STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

COLEMAN WYNDELL WALKER,

Defendant-Appellant.

UNPUBLISHED
October 14, 1997

No. 180265
St. Clair Circuit Court
LC No. 91-002922-FH

Before: Corrigan, C.J., and Michael J. Kelly and Hoekstra, JJ.

PER CURIAM.

Defendant appeals by right his 1992 jury trial convictions of operating a motor vehicle under the influence of intoxicating liquor (OUIL), third offense, MCL 257.625(6); MSA 9.2325(6), attempted resisting and obstructing of a police officer, MCL 750.92; MSA 28.287, driving while license suspended (DWLS), second offense, MCL 257.904(3); MSA 9.2604(3), and unlawful use of a license plate, MCL 257.256; MSA 9.1956. Defendant thereafter pleaded guilty to being an habitual offender, third offense, MCL 769.11; MSA 28.1083. In 1994,[1] the court sentenced defendant to a term of imprisonment of three to ten years as an habitual offender. We affirm.

Defendant first argues that the trial court erred in admitting his driving record, which contained his prior OUIL convictions, asserting that the admission was highly prejudicial and denied him a fair trial. Because defendant failed to object to this evidence, we review for the existence of plain error that affected a substantial right. MRE 103(d). Review is precluded if the error was not decisive of the outcome or the case does not fall within the category of cases where prejudice is presumed or reversal is automatic. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). As discussed *infra*, no manifest injustice is present and we decline to grant defendant a second trial given that he could have objected below, but failed to do so. *People v Mayfield*, 221 Mich App 656, 660-661; 562 NW2d 272 (1997).

In 1992, when defendant was tried, Michigan case law entitled a defendant in an OUIL third-violation jury trial to have a bifurcated proceeding. In the first phase, the jury determined the defendant's guilt or innocence of the current offense. At that point, the jury was not permitted to know

of the defendant's previous OUIL convictions. If the jury convicted the defendant, the jury decided in the second phase whether the defendant previously had been convicted of OUIL within ten years. *People v Raisanen*, 114 Mich App 840, 843-844; 319 NW2d 693 (1982) (citing *People v Pipkin*, 93 Mich App 817, 820; 287 NW2d 352 (1979) and *People v Bosca*, 25 Mich App 455; 181 NW2d 678 (1970)).[2]

In this case, the court conducted a bifurcated trial as called for under *Raisanen*.[3] Because the bifurcated trial is not at issue, the question therefore is whether defendant was prejudiced by the admission of his driving record. The prosecutor introduced defendant's driving record while she questioned the officer who arrested defendant. Neither the prosecutor nor the witness referenced defendant's prior convictions. The officer merely testified that defendant's driving privileges were denied and revoked on May 3, 1991, the date of the instant occurrence. The prosecutor used defendant's driving record to demonstrate that his license was suspended on the date in question. Thereafter, the prosecutor admitted both the driving record and defendant's license plate, which had been registered for a different car in another person's name. The prosecutor then passed the exhibits to the jury. On this record, we decline to rule that defendant was unduly prejudiced by the admission, even assuming that the jury examined his driving record and discovered his OUIL convictions.

Further, the prosecutor offered defendant's driving record only in support of the DWLS charge. The evidence was probative of that charge. The elements of DWLS call for the prosecution to prove that defendant had a suspended license, which may be proven by defendant's driving record. See generally *People v Hislope*, 13 Mich App 63; 163 NW2d 675 (1968). The witnesses did not mention defendant's prior convictions. The prosecutor did not use the driving record to prove that defendant committed the OUIL charge. No miscarriage of justice occurred.

Also, the admission of defendant's criminal driving record was not decisive of the outcome because overwhelming evidence demonstrated defendant's guilt. *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992). The two officers who stopped defendant testified that he had exceeded the speed limit by eighteen miles per hour. One officer testified that defendant's car and breath smelled of alcohol and that his eyes were bloodshot. Both officers testified that defendant failed several field sobriety tests. A third officer testified that when defendant was at the police station, his breath had a strong odor of alcohol and his eyes were bloodshot. A doctor who treated defendant that evening noticed that defendant's eyes were bloodshot and that he smelled of alcohol. A fourth officer testified that defendant still had a "[s]trong odor of alcohol" a substantial amount of time after his arrest. The toxicologist testified that the blood sample taken from defendant indicated that his blood-alcohol content was .15, which exceeds the legal limit. Finally, although defendant claimed that he was not drunk on the night in question, he conceded that he had two beers that evening and was on three types of medication including Dilantin, Phenobarbitol and Tylenol III. Given this evidence, defendant would have been convicted of the underlying offense even if the court had excluded defendant's criminal driving record. *People v Daniels*, 192 Mich App 658, 672; 482 NW2d 176 (1991). We determine that the admission of defendant's driving record was harmless error. See *Bartlett*, *supra*; *Raisanen*, *supra* at 846.

Defendant also argues that if the failure to object is deemed controlling, then his counsel's performance was ineffective and he was denied the right to a fair trial. This Court presumes that counsel was effective, and a defendant bears the heavy burden of demonstrating otherwise. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). To prevail, a defendant must show that counsel's performance fell below an objective standard of reasonableness and "that counsel's errors were so serious as to deprive . . . defendant of a fair trial, a trial whose result is reliable." *People v Reed*, 449 Mich 375, 401; 535 NW2d 496 (1995) (citations omitted). A defendant must also show a reasonable probability that, but for counsel's deficient performance, the result would have been different and that the result of the proceeding was fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). Because of the overwhelming evidence previously discussed, defendant did not have a reasonably likely chance of acquittal. *People v Harmelin*, 176 Mich App 524, 535; 440 NW2d 75 (1989); *People v Caldwell*, 122 Mich App 618, 624-625; 333 NW2d 105 (1983). Defendant has not shown that, had counsel acted differently, the result would have been different and that the proceeding was fundamentally unfair or unreliable.

Next, defendant argues that the trial court erred in failing to reinstruct the jury on various issues during the second phase of the trial. We disagree. "[I]t is not necessary in all cases for instructions which were read during the first phase of a bifurcated trial to be repeated during the second phase. Rather, we will look to the instructions given during both phases to determine if the jury was properly instructed." *People v Jelneck*, 148 Mich App 456, 463; 384 NW2d 801 (1986).

In *Jelneck*, the defendant had a bifurcated trial on an underlying OUIL charge and on an OUIL third offense charge. The jury returned a guilty verdict against the defendant on the underlying charge and the trial moved to the second phase. Despite the defendant's request, the trial court refused to reread the instructions that it had given during the first phase. *Id.* at 462-463. In affirming the trial court's decision, this Court held:

> In the instant case, the judge had read the composite instructions three hours before reading the instructions in the second phase of the trial. The judge reminded the jury that the first instructions applied in the second phase of trial. He specifically mentioned the applicability of the presumption of innocence, burden of proof, right to remain silent, and duty to weigh the evidence. Under these circumstances, the trial judge properly instructed the jury in the second phase of trial. [*Id.* at 463.]

The case at bar is more compelling than *Jelneck* because only about an hour elapsed between the jury instructions in the first and second phases, as opposed to the three hour delay in *Jelneck*. Further, the trial court here gave detailed instructions on the presumption of innocence, the definition of reasonable doubt and the burden of proof before either party called any witnesses and at the end of the first phase of the trial. At the close of the proofs after the second phase, the court reminded the jury that the second verdict form was a "continuation of your original jury verdict form" and that they must be satisfied beyond a reasonable doubt that defendant was guilty of OUIL, third offense. No miscarriage of justice occurred.

Defendant next argues that the trial court failed to instruct the jury that the three OUIL offenses must have occurred within a ten-year period. Although the court did not instruct specifically the jury regarding the ten-year element, it stated: "It's just whether or not, as the Prosecutor charges here, more than one offense occurred within the time frame that they've claimed." This instruction was preceded by the following statement made by the prosecutor:

> The People ask that in this matter that we have proven, within a ten year period, that the Defendant has been convicted of, within that period, three OUIL convictions. We ask that you find him guilty of that, and also for the driving with license suspended, second.

The trial court's instruction was adequate in that the court's reference to the ten-year requirement, albeit vague, sufficiently advised the jury of this element. *People v McGhee*, 67 Mich App 12, 15-17; 239 NW2d 741 (1976). Moreover, the jury could not have reached another verdict even had the court differently instructed the jury. See *People v Vaughn*, 447 Mich 217, 235-236; 524 NW2d 217 (1994) (Brickley, J.). Defendant's only prior OUIL convictions in evidence occurred within ten years of the 1992 conviction at issue.

Next, defendant argues that the trial court erroneously instructed the jury when it read the instruction that delineates the statutory presumption of intoxication based on the numerical results of a blood-alcohol test. Defendant failed to object to this instruction and thus has waived the issue unless relief is necessary to avoid manifest injustice. MCL 769.26; MSA 28.1096, *People v Perry*, 218 Mich App 520, 530; 554 NW2d 362 (1996). Manifest injustice occurs where the erroneous or omitted instruction pertains to a basic and controlling issue in the case. *People v Torres (On Remand)*, 222 Mich App 411; 564 NW2d 149 (1997). Because the evidence of defendant's intoxication was overwhelming, defendant has not demonstrated that a failure to review this issue would result in manifest injustice. We decline to review the instruction.

Next, defendant agues that no legitimate reason existed for his counsel's failure to move to suppress the blood-alcohol test results. Defendant argues that his counsel should have presented an expert or challenged the prosecution's toxicologist on cross-examination with the argument that his blood sample, taken so long after his arrest, was an unreliable indicator of defendant's blood-alcohol content when he was driving. We disagree.

Before trial, defense counsel pointed out that *defendant wanted* the blood-alcohol test introduced *as part of his defense*, stating:

> [Y]our honor, there is something I would like to place on the record. My client, as one of his line[s] of defenses, would like me to place on the record that he is an epileptic and he is under [a] physician['s] care and taking the drugs of Phenobarbitol and Dilantin. He was also going to the dentist at the time that this incident occurred and was taking, I believe it is codeine or Tylenol III. He wants me to put forth as a defense that that may have had something to do with his blood alcohol level. I have advised him against that, but he has informed me that he still wants me to put that forth as a defense, and I just want to advise the Court of that prior to the trial starting.[4]

Defense counsel followed this strategy at trial: (1) defense counsel commented during opening statement that defendant was on medication for his epilepsy and therefore knew that he was not able to drink much; (2) defense counsel called defendant's girlfriend to testify that he never drank much because he was on medication; (3) defendant himself testified that he never drank much because he was on medication; and (4) defense counsel questioned the prosecution's toxicologist on cross-examination, asking if medication, such as the medication being taken by defendant at the time of his arrest, could have had an effect on blood-alcohol readings. This testimony, combined with the fact that defendant wanted the blood test results entered into evidence, indicates that the results were being used consistent with trial strategy. This Court will not substitute its judgment regarding matters of trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Finally, defendant argues that the trial court sentenced him in violation of the Ex Post Facto Clause, Const 1963, art 1, § 10, because it allegedly sentenced him to a term longer than that provided by statute at the time of the offense. Defendant's argument fails.

A statute that affects the prosecution or disposition of a criminal case involving a crime committed before the effective date of the statute violates the Ex Post Facto Clause if it increases the punishment for the crime. *Riley v Parole Bd*, 216 Mich App 242, 244; 548 N.W.2d 686 (1996). When defendant committed the offense on May 3, 1991, the applicable statute, a provision of the Motor Vehicle Code, read: "A person who violates subsection (1) or (2) . . . within 10 years of 2 or more prior convictions, as defined in subsection (5), is guilty of a felony. . . ."[5] MCL 257.625(6); MSA 9.2325(6). At that time, the Motor Vehicle Code also provided: "Any person who is convicted of a violation of this act declared to constitute a felony, unless a different penalty is expressly provided herein, shall be punished by imprisonment for not less than 1 year nor more than 5 years . . . ." MCL 257.902; MSA 9.2602.[6] Thus, the court could have sentenced defendant to a maximum term of five years imprisonment. Defendant, however, pleaded guilty as an habitual offender. Under the pertinent habitual offender statute, MCL 769.11(1)(a); MSA 28.1083(1)(a), the sentencing court had the authority to sentence defendant to "imprisonment for a maximum term which is not more than twice the longest term prescribed by law for a first conviction of that offense . . . ." Defendant's three to ten year sentence therefore did not violate the Ex Post Facto Clause.

Affirmed.

/s/ Maura D. Corrigan
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra

[1] Defendant did not appear for sentencing in 1992. In 1994, the court arraigned defendant on a bench warrant for failing to appear at sentencing two years earlier. Defendant was apprehended after his arrest for another drunk driving charge on the previous weekend, a violation of his probation.

[2] We note that, in none of these cases was the defendant charged with offenses other than the OUIL driving offense. In this case, defendant was charged with three offenses aside from the OUIL. The

prosecution was required under double jeopardy principles to join all charges against defendant that arose from the same transaction. *People v Spicer*, 216 Mich App 270, 272; 548 NW2d 245 (1996).

[3] This Court recently has held that a jury has no role in determining whether a defendant previously has been convicted of drunk driving offenses. *People v Weatherholt*, 214 Mich App 507, 509; 543 NW2d 35 (1995). This Court held that a defendant is not entitled to a jury trial on the issue of his prior convictions under the statutes, which the Legislature revised after *Raisanen*. *Weatherholt*, *supra* at 512. This Court held that the statutes did not create a substantive crime, but were designed for sentence enhancement. *Id*.

[4] In reply, the judge stated in part: "Well, I'm not too sure it's a wise thing to introduce that evidence."

[5] Later versions of this section delineate a one to five year term of imprisonment for this offense. MCL 257.625(7)(d)(i); MSA 9.2325(7)(d)(i).

[6] Defendant neglected to rely on this statute and instead cited MCL 750.503; MSA 28.771.