STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE CITY OF HOWELL,

Plaintiff-Appellant,

V

JASON PAUL AMELL,

Defendant-Appellee.

UNPUBLISHED
December 19, 2006

No. 261228
Livingston Circuit Court
LC No. 04-020876-AZ

Before: Sawyer, P.J., and Wilder and Servitto, JJ.

PER CURIAM.

Defendant was convicted by a district court jury of operating a vehicle while visibly impaired (OWVI), in violation of Howell City Ordinance Section H257.625(3).[1] The circuit court reversed defendant's conviction. The prosecutor appeals by leave granted the circuit court's order reversing defendant's conviction. We reverse and remand to the district court for further proceedings consistent with this opinion.

I.

This action arises out of events culminating during the early morning hours of November 2, 2003. At approximately 9:30 p.m. on November 1, 2003, Defendant met a friend, Joseph Labadie, at the Red Robin restaurant in Brighton, Michigan. During a two hour period, defendant drank three "TNT's," a "strong" cocktail containing triple sec, gin and vodka. Defendant and Labadie then went to Cleary's Bar in Howell, Michigan. Labadie drove defendant's car because defendant purportedly did not feel well and because Labadie believed he

[1] The ordinance generally adopted by reference MCL 257.625(3), which provides as follows:

> A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state when, due to the consumption of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance, the person's ability to operate the vehicle is visibly impaired. If a person is charged with violating subsection (1), a finding of guilty under this subsection may be rendered.

was in better shape to drive than defendant was. After arriving at Cleary's Bar, defendant allegedly slept in the passenger seat of his car while Labadie went into the bar and had numerous drinks. When Cleary's closed, Labadie believed he was too drunk to drive, and he went to sleep in the driver's side seat.

At approximately 2:35 am on November 2, Howell City Police Sergeant Jeffrey Woods was on patrol and noticed that defendant's vehicle was both illegally parked on the street[2] and parked so that the back end of the car stuck out far from the curb. Woods parked with the intention to write a ticket when he noticed two people sleeping in the vehicle. Woods knocked on the driver's side window, and when Labadie opened the window, Woods could smell the strong odor of intoxicants. While obtaining identification from both men, Woods noticed that both men had bloodshot and glassy eyes. Woods advised both men that he would overlook the illegal parking and that they should avoid driving while they were intoxicated. Woods described Labadie as argumentative during this conversation, and because he suspected Labadie might try to drive away from the location, he parked several blocks away to observe.

After 25 minutes, defendant decided he was able to drive and began driving away from the area. Woods observed the headlights of defendant's vehicle illuminate and watched as the vehicle began coming toward him. Although he did not observe any unusual driving, Woods executed a traffic stop and learned only at that time that defendant, not Labadie, was driving. After a brief conversation with defendant, Woods directed defendant to get out of the car and conducted a series of field sobriety tests. Defendant correctly recited the alphabet but according to Woods, defendant asserted that he was not able to count back from 20 to 10 as requested. Defendant claimed that he simply refused the request to count back from 20 to 10 because he had accurately recited the alphabet. Defendant was then asked to complete the finger-to-nose test, which he successfully completed with his right hand but not his left. Woods also observed defendant swaying from side to side during this test. Woods next instructed defendant to walk forward heel-to-toe with arms extended to the sides for five steps, and to walk backward for three steps. Defendant did not follow these directions. Defendant was also unable to perform a finger-dexterity test.

Woods placed defendant under arrest for driving under the influence of alcohol, read defendant his chemical test rights, and transported defendant to the Livingston County jail. At the jail, two breathalyzer tests were administered, each registering a finding that defendant had a breath alcohol level of .07.

During defendant's trial, Woods testified that the "legal blood alcohol level limit" was .08. Following closing arguments and without objections from either party, the trial court gave the standard jury instructions for the operating while intoxicated (OWI)[3] and operating while visibly impaired (OWVI) offenses:

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[2] A local ordinance precluded on-street parking between the hours of 2:00 a.m. and 6:00 a.m.

[3] "Prior to the offense date in this case, the Legislature had replaced the crime of operating under the influence of intoxicating liquor (OUIL) with operating while intoxicated (OWI)." People v Rideout __ Mich App __, __; __ NW2d __ (2006), slip op, n 24.

(continued…)

> One way to determine whether a person is intoxicated is to measure how much alcohol is in his breath. There is evidence in this trial that a test was given to defendant. The purpose of this test was to measure the amount of alcohol in the person's breath. You may infer that the defendant's . . . bodily alcohol content at the time of the test was the same as his bodily alcohol content at the time he operated the motor vehicle. In considering the evidence and arriving at your verdict, you may give the test whatever weight you believe it deserves. The results of a test are just one factor you may consider along with all of the other evidence about the condition of the defendant at the time he operated the motor vehicle. . . .

During its deliberations, the jury sent out a note asking whether someone driving with a alcohol level under .08 could be considered to have been driving under the influence. Without objection, the trial court advised the jury that it could not answer its question and that it should rely on the jury instructions previously given by the trial court. The jury sent out a second note, asking this time whether the defendant's driving or the observations of Woods during the sobriety tests constituted operating while visibly impaired. The trial court dismissed the jurors for the day and advised counsel that when the jury returned he would reread the OWVI and OWI instructions.

When trial resumed, defense counsel requested the jury be given the following proposed instruction:

> These are the specific instructions as it relates to operating while intoxicated or operating while visibly impaired. The defendant is charged with operating a motor vehicle while intoxicated by operating a motor vehicle while under the influence of alcohol. To prove that the defendant operated while intoxicated or while operating visibly impaired, 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 2nd, 2003 in the City of Howell, County of Livingston. Operating means driving or having actual physical control the vehicle. Second, that the defendant was operating the vehicle on a highway or other place open to the public or generally accessible to motor vehicles and third, that the defendant was operating a motor vehicle in the City of Howell, County of Livingston and State of Michigan. To prove that the defendant operated a motor vehicle while intoxicated, the prosecutor must prove, also prove beyond a reasonable doubt that the defendant was under the influence of alcohol while operating the vehicle. Under the influence of alcohol means that because of drinking alcohol, the defendant's ability to operate the motor vehicle in a normal manner was substantially lessened. To be under the influence, a person does not have to be what is called dead drunk. That is falling down or hardly able to stand

(…continued)

> up. On the other hand, just because a person has drank alcohol or smells of alcohol does not prove by itself that a person is under the influence of alcohol. The test is whether because of drinking alcohol, the defendant's mental or physical condition was significantly affected and that the defendant was no longer able to operate a motor vehicle in a normal manner.

On the basis that the applicable statute in this case, MCL 257.625a, does not contain the presumptions contained in the version of MCL 257.625a that was in effect before September 30, 2003, the trial court denied defendant's request for the proposed jury instruction, and reread the standard jury instructions for OWI and OWVI. After reading the standard jury instructions, the trial court also denied defendant's request that the trial court read to the jury the old jury instruction defining the meaning of a .08 blood alcohol level. The jury subsequently returned its verdict of guilty on the lesser offense of OWVI.

Defendant appealed his conviction to the circuit court, contending that the trial court provided the jury inadequate instructions on the issue of defendant's blood alcohol level. The prosecution opposed the appeal, arguing that the jury instructions as a whole were sufficient. After briefing and argument, the circuit court reversed the conviction and ordered a new trial:

> I do that because I believe that there is a lack of expert -- it is required that there be expert testimony as to the meaning and/or impact of a blood alcohol level of 0.01 to 0.07. Otherwise, [those] figures exist in a vacuum with no criteria by which to judge their meaning or significance. The learned judge, and indeed Judge Pikkarainen is an acknowledged expert in these types of cases, himself spotted what he called a deficiency in the instructions on this issue. That being the case, I believe you would have to have expert testimony as to the significance of a blood alcohol in that range.

The trial court entered an order reversing defendant's conviction, and following a delayed application for leave to appeal, this Court granted leave.

II

We review claims of instructional error de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253, rem'd 467 Mich 888 (2002), on rem 256 Mich App 674; 671 NW2d 545 (2003). In determining whether error has occurred, jury instructions are to be read as a whole rather than piecemeal. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001), lv den 465 Mich 952 (2002). Even if somewhat imperfect, jury instructions are not erroneous if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *Id*.

III

The circuit court reversed defendant's conviction because it concluded that the trial court committed reversible error when it allowed defendant's blood alcohol level of .07 to be admitted into evidence and considered by the jury during deliberations without expert testimony being offered to explain what that evidence meant.

The question of whether expert testimony was required in order to admit defendant's bodily alcohol level into evidence was not before the circuit court. Indeed, the parties stipulated at trial to the admission of defendant's bodily alcohol level, and a party cannot stipulate to a matter and then argue on appeal that the resultant action was error. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001). Additionally, defendant framed his appeal to the circuit court as involving a claim of instructional error, not an evidentiary issue. Moreover, nothing in the drunk-driving statutes would expressly require the prosecution to produce expert testimony before a defendant's bodily alcohol level can be admitted into evidence. While to the contrary, MCL 257.625a(6)(d) clearly states that breath tests are admissible.[4] Therefore, we first conclude that the circuit court erred when it reached an issue that was not properly before it, and when it reversed defendant's conviction based on its erroneous conclusion that defendant's breath alcohol level of .07 could not be admitted into evidence and considered by the jury during deliberations without expert testimony.

We further conclude that the trial court's instructions to the jury regarding defendant's bodily alcohol level were adequate. A trial court must instruct the jury as to the applicable law, and fully and fairly present the case to the jury in an understandable manner. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). Here, the trial court read the standard OWVI and OWI instructions to the jury. Those instructions state that a defendant's bodily alcohol level is only one factor to consider, along with the other evidence presented at trial, to determine if the defendant is guilty of either OWVI or OWI. While the trial court refused to read defendant's requested instruction, which included the presumptions from the old statute,[5] the court's refusal was not erroneous because the Legislature removed those presumptions with its 2003 amendment to the drunk-driving statutes.

Defendant's reliance on *People v Lambert*, 395 Mich 296; 235 NW2d 338 (1975), to support his argument that the jury in this case was improperly left to speculate on the import of defendant's blood alcohol level of .07 is misplaced as *Lambert* is distinguishable from this case. In *Lambert*, the trial court failed to instruct the jury on the difference between the offenses of

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[4] MCL 257.625a(6)(d) states, in pertinent part, as follows:

> A chemical test described in this subsection shall be administered at the request of a peace officer having reasonable grounds to believe the person has committed a crime described in section 625c(1). . . . The test results are admissible and shall be considered with other admissible evidence in determining the defendant's innocence or guilt. . . .

[5] MCL 257.625 and MCL 257.625a were amended in 2003, effective September 30, 2003, just a few weeks before defendant was charged. The old version of MCL 257.625a contained the following presumptions: one was presumed to be driving under the influence if he had a blood alcohol level of .10 or higher; one was presumed to be driving impaired if he had a blood alcohol level of .08 or .09; and one was presumed not to be driving under the influence or impaired if his blood alcohol was .07 or less. However, the 2003 amendments lowered the blood alcohol level for driving under the influence to .08, set out no blood alcohol level for impaired driving, and removed the presumptions from the statute.

operating under the influence of liquor and operating while impaired. See *id.* at 304-305. However, in this case, the trial court gave the jury sufficient instructions on the elements of the crimes of OWVI and OWI. Further, it instructed the jury on the use of the bodily alcohol test results. Therefore, the jury in this case was not left to speculate on the law; rather, the jury was properly required to determine the weight and credibility to be given the bodily alcohol test and to determine if that along with the other evidence proved that defendant was guilty of either OWVI or OWI.

The circuit court erred in concluding that expert testimony was required to allow the jury to interpret the breath alcohol level of 0.07. This Court interprets a statute according to its terms. "The fair and natural import of the terms of the statute, in view of the subject matter of the law, is what should govern." *People v Cervi*, 270 Mich App 603, 615; 717 NW2d 356 (2006). There is nothing in the statute to suggest that expert testimony is required to allow a jury to interpret such evidence. The OWI section of the statute provides:

> (1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, "*operating while intoxicated" means either of the following* applies:
>
> (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, per 210 liters of breath, or per 67 milliliters of urine, or, beginning October 1, 2013, the person has an alcohol content of 0. 10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine. [MCL. 257.625(1) (emphasis added).]

Thus, operating while intoxicated means *either* that the person is under the influence of alcohol, *or* the person has a certain level of alcohol in his blood, breath or urine.

The evidence indicated that defendant had a alcohol level of 0.07 in his breath at the time the breathalyzer tests were administered at the Livingston County Jail. Even without expert testimony to opine what alcohol level defendant had at the time of his arrest, given defendant's 0.07 alcohol level at the time of the breathalyzer test, the jury could conclude from the alcohol content evidence and the field sobriety test results that defendant was under the influence of alcohol under subsection (1)(a) at the time he operated the motor vehicle.[6] In any event, the jury did not conclude that defendant was operating while intoxicated, but rather that he was operating while visibly impaired.

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[6] In the context of an OWI charge, the phrase "under the influence" means that the defendant's ability to drive is substantially and materially affected by consumption of intoxicating liquor or that the defendant is substantially deprived of his normal control or clarity of mind at the time he operates a vehicle. *Oxendine v Secretary of State*, 237 Mich App 346, 353-354; 602 NW2d 847 (1999).

The OWVI section of the statute provides, in relevant part: "A person . . . shall not operate a vehicle upon a highway . . . when, due to the consumption of alcoholic liquor . . . the person's ability to operate the vehicle is visibly impaired." MCL. 257.625(3). The statute does not contain any parameters that must be met other than that the driver is visibly impaired. MCL 257.625(3). Therefore the jury would not need any expert testimony to interpret the evidence that defendant's alcohol level in his breath was 0.07. Our Supreme Court has held that the results of bodily alcohol tests are admissible under MCL 257.625a(6)(b)(ii),[7] "and the prosecutor is not required to introduce expert testimony" on the reliability of the test results in light of the passage of time between the arrest and the administration of the test. *People v Wager*, 460 Mich 118, 126; 594 NW2d 487 (1999). Similarly here, the prosecutor is not required to present expert testimony on the meaning of the test results, which is an issue for the trier of fact to decide. Moreover, defendant was free to present relevant expert testimony to contradict the prosecution's assertion that defendant was operating his motor vehicle while intoxicated or, alternatively, visibly impaired, as well as to argue to the jury regarding the meaning or import of the test results.[8]

Accordingly, we reverse the circuit court and remand to the district court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto

[7] "The results of the [bodily alcohol] test are admissible in a judicial proceeding as provided under this act and will be considered with other admissible evidence in determining the defendant's innocence or guilt." [MCL 257.625a(6)(b)(ii).]

[8] In his appeal to circuit court, defendant contended that the district court committed reversible error by limiting closing arguments to 15 minutes. The circuit court did not address this argument. Defendant did not cross-appeal on this issue, and does not now raise this issue before this Court. Therefore, we need not address this issue.