No. 89501

In the
Missouri Supreme Court

STATE OF MISSOURI,

Respondent,

v.

MICHAEL TEER,

Appellant.

Appeal from St. Charles County Circuit Court
The Honorable Ted C. House, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a conviction for four counts of involuntary manslaughter, §565.024, RSMo 1994, and one count of second degree assault, §565.060, RSMo 1994, obtained in the Circuit Court of St. Charles County, for which appellant was sentenced to consecutive sentences of four years on each count. The Missouri Court of Appeals, Eastern District, affirmed appellant's conviction and sentence. ***State v. Teer***, No. ED89409 (Mo.App.E.D., June 3, 2008). It denied appellant's motion for rehearing on July 21, 2008.

This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. On August 26, 2008, pursuant to Supreme Court Rules 30.27 and 83.04, this case was transferred to this Court. Therefore, this Court now has jurisdiction pursuant to Article V, §10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Michael Jay Teer, was charged by information with four counts of involuntary manslaughter, and one count of second degree assault (LF 18-22). On July 8, 1996, this cause went to trial before a jury in the circuit court of St. Charles County, the Honorable William T. Lohmar, Jr. presiding (LF 7).

Viewed in the light most favorable to the verdict, the evidence adduced at trial showed the following.

On July 4, 1994, at about 5 p.m., appellant attended a barbecue at his brother's house (Tr. 434-435). Appellant drank beer at the party (Tr. 435). Later that evening, appellant was observed driving his truck on New Halls Ferry Road (Tr. 333). Appellant fishtailed around a corner onto Lindberg, almost flipping the truck, and was speeding, passing cars on the shoulder and in the turning lane (Tr. 335, 347, 357-358, 360-362, 368, 402-403, 408, 419, 426). The truck was followed by a small blue car (Tr. 335, 347, 362, 422). The truck was driving much faster than 45 mph, and faster than all of the other traffic (Tr. 336-337, 349, 369-370). On Highway 367, the truck continued to weave in and out of traffic, using the shoulder and the turning lane, followed by the blue car (Tr. 371). Appellant's truck reached speeds of 90 mph (Tr. 411, 428). At some point, appellant threw what appeared to be a beer can out of the truck (Tr. 372, 404, 412, 423, 428).

On July 4, 1994, Beverly Haney and her sister, Brenda Carson, took their three children to a fireworks stand near West Alton (Tr. 197-199). They purchased fireworks and left in Haney's 1991 Ford Escort (Tr. 199). Haney was driving; Carson was in the front

passenger seat; the three children were in the back seat (Tr. 199). Traffic on the highway near the fireworks stand was moving slowly (Tr. 199). Haney and Carson looked to see if any cars were coming (Tr. 208, 466). As there was no traffic coming, they started across the northbound lanes to reach the southbound lanes (Tr. 208, 461-462). When they were halfway across, appellant's truck, traveling about 85 to 90 mph, struck them (Tr. 208-210, 446, 463). The three children were thrown from the vehicle (Tr. 226). Beverly Haney, Lawrence Haney, Tiara Haney, and Latosha Edwards were all killed (Tr. 193, 226, 325-328, 331, 385-386). Carson suffered a broken arm and crushed sternum, and required two plates with sixteen screws in her arm (Tr. 206). She was transported by helicopter to the hospital (Tr. 226-227). Subsequent tests of appellant's truck revealed that it was in working order at the time of the accident, including the brakes (Tr. 486). The speed limit on U.S. Highway 67 at the scene of the accident is 55 mph (Tr. 503). Skid marks revealed that appellant had moved from the driving lane to the passing lane prior to the accident (Tr. 509-510). Had appellant been going less than 59 mph, he would have been able to stop in time to avoid the accident (Tr. 511-512).

After the accident, Michael Oliva, an employee of the fireworks business, escorted appellant from the area for his own protection, turning him over to Mark Koester, a St. Charles County deputy sheriff who was doing part time work at the fireworks stand; Robert Kendall, a security guard, stayed with appellant (Tr. 227, 235, 242-243). Appellant told Oliva that he had been drinking O'Douls all day and then had a few shots of tequila (Tr. 227). Appellant's lip was bleeding and he had abrasions on his knee (Tr. 232). Koester

believed appellant to be intoxicated, and could smell alcohol (Tr. 244-245, 250). Koester asked appellant if he was the driver, and appellant said he was (Tr. 245). Koester asked appellant if he had been drinking, and appellant told Koester that he had drunk an O'Douls and a couple of shots of tequila (Tr. 246, 250). Appellant's eyes were glazed over and red (Tr. 253). He was swaying back and forth (Tr. 253). His speech was slurred (Tr. 255). Koester turned appellant over to Robert Kendall and then returned to the accident scene (Tr. 245).

Kendall, in addition to being the security guard at the scene, was also a reserve officer with St. Louis County (Tr. 280). Kendall also believed appellant to be intoxicated (Tr. 281). Appellant stumbled going up the stairs into the trailer (Tr. 282). Appellant was seated inside the trailer, and when he tried to get up, he wobbled (Tr. 282). Kendall told appellant to sit down and not say anything (Tr. 282). Appellant's pupils appeared dilated, and his eyes appeared watery (Tr. 283, 284). Appellant did not eat or drink while in Kendall's custody (Tr. 283). Appellant asked Kendall what had happened and then said that he didn't mean to hurt anybody (Tr. 286). Appellant said he had drunk O'Douls and a couple of shots (Tr. 286).

When Koester returned to the trailer, appellant kept asking, "Did I kill somebody?" (Tr. 257). Koester told appellant that people had been injured, and told the other officers to keep an eye on him and make sure he did not eat or drink or smoke (Tr. 259).

Deputy Craig Ostermeyer was dispatched to the scene and he placed appellant under arrest (Tr. 261-263). Appellant was advised of the ***Miranda*** warnings (Tr. 263-264).

Appellant indicated that he understood his rights (Tr. 264). Appellant acknowledged that he had been driving the truck (Tr. 264). Ostermeyer observed that appellant "showed all the classic signs" that he was intoxicated (Tr. 267). Appellant's speech was slurred, his eyes, were glassy, and there was a distinct odor of alcohol about his breath (Tr. 270).

Kenneth Pesout of the Missouri Highway Patrol took custody of appellant and took him to Christian Hospital for medical treatment (Tr. 287-288). Pesout read appellant the ***Miranda*** warnings (Tr. 291). Appellant indicated that he understood his rights (Tr. 291-292). As they drove to the hospital, appellant indicated that he had been at a barbecue at his brother's house, where he had drunk some O'Douls and had some shots of tequila prior to leaving the barbecue (Tr. 292). Appellant indicated that he had a drinking problem (Tr. 292). Appellant mentioned that a girl named Kathy had been following him in her car (Tr. 294). Appellant appeared intoxicated (Tr. 295). He refused to perform any sobriety tests, except to recite the alphabet, which he was able to do (Tr. 295-296). Pesout read appellant the implied consent law, which appellant indicated that he understood (Tr. 296-297). Appellant said he was willing to give blood, but after a nurse read the hospital form in reference to the blood, appellant refused (Tr. 296).

Appellant testified in his own defense, stating that he had two shots of tequila earlier in the afternoon and had been drinking O'Douls, a non-alcoholic beer, and Pepsi (Tr. 656-658). Appellant admitted to speeding and swerving in and out of traffic on Lindberg and passing cars on the shoulder (Tr. 660). Appellant denied being intoxicated at the time of the accident (Tr. 670).

In rebuttal, the state put on the testimony of Highway Patrol Trooper Brian Harrel, who testified that appellant volunteered to him that he had been drinking O'Douls and tequila, and that he was driving at least 65 mph when he hit the van (Tr. 679-680).

At the close of evidence, instructions, and argument by counsel, the jury, after deliberation, found appellant guilty on all counts (LF 7-8; Tr. 744-745). The court sentenced appellant to four years on each count, run consecutively (LF 8, 9-10, 106-109; Tr. 777-778).

Appellant's conviction initially was affirmed on direct appeal by per curiam order. ***State v. Teer***, 959 S.W.2d 930 (Mo.App.E.D. 1998). Appellant's first postconviction appeal was remanded so that the motion court could issue findings of fact and conclusions of law as to appellant's claims. ***Teer v. State***, 50 S.W.3d 284 (Mo.App.E.D. 2001). This court reversed and remanded appellant's second postconviction appeal for an evidentiary hearing on appellant's claim that appellate counsel was ineffective for failing to file a complete record on the first direct appeal. ***Teer v. State***, 198 S.W.3d 667 (Mo.App.E.D. 2006). Inasmuch as this case is now before this court on another direct appeal, it would appear that the motion court granted appellant's Rule 29.15 motion claiming ineffective assistance of appellate counsel.

ARGUMENT

The trial court did not err in allowing the state to file an amended information charging appellant as a prior offender after the jury had begun deliberations because the amended information was permissible under Supreme Court Rule 23.08 in that it did not charge a new offense and did not substantively affect appellant's rights.

Appellant contends that the trial court should not have allowed the state to file an amended information, charging him as a prior offender, after the jury had begun deliberations because the information had to be filed before the case was submitted to the jury, and appellant was prejudiced because the trial court sentenced him more harshly (App.Br. 14). Appellant's claim is without merit because the amended information could be filed anytime prior to the verdict in that it did not charge a new offense nor did it affect appellant's substantive rights.

A. Standard of review.

Appellant, in setting out the standard of review in his brief, states that when the trial court gives an instruction violating a statute, the court has committed error, and if the error is prejudicial, the case must be reversed (App.Br. 15). Inasmuch as appellant's claim is not one of instructional error, this is not the correct standard of review.

The claim raised in appellant's Point Relied On is that the trial court erred in granting the state's motion to file an amended information (App.Br. 14). The standard of review for such a claim is as follows: A trial court's order granting leave to file an amended information is reviewed for an abuse of discretion. ***State v. Hoover***, 220 S.W.3d 395, 399 (Mo.App.E.D. 2007). An abuse of discretion will be found only where the trial court's ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to indicate a lack of careful consideration. ***Id.***

B. Relevant facts.

Appellant was initially charged by information with four counts of vehicular manslaughter and one count of second degree assault (LF 18-22). At the end of the state's case, the state announced to the trial court that it had just learned that appellant was a prior offender, and asked leave to file an amended information charging him as a prior offender (Tr. 526, 544, 548). The prosecutor explained that it was allowed to do so under Supreme Court Rule 23.08 (Tr. 530-531). The trial court stated that it would allow the defense to present its case and have the state present the amended information after the jury went out (Tr. 551). The jury would not know about the change, the instructions would not be altered, and any recommendation the jury made as to sentencing would merely be considered advisory (Tr. 551-552).

Appellant testified in his own defense and admitted, on direct examination, that he had pled guilty to driving while intoxicated and stealing over $150 (Tr. 664). After the defense rested its case, but before the case was submitted to the jury, the state submitted to

the trial court, out of the presence of the jury, State's Exhibit 26, a certified copy of appellant's prior conviction (Tr. 690-691). The state then asked for leave to file the amended information, but the trial court said it would not receive that until the jury had gone out (Tr. 691).

Once the jury went out to deliberate, the state again asked for leave to file the amended information charging appellant as a prior offender, over appellant's objection (Tr. 741). The state was granted leave, and an amended information was filed, charging appellant as a prior offender, based on his plea to stealing over $150 (LF 39-42; Tr. 742-743).

The jury returned verdicts finding appellant guilty on all counts, and assessing punishments of 10 months in the County Jail on the manslaughter counts, and 8 months in the County Jail on the assault (Tr. 744-745). At the subsequent sentencing hearing, the trial court stated, in pertinent part, as follows:

> This is a case of enhanced punishment. This is a case where an Information was filed and you were found beyond a reasonable doubt to be a prior offender by virtue . . . of a stealing offense in St. Louis County . . . At that time you were given a chance at probation and a chance to conform your conduct to the law. I can't ignore what has been said today. I don't think you can, either. I don't think you will for the rest of your life.

(Tr. 776-777). The trial court then sentenced appellant to consecutive sentences of four years on each charge (Tr. 777-778).

C. Analysis.

The trial court did not abuse its discretion in allowing the state to file an amended information, charging appellant as a prior offender. Supreme Court Rule 23.08 provides that "[a]ny information may be amended or substituted for an indictment *at any time before verdict* or finding if no additional or different offense is charged and if a defendant's substantial rights are not thereby prejudiced." (emphasis added). An information adding a count charging the defendant under the prior offender statute is not an additional or different offense. ***State v. Dunmore***, 227 S.W.3d 524, 527 (Mo.App.W.D. 2007). "[I]nvoking a prior and persistent statute for minimum sentencing purposes does not constitute a charge of a different offense." ***State v. Rogers***, 758 S.W.2d 199, 201 (Mo.App.E.D. 1988).

Thus, in ***State v. Golatt***, 81 S.W.3d 640, 649 (Mo.App.W.D. 2002), the Court of Appeals found no error in the trial court allowing the state to file an amended information after the close of evidence, charging the defendant as a prior offender. The Court noted that Rule 23.08 allows for the filing of such an amended information any time prior to the verdict where the new information does not charge an additional or different offense, and repeat offender provisions do not create an additional substantive offense. ***Id.*** The Court further found that allowing the amended information to be filed did not prejudice the defendant's substantive rights. As the Court stated, "Missouri appellate courts have repeatedly held that allowing such amendment as late as sentencing or even for the first time on remand from appeal does not prejudice a defendant's substantial rights." ***Id.***

Appellant, in his reply brief below, asserts that Rule 23.08 does not govern, but rather §558.021 governs and thus the trial court erred in finding appellant to be a prior offender. But appellant's claim, as stated in his point relied on, is not that the trial court erred in finding him to be a prior offender. His claim is that the trial court erred in allowing the state to file an amended information, and this was not error. In any event, Missouri courts have long held that allowing the State to prove prior or persistent felony offender status under §558.021, RSMo 1994, even after a verdict has been reached is harmless error and not prejudicial to the defendant. *See* ***State v. Jordan***, 978 S.W.2d 36, 41-42 (Mo.App.E.D. 1998); ***State v. Jennings***, 815 S.W.2d 434, 446-447 (Mo.App.E.D. 1991) ("the failure during trial to heed the order the statute prescribes for the reception of that proof does not violate due process"); ***State v. Tincher***, 797 S.W.2d 794, 797-798 (Mo.App.S.D. 1990); ***State v. Tate***, 752 S.W.2d 393, 394 (Mo.App.E.D. 1988) ("Because movant was, in fact, a prior offender, he had no right to be sentenced by a jury, and thus his substantive rights were not violated by the tardy adjudication of his prior offender status"); ***State v. Umphrey***, 694 S.W.2d 816, 189 (Mo.App.W.D. 1985); ***State v. Wynn***, 666 S.W.2d 862, 864-865 (Mo.App.E.D. 1984). *See also* ***State v. Hinkle***, 987 S.W.2d 11, 14-15 (Mo.App.E.D. 1999); ***State v. Richardson***, 719 S.W.2d 884, 885-886 (Mo.App.W.D. 1986); ***State v. Jones***, 703 S.W.2d 41, 43 (Mo.App.S.D. 1985). In ***State v. Jordan***, the Court of Appeals, Eastern District, cited this Court and held that "a hearing on prior offenses held untimely was harmless error and did not affect substantial rights." ***State v. Jordan***, 978 S.W.2d 36, 41

(Mo.App.E.D. 1998) (citing ***State v. Kilgore***, 771 S.W.2d 57, 64 (Mo.banc 1989), *cert. denied,* 493 U.S. 874 (1989)).

In ***State v. Wynn***, *supra*, the defendant claimed that the trial court erred in failing to conduct the persistent offender hearing before submission of the case to the jury as required under §558.021.2, RSMo 1981. In holding that such action was not prejudicial, this Court stated as follows:

> It is difficult to see how defendant suffered any actual prejudice by reason of the fact that the persistent offender hearing was conducted after instead of prior to submission to the jury. The central fact of importance and substance is that defendant is a persistent offender, as was amply demonstrated, in which case the Court, not the jury, determines punishment upon a finding of guilt. The subsection does not provide what results shall follow after failure to comply with its terms, and generally in such case a statute is held to be directory and not mandatory, particularly in the case of a statute specifying a time within which an official act is to be performed, 'with a view merely to the proper, orderly and prompt conduct of business.' The State, by failing to introduce the persistent offender evidence at the prescribed time did not thereby waive its right to make proof thereof before sentencing. Nor was the State estopped to do so by reason of the manner in which the matter was handled. Defendant acquired no vested right to have a jury assess the punishment by reason of the failure to conduct the hearing at the prescribed

> time. It is true that if the proof had never been made the conviction would have to be set aside; in that event the failure to submit the question of punishment to the jury would have been fatal to the verdict; but it was made, even if tardily.

666 S.W.2d at 864-865 (internal citations omitted).

In the present case, the state sought to amend the information prior to submitting the case to the jury and, for whatever reason, the trial court said that it would wait until after the case went to the jury. Appellant himself admitted that he was a prior offender, and the state also presented evidence to the trial court, prior to submitting the case to the jury, demonstrating appellant's prior offender status. The state ultimately filed the amended information prior to a verdict being submitted. This is within the time contemplated under Rule 23.08 and, per the case law, does not constitute charging a different offense.

Nor did it affect appellant's substantive rights. Appellant has no constitutional right to jury sentencing. ***State v. Weaver***, 178 S.W.3d 545, 547 (Mo.App.W.D. 2005). And because appellant *is* a prior offender (he cannot and does not maintain he is not), he did not even have a statutory right to jury sentencing. ***See Tate v. State***, 752 S.W.2d 393, 394 (Mo.App.E.D. 1988) ("Because movant was, in fact, a prior offender, he had no right to be sentenced by a jury, and thus his substantive rights were not violated by the tardy adjudication of his prior offender status."); ***State v. Wynn***, ***supra***, ("Defendant acquired no vested right to have a jury assess the punishment by reason of the failure to conduct the hearing at the prescribed time").

Moreover, the test of prejudice to one's substantive rights is whether the planned defense to the original charge would still be available after the amendment, and whether the defendant's evidence would be applicable before and after the amendment. ***State v. McGinness***, 215 S.W.3d 322, 324 (Mo.App.E.D. 2007). Appellant has made no showing, nor could he, that his defense to the original charges was affected by the amendment.

Moreover, given that in cases such as ***State v. Martin***, 882 S.W.2d 768, 771 (Mo.App.E.D. 1994), the case was remanded on appeal to allow the state to file an amended information in conformance with the prior offenses proven at trial, it can hardly be said to be prejudicial error to allow the state to file its amended information at the close of the trial to conform with the evidence that had already come in. An amendment properly may be made under Supreme Court Rule 23.08 to conform the information to the evidence. ***State v. Walter***, 918 S.W.2d 927, 929 (Mo.App.E.D. 1996).

In his brief, appellant notes that the trial court instructed the jurors on the ranges of punishment (App.Br. 15). Appellant has not raised a claim of instructional error. To the extent that the instructions improperly submitted to the jury the range of punishment, such language was mere surplusage. Where a defendant, as appellant in the present case, has been found to be a prior offender, the trial court shall not seek an advisory verdict from the jury as to sentencing, and if such a verdict is rendered, as it was here, the court shall not deem it advisory, but shall consider it as mere surplusage. §557.036.5, RSMo 2000.

In ***State v. Miller***, 699 S.W.2d 140, 141 (Mo.App.S.D. 1985), prior to the jury verdict, the trial court found Miller to be a dangerous offender. Thus, sentencing was for the trial

court, not the jury, and the jury should not have been instructed, but the fact that they were was not prejudicial. ***Id.*** at 141-142. Thus, the jury's sentence recommendation was "mere surplusage" and not binding on the trial court. ***Id.*** at 142.

In ***State v. Knight***, 703 S.W.2d 588 (Mo.App.S.D. 1986), the trial court found Knight to be a prior offender but, due to oversight, submitted Knight's punishment to the jury. ***Id.*** at 590. The jury returned a verdict assessing Knight's punishment for a term of one year in the county jail. ***Id.*** At sentencing, the trial court found Knight to be a prior offender and assessed his punishment at 7 years. ***Id.*** The Court of Appeals, Southern District, found no prejudicial error, noting that §557.036 "fairly read, deprive[s] the jury of any function, including any advisory function, in fixing the punishment of a defendant found to be a prior, persistent or dangerous offender." ***Id.***

Appellant argues that "Missouri law is not as clear on what the remedy should be where a defendant is erroneously found a prior offender and the jurors are asked to assess punishment." (App.Br. 18). To begin, appellant's claim of error herein is not that the court improperly found him to be a prior offender, nor is his claim that the trial court erred in sentencing him as it did. His claim is that the trial court erred in allowing the state to amend its information, but there is no question, as demonstrated above, that there was no error in allowing the state to do so.

In any event, appellant's assertion as quoted above is without consequence because appellant *was properly* found to be a prior offender. Appellant himself acknowledged that he was a prior offender and the trial court did not abuse its discretion in allowing the state to

amend the information, as discussed above. If appellant takes issue because the trial court did not make an express finding of his prior offender status before submission to the jury, this is of no consequence. "If there is sufficient evidence to meet the definition of persistent offender, the failure of the trial court to make specific findings is a procedural deficiency." ***State v. Trevino***, 206 S.W.3d 356, 360 (Mo.App.S.D. 2006). The trial court may use a variety of methods to find prior and persistent offender status. ***Id.*** Thus, where there is evidence that the defendant is a prior offender and the trial court acted in a manner consistent with that finding, this is sufficient to constitute a finding that the defendant was, in fact, a prior offender. ***See, e.g., State v. Gibson***, 122 S.W.3d 121, 125 (Mo.App.W.D. 2003) ("The law is well settled that . . . the trial court is not required to . . . make an express finding that the defendant is a [prior and persistent] offender, where the court effectively finds the defendant to be [such an] offender."). Here, appellant admitted to being a prior offender by admitting his prior conviction, and the trial court expressly referenced its finding at sentencing (Tr. 664, 776-777). There was thus no error in the trial court sentencing appellant as a prior offender, and as the cases above indicate, the instructional language submitted to the jury was of no practical consequence.

Appellant argues that he was prejudiced, however, because the jury compromised on their verdicts by convicting him of the felony charges but giving him minimal punishments (App.Br. 20-21). Appellant asserts that the "court's error deprived him of the jurors' right to compromise on their verdicts and assessed punishments." (App.Br. 21). Appellant's assertion is bereft of merit as jurors do not have a "right" to compromise on verdicts. Nor do

defendants have a "right" to have jurors engage in jury nullification, which is essentially what appellant is arguing for. Appellant cites no authority for this so-called "right" to compromise on their verdicts. On the contrary, jurors are presumed to follow the instructions, and thus appellant was found guilty because the jury believed he was guilty. What the jury thought would be an appropriate sentence has nothing to do with their determination of his guilt, and their determination of a sentence was surplusage and non-consequential. Thus, while certainly juries may engage in compromise verdicts, there is no protected right for them to do so.

In ***State v. Hunter***, 586 S.W.2d 345 (Mo.banc 1979), the jury was instructed as to the felony range of punishment, and the jury found Hunter guilty and set punishment at one year in the St. Louis Medium Security Institution. ***Id.*** at 346-347. The trial court, acting under the Second Offender Act, then assessed a punishment of five years imprisonment. ***Id.*** at 347. Hunter argued, on appeal, that inclusion of the range of punishment in the instruction misled the jury to believe he would only serve the time they assessed. ***Id.*** Hunter argued that the jury might have acquitted him on the felony count had they known that the judge could sentence him to more time than they assessed. ***Id.*** This Court rejected appellant's claim, noting that there is no constitutional basis for jury nullification, and appellant had no right to jury nullification. The Court recognized that the jury might have been misled as to its power to assess punishment, but could not see how this prejudiced the defendant. ***Id.*** Per the instructions, punishment was to be determined only if the jury first found the defendant guilty beyond a reasonable doubt. ***Id.*** The Court rejected the premise that the jury would

decide to convict of a felony (as opposed to a lesser offense) not on the basis of guilt, but on the basis that it could control the assessment of punishment. ***Id.*** The Court refused to find prejudice based on Hunter's speculations as to the jury's inclination toward nullification. ***Id.***

Thus, per this Court's decision in ***Hunter***, appellant cannot claim prejudice because the jury was not allowed to compromise on their verdicts by assessing the punishment. Nor was appellant prejudiced because the trial court "disregarded" §557.036.3, which limits a defendant's sentence to no longer than what the jury recommends. That provision is only relevant when the defendant is properly subject to jury sentencing. In the present case, as appellant was a prior offender, he was subject to sentencing by the trial court and he had no right to jury sentencing. §557.036.2(2) and §557.036.5, RSMo 2000.

A similar situation arose in ***State v. Bryant***, 658 S.W.2d 935 (Mo.App.W.D. 1983), where the defendant argued that the trial court failed to comply with the statutory provisions for sentencing[1] because the state did not prove its charge of persistent offender until after the jury returned its verdict and assessed punishment at five years, but the trial court sentenced the defendant to ten years. The Court of Appeals noted that §557.036.5,[2] RSMo. 1981 prohibited the trial court from seeking an advisory verdict and that, where one is rendered, it should be treated as "mere surplusage." ***Bryant***, 658 S.W.2d at 939. Thus, the court had authority to impose the sentence it did, and it was the jury who was deprived of any role. The court further found that the defendant had failed to show that employment of the correct

[1] A claim of error not raised by appellant in his point relied on in the present case.

[2] Currently §557.036.7.

procedure would have resulted in a different verdict. The Court of Appeals also found no due process violation, noting that the ultimate decision as to the sentence lies with the trial court, not the jury, and the court may impose a longer term where the defendant is found to be a persistent offender. ***Id.*** at 940. ***See also State v. Chunn***, 636 S.W.2d 166, 167-68 (Mo.App.S.D. 1982) (any error in the timing of the persistent offender hearing was harmless and jury's sentencing recommendation was an advisory verdict only).

Appellant, in his brief, argues that this Court should not follow ***Bryant*** and ***Chunn*** because both of those cases involved plain error and in the present case, appellant's claim is preserved. But this distinction is of no consequence because the Courts of Appeal did not base their analysis of the issue on the fact that it was unpreserved error, but rather found any error to be harmless. For example, the court in ***Bryant*** expressly found no due process violation, and the court in ***Chunn***, while finding the procedure used erroneous, stated that the error was harmless and did not result in prejudice. ***Bryant***, ***supra*** at 939-940; ***Chunn***, ***supra*** at 167.

Finally, the state, before submission to the jury, notified both the court and appellant of its intent to charge and prove up appellant as a prior offender (Tr. 526, 544, 548). Appellant admitted, and the state presented evidence of appellant's prior offender status, prior to submission to the jury (Tr. 664, 690-691). The state twice asked for leave to file an amended information *prior* to submission to the jury (Tr. 526, 544, 548, 691). The state did what was necessary to timely prove up appellant as a prior offender. Appellant cannot show prejudice when he knew – prior to submission to the jury – that the state intended to prove

him to be a prior offender and the court intended to treat him as such. The mere fact that the trial court, for some reason, decided to delay the actual filing of the information does not entitle appellant to relief.

In sum, the trial court did not err in allowing the state to file an amended information charging appellant as a prior offender. The amended information was filed within the time frame allowed by Supreme Court Rule 23.08, and appellant was properly proven to be a prior offender and sentenced as such. Appellant's claim is without merit and should be denied.

CONCLUSION

In view of the foregoing, respondent submits that appellant's convictions and sentences be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains _____ words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this _____ day of October, 2008, to:

Lisa M. Stroup
Office of State Public Defender
1000 St. Louis Union Station
St. Louis, MO 63103

_____
KAREN L. KRAMER