STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 11, 2014
v	No. 314375 Leelanau Circuit Court
JOSEPH WILLIAM MILLER, Defendant-Appellant.	LC No. 12-001777-FH

Before: DONOFRIO, P.J., and SAAD and METER, JJ.

PER CURIAM.

Defendant appeals as of right his conviction following a jury trial of operating while intoxicated (OUIL), MCL 257.625(1), and OUIL causing serious injury, MCL 257.625(5). Having two or more prior OUIL convictions, his OUIL conviction was elevated to a felony pursuant to MCL 257.625(9)(c). Defendant was sentenced to five years' probation, with the first nine months to be served in county jail, for each conviction. Because defendant waived the evidentiary issue he brings forth on appeal, he is not entitled to a new trial. However, because defendant's two convictions violate double jeopardy, we vacate defendant's OUIL conviction and remand for amendment of the judgment of sentence.

I. BASIC FACTS

In June 2012, defendant and his girlfriend spent time at a casino, where they both consumed alcohol. They left the casino in the same vehicle, with defendant's girlfriend driving. While traveling, they got into an argument, and at some point during the drive, the car went off the road and crashed. An audio recording of a 911 call placed by defendant's girlfriend was admitted into evidence, and in the recording she states, "I'm next to the tree because [defendant] moved my steering wheel." "I was going to drive [defendant] home," she explained, "but he turned the steering wheel on me." However, defendant's girlfriend told a sheriff's deputy who responded to the scene that defendant had not grabbed the wheel. At trial, she testified that she did not remember the accident, placing the 911 call, or that defendant had grabbed the wheel. Testing revealed that she had a blood alcohol level of 0.12 and that defendant had a blood alcohol level of 0.17.

The physician's assistant who attended to the girlfriend at the hospital following the accident testified that she told him that defendant had "grabbed the wheel." The physician's assistant filled out a document entitled, "History and Physical," in which he documented her

condition and his treatment recommendations, which, along with other documents, was admitted into evidence at trial. Under the heading, "History of Present Illness," the following was written down:

> The patient is a 33-year-old female, who was apparently an unrestrained driver in a vehicle traveling highway speeds down a straight road when apparently it is being reported that her boyfriend, who was in the car with her, grabbed the wheel secondary to an altercation, causing them to lose control, leave the road, and causing the vehicle to roll multiple times, coming to rest at a tree.

During voir dire, the physician's assistant testified that the report contained both information he obtained directly from defendant's girlfriend and the responding EMS personnel. He explained that because the girlfriend did not recall what had happened after the accident, he relied on EMS for those details; however, he was clear that it was the girlfriend who told him that defendant had grabbed the steering wheel leading to the accident.

After the conclusion of the one-day trial, the jury convicted defendant of OUIL and OUIL causing serious injury.

II. HEARSAY

Defendant first argues that the statements in defendant's girlfriend's "History and Physical" report are hearsay and do not fall under the exception for statements made for the purpose of medical diagnosis found in MRE 803(4).[1] However, because defendant expressly agreed at the trial court that the statements in the medical record would be admissible, so long as the physician's assistant got the information first hand from defendant's girlfriend, he has waived the issue.[2] *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); see also *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998) ("A defendant should not be allowed to assign error on appeal to something his own counsel deemed proper at trial."). The physician's

[1] MRE 803(4) exempts from hearsay "[s]tatements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment."

[2] Defendant claims there was no waiver, but we disagree. After the physician's assistant explained that he got the information related to defendant grabbing the steering wheel from defendant's girlfriend, defense counsel stated to the trial court, "I understand there's a difference between [defendant's girlfriend] telling the Physician's Assistant he grabbed the wheel, okay. And I think that statement probably can come in." Then, after determining that the medical record was admissible in its entirety, the trial court stated, "[I]t's admissible, as the parties have understood and just acknowledged, so we'll admit that and go from there. . . . [Defense counsel] agreed to that. And he's correct." Notably, if defense counsel thought that the trial court was mischaracterizing his previous comment or position, he should have corrected the court at that time.

assistant testified that he got the information regarding defendant grabbing the steering wheel directly from the girlfriend. Thus, defendant's waiver extinguished any error. *Carter*, 462 Mich at 215.

Moreover, assuming arguendo that there was no wavier and that the objected-to portion of the medical record was erroneously admitted into evidence because that statement did not pertain to medical treatment, we would conclude that a new trial would not be warranted because "reversal is only required if the error was prejudicial." *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996); see also MCL 769.26 (Michigan's harmless error statute). "Although whether a hearsay statement is cumulative is not dispositive to [the harmless error] analysis under Michigan law, it is an indicator that the error was not highly prejudicial, particularly in the presence of other corroborating evidence." *People v Gursky*, 486 Mich 596, 623; 786 NW2d 579 (2010). Here, the challenged portion of the medical record was cumulative of other evidence that was admitted at trial and whose admissibility is not challenged on appeal. The other admitted evidence includes (1) a tape of a 911 conversation and (2) the physician's assistant's *testimony* recounting what the girlfriend told him at the hospital. Accordingly, defendant's contention that without the statements in the medical records the jury would have been "left to speculate" about the cause of the accident is without merit.

II. DOUBLE JEOPARDY

Defendant next argues that his conviction and sentence for OUIL and for OUIL causing serious injury violate both state and federal constitutional prohibitions against double jeopardy. Generally "[a] challenge under the double jeopardy clauses of the federal and state constitutions presents a question of law that this Court reviews de novo." *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003). However, defendant did not preserve the issue by raising it below, and we review the issue for plain error affecting substantial rights. *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008). Further, we review issues of statutory interpretation de novo. *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008).

"The double jeopardy clauses of the United States and Michigan constitutions protect against governmental abuses for both (1) multiple prosecutions for the same offense after a conviction or acquittal and (2) multiple punishments for the same offense." *Calloway*, 469 Mich at 450, citing *Ohio v Johnson*, 467 US 493, 498; 104 S Ct 2536; 81 L Ed 2d 425 (1984). The issue in this case is of multiple punishments for the same offense.

Two offenses are the "same offense" if they meet the "same elements" test provided by the United States Supreme Court in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932). "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision *requires* proof of a fact which the other does not." *Id.* (emphasis added).

When looking at the elements of multiple crimes to see whether each "requires proof of a fact which the other does not," *id.*, "the focus must be on a comparison of the abstract legal elements of the offenses and not on the particular facts of the case," *People v Garland*, 286 Mich App 1, 5; 777 NW2d 732 (2009).

Defendant was convicted of violating MCL 257.625(1) (OUIL), which has the following elements: (1) the defendant operated a motor vehicle, (2) upon a highway or other place open to the general public, and (3) the defendant was intoxicated. It is important to note that the "third offense" designation is not an element of the crime but, instead, a sentencing enhancement. *People v Reichenbach*, 459 Mich 109, 127 n 19; 587 NW2d 1 (1998).

Defendant's other conviction was for violating MCL 257.625(5) (OUIL causing serious injury), which states the following:

> A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1), (3), or (8) and by the operation of that motor vehicle causes a serious impairment of a body function of another person is guilty of a felony . . . .

Using the *Blockburger* test, it is evident that MCL 257.625(5) requires an element that MCL 257.625(1) does not, namely it requires that a defendant's operation of a motor vehicle caused a serious impairment of a body function of another person. However, MCL 257.625(1) does not *require* an element that is distinct from MCL 257.625(5). From MCL 257.625(5)'s plain language, it explicitly incorporates all of the elements of MCL 257.625(1) when it states, "who operates a motor vehicle in violation of subsection (1)." Thus, it cannot be said that MCL 257.625(1) requires an element that is not present in MCL 257.625(5). While one *could* be convicted of MCL 257.625(5) without having violated MCL 257.625(1), such as by violating MCL 257.625(3) or (8) while causing serious injury to another person, that is not the test. In short, MCL 257.625(1) does not require an element to be proved that is not present in MCL 257.625(5), and as a result, the two crimes are considered the "same crime" under the *Blockburger* test.

However, as the prosecution correctly points out, when the Legislature "clearly intend[s] to impose such multiple punishments, imposition of such sentences does not violate the Constitution, regardless of whether the offenses share the same elements." *People v Smith*, 478 Mich 292, 316; 733 NW2d 351 (2007) (quotation marks omitted). However, the prosecution's reliance on MCL 257.625(27) as being evidence of the Legislature's clear intent to impose multiple punishments is misplaced. MCL 257.625(27) merely prescribes how prior convictions are to be determined. MCL 257.625(27) states, "If 2 or more convictions described in subsection (25) are convictions for violations arising out of the same transaction, only 1 conviction shall be used to determine whether the person has a prior conviction." While that subsection references "2 or more convictions . . . arising out of the same transaction," it does not clearly state that it was the Legislature's intent to allow multiple punishments. That is because looking at MCL 257.625(25), which subsection (27) refers to, it includes as part of its definition of "prior conviction" a conviction from a foreign jurisdiction of a law that "substantially correspond[s] to a law of this state." MCL 257.625(25)(b). Thus, because some other jurisdictions may have chosen to explicitly impose multiple punishments for a single transaction, Michigan's Legislature took steps through the enactment of subsections (25) and (27) to limit how those multiple convictions are to be handled with respect to calculating a defendant's number of "prior convictions." As a result, MCL 257.625(25) and (27) do not evince a clear expression of any intent to allow Michigan to allow multiple punishments for the same offense.

When "a defendant has been punished doubly for offenses arising out of a single transaction," the appropriate remedy is to affirm the conviction of the higher charge and to vacate the lower conviction. *People v Herron*, 464 Mich 593, 609; 628 NW2d 528 (2001). Accordingly, we affirm defendant's OUIL causing serious injury conviction and vacate defendant's OUIL conviction.

Affirmed in part, vacated in part, and remanded for modification of defendant's judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Patrick M. Meter