STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN DENNIS SHINE,

Defendant-Appellant.

UNPUBLISHED
February 24, 1998

No. 196664
Montcalm Circuit Court
LC No. 95-000318-FH

Before: McDonald, P.J., and Sawyer and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his conviction for operating a motor vehicle with unlawful blood alcohol level (UBAL), third offense, MCL 257.625(1), (7); MSA 9.2325(1), (7), and related misdemeanor offenses. We affirm.

In November 1995, a Michigan state trooper was dispatched to investigate a complaint of an attempted kidnapping. While the trooper was interviewing the complainant in her driveway, defendant, whose driver's license had previously been revoked, drove past the house. The complainant immediately identified him as the perpetrator and the trooper pursued him and effectuated a traffic stop within minutes. An odor of intoxicants emanated from defendant, his eyes were watery and bloodshot, he was disheveled in appearance, and his speech was slurred and slow. Defendant had to lean on the door while exiting his car and swayed while standing. Defendant admitted to drinking nine beers, and there were two empty beer cans, three full beer cans, and one cold, half-full beer can on the floor of the front seat of his car. A subsequent blood test showed that defendant's blood alcohol level was 0.25 grams per 100 milliliters of blood. The trooper admitted there was nothing about defendant's driving that led him to believe defendant might be intoxicated before he pulled him over.

Defendant, who had previously been convicted of operating a vehicle under the influence of intoxicating liquor (OUIL) on April 14, 1986, and May 23, 1988, was charged with OUIL/UBAL third offense, MCL 257.625(1), (7); MSA 9.2325(1), (7), possession of open intoxicants, MCL 257.624a; MSA 9.2324(1), and driving on a suspended license, MCL 257.904(1)(a); MSA 9.2604(1)(a). Following a jury trial on April 30, 1996, defendant was convicted of UBAL and the two

misdemeanor offenses. He was later sentenced to three years' probation with the first year in jail for UBAL third and concurrent terms of 90 days in jail for the two other convictions.

Defendant first contends his UBAL conviction should not have been subject to sentence enhancement as a third offense because he was convicted more than ten years after his earliest prior conviction. The statute provides that if a person is convicted of violating subsection (1) and the violation occurs within ten years of two or more prior convictions, the person is guilty of a felony. MCL 257.625(7)(d); MSA 9.2325(7)(d). Defendant violated the statute when he committed the instant offense in November 1995, which was within ten years of both prior convictions, and thus his sentence was subject to enhancement as a third offense. *People v Vezina*, 217 Mich App 148, 151; 550 NW2d 613 (1996).

Defendant also contends the trial court erred in refusing his request for an instruction on the lesser included offense of driving while his ability to operate a vehicle was visibly impaired (DWI), MCL 257.625(3); MSA 9.2325(3). One's ability to operate a vehicle is presumed to be impaired if one's blood alcohol level is more than 0.07 grams but less than 0.10 grams of alcohol per 100 milliliters of blood, and one is presumed to be under the influence of intoxicating liquor if one's blood alcohol level is 0.10 grams or more of alcohol per 100 milliliters of blood. MCL 257.625a(9)(b), (c); MSA 9.2325(1)(9)(b), (c). The trial court refused the request because defendant's blood alcohol level was well past 0.10 grams of alcohol per 100 milliliters of blood.

Regardless of the evidence in the case, the trial court must instruct the jury on necessarily included lesser offenses. *People v Lemons*, 454 Mich 234, 254; 562 NW2d 447 (1997). DWI is a necessarily included lesser offense of OUIL, the only difference between them being the degree of intoxication. *People v Lambert*, 395 Mich 296, 305; 235 NW2d 338 (1975); *People v Pipkin*, 93 Mich App 817, 819-820; 287 NW2d 352 (1979). Thus, the trial court erred in refusing to instruct the jury on DWI and reversal is required unless the error was harmless. *People v Mosko*, 441 Mich 496, 502-503; 495 NW2d 534 (1992). An error is considered harmless unless the defendant can show a reasonable probability that it affected the outcome of the trial. *People v Hall*, 435 Mich 599, 609 n 8; 460 NW2d 520 (1990).

In this case, there was overwhelming evidence that defendant was heavily intoxicated. Despite the fact that defendant's blood alcohol level was more than twice that necessary to create a presumption he was under the influence of intoxicating liquor, the jury declined to convict defendant of OUIL, apparently because the only direct evidence regarding his ability to drive indicated it was not affected by his drinking. Therefore, it is unlikely the outcome would have been any different had the trial court instructed the jury on the lesser included offense of DWI. Accordingly, we conclude the error was harmless.

Affirmed.

/s/ Gary R. McDonald
/s/ David H. Sawyer
/s/ Joel P. Hoekstra