

The facts of this case are more similar to the facts presented in *People v Lynn*, 223 Mich App 364; 566 NW2d 45 (1997). In *Lynn*, the defendant was charged with violating MCL 750.448 for soliciting another to "commit prostitution or to do any other lewd or immoral act." The defendant argued that he was entitled to a bifurcated jury instruction requiring the jury to unanimously conclude that he solicited a person either (1) to commit prostitution or (2) to do any other lewd or immoral act. This Court disagreed, holding that the statute prohibited certain conduct undertaken for a prohibited purpose and listed alternative means by which the "prohibited purpose requirement may be fulfilled." *Id.* at 368. That is, the listed alternatives were "merely different ways of defining the single element of a prohibited purpose." *Id.* Analogously, in our case, MCL 257.625(1) prohibited operating a vehicle while intoxicated and listed the different ways of defining the single element of intoxication.

Similarly, in *People v Asevedo*, 217 Mich App 393; 551 NW2d 478 (1996), the defendant was convicted of first-degree criminal sexual conduct,³ which generally proscribes sexual penetration causing personal injury to the victim using force or coercion. "Personal injury" was defined as including bodily injury and mental anguish.⁴ The defendant argued that the jury was

³ MCL 750.520b(1)(f).

⁴ MCL 750.520a(j).

required to make an independent finding as to whether bodily injury or mental anguish was established. This Court disagreed, holding that bodily injury and mental anguish “are merely different ways of defining a single element of personal injury.” *Id.* at 397. Thus, jury unanimity was not required. Analogously, in our case, MCL 257.625(1) prohibited operating a vehicle while intoxicated and listed the different ways of defining the single element of intoxication.

In summary, defendant has failed to establish that he was entitled to a special verdict under MCL 257.625(18) or that his constitutional right to a unanimous jury verdict was violated. Thus, defendant’s attorney was not ineffective for failing to request a special verdict or a bifurcated jury instruction. Accordingly, defendant’s ineffective assistance of counsel claim is without merit. See *Jordan*, 275 Mich App at 667.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly