STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 21, 2004
v	No. 250699 Midland Circuit Court
ERIC PERRIN GREENE, Defendant-Appellant.	LC No. 03-001402-FH

Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of Operating Under the Influence of Liquor (third offense), MCL 257.625(1), (8), and (10), and Operating in Violation of License Restrictions, MCL 257.312. He was sentenced to serve two years' probation, with six months in the county jail. He now appeals and we affirm.

Defendant's convictions arise out of an automobile accident in Midland County. Defendant's vehicle was found off the road, having struck a tree and rolling over several times, and defendant was found approximately twenty feet from the vehicle. Defendant indicated that he was not sure if he had been driving and that he was not aware of anyone else being in the vehicle, but did indicate to one of the deputies that his car was parked at his house and that he had been out with a friend. A blood test was performed and it indicated that defendant's blood-alcohol level was 0.24 grams per 100 milliliters.

At trial, defendant testified that he had ridden his bicycle to a bar, where he had a conversation with a man he did not know; defendant cannot recall the man's name. During the conversation, the man indicated an interest in purchasing defendant's car. The two rode to defendant's house in the man's truck, where they continued the conversation and had more to drink. The man indicated he wanted to take defendant's car for a test drive. The two left defendant's house in defendant's car, with the other man driving. According to defendant, the other man was driving at the time of the accident.

Based upon defendant's testimony, the prosecutor requested and received an aiding and abetting instruction. That is, the prosecutor argued in the alternative either that defendant had been driving and was guilty as a principal or that the unidentified man was driving and was also drunk, and therefore defendant was guilty of aiding and abetting the unidentified man's drunk driving by giving the man access to defendant's vehicle.

On appeal, defendant first argues that there was insufficient evidence to establish that the other man was, in fact, intoxicated and, therefore, there was insufficient evidence to establish defendant's liability under an aiding and abetting theory. The only evidence of the other man's intoxication was defendant's testimony regarding how long they had spent drinking together and defendant's agreement to a question posed by the prosecutor that defendant would be "safe in testifying that your friend was drunk." Defendant did, however, later testify that the man seemed normal at the time they left in defendant's car and he did not seem drunk at that time.

In response to defendant's argument, the prosecutor does not argue that there was, in fact, sufficient evidence to support a conviction under an aiding and abetting theory. Rather, the prosecutor argues that any error in giving the instruction was harmless because the jury clearly found that it was defendant, not the unidentified man, who had been driving. The prosecutor bases this argument upon the fact that the jury found defendant guilty on Count II as well, operating in violation of license restrictions. Because the jury had to conclude that defendant had been driving the vehicle in order to convict on Count II, then it necessarily follows that they also concluded that defendant had been driving the vehicle with respect to Count I and, therefore the prosecutor argues, the jury must have convicted defendant as a principal and not as an aider and abettor.

We agree that any error in instructing the jury on aiding and abetting was harmless. Defendant's conviction may not be set aside unless it affirmatively appears that the error resulted in a miscarriage of justice. MCL 769.26; *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999). The burden rests on defendant to establish that any error resulted in a miscarriage of justice. *Id.* at 493-494. And to meet that burden, it must be "shown that it is more probable than not that the error was outcome determinative." *Id.* at 495-496. In the case at bar, the jury also convicted defendant of operating a motor vehicle in violation of license restrictions. Therefore, of necessity, the jury concluded that defendant was operating the motor vehicle. Accordingly, they must have rejected defendant's argument that it was the unidentified acquaintance, rather than defendant, who was operating defendant's vehicle at the time of the accident. In sum, we are not persuaded that any error in instructing the jury on a theory of aiding and abetting was outcome determinative.

Next, defendant argues that the trial court erred in submitting the aiding and abetting theory under a general aiding and abetting instruction instead of under the specific OUIL aiding and abetting statute, MCL 257.625(2). But as discussed above, any error in instructing the jury on aiding and abetting was harmless beyond a reasonable doubt.

Finally, defendant argues that he was denied a fair trial when the prosecutor introduced during his case-in-chief the fact that defendant refused a preliminary breath test and that blood had to be drawn under a search warrant in order to perform the blood-alcohol test. Defendant concedes that he failed to preserve this issue by objecting at trial. Therefore, this issue must be reviewed under the plain error rule. *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). To establish plain error, among other things it must shown that the error was prejudicial and that it affected the outcome of the proceedings. *Id.* at 763. Assuming that defendant is correct that it was improper to introduce the fact that he refused a preliminary blood test, we are not persuaded that the error affected the outcome of the case. Defendant acknowledges that he was intoxicated at the time of the accident and does not claim that the refusal prejudiced him regarding that question. Rather, defendant argues that it prejudiced his claim that he was not the driver of the

vehicle. That is, that his refusal to submit to the preliminary breath test may have been viewed by the jurors as establishing that he was the driver because there would be no reason for him to refuse a breath test unless he was, in fact, the driver.

It is plausible, as defendant argues, that the jury may have taken his refusal as a tacit admission of having been the driver and not wanting to provide evidence of his drunkenness. But, it is also possible that the jury may have interpreted his refusal as being based upon his claim of having been the passenger and, therefore, defendant believing that there was no basis to require him to submit to a breath test. That is, when defendant responded to the officer's request by stating, "under the circumstances, no," the circumstances defendant referred to may have been his drunk driving, but it may also have been his status as a passenger. Therefore, we are not persuaded that the error affected the outcome of the proceedings, thus permitting review under the plain error doctrine.

Defendant also argues that defense counsel's failure to object deprived him of effective assistance of counsel. But this argument also requires a showing of prejudice, *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994), and therefore must also fail.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Henry William Saad