

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK JOHN ZIMMERMAN,

Defendant-Appellant.

UNPUBLISHED

June 4, 2002

No. 232860

Menominee Circuit Court

LC No. 00-002479-FH

Before: Griffin, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating a motor vehicle under the influence of intoxicating liquor and while having an unlawful blood level, third offense (OUIL/OBAL third), MCL 257.625(1), 8(c), 10(2). The trial court sentenced defendant to seven months in jail, twenty-four months' probation, and \$860 in fines and costs. We affirm.

Defendant first argues that the Datamaster breathalyzer tests were improperly administered by the operator's request that defendant "blow hard" into the collection mouthpiece, contrary to the procedures set forth in the breathalyzer manual; consequently, the results should have been suppressed. We disagree.

At trial, defendant failed to object to the admission of the breathalyzer results; thus, the issue was not properly preserved. *People v Aldrich*, 246 Mich App 101, 116; 631 NW2d 67 (2001). This Court reviews unpreserved claims of constitutional error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764-766; 597 NW2d 130 (1999); *People v Taylor*, 245 Mich App 293, 304; 628 NW2d 55 (2001). To avoid forfeiture under the plain error rule, defendant must establish that: (1) error occurred, (2) the error was clear and obvious, and (3) the plain error affected substantial rights, in that the error affected the outcome of the lower court proceedings. *Carines*, *supra* at 765. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.* at 763. Here, defendant has demonstrated no plain error.

Generally, under the "implied consent statute," MCL 257.625a, the amount of alcohol in a driver's blood, as shown by chemical analysis of the person's blood, is admissible into evidence in any civil or criminal proceeding. MCL 257.625a(6)(a); *People v Wager*, 460 Mich 118, 121; 594 NW2d 487 (1999). The *Wager* Court essentially moved away from a formulistic

approach to the admission of chemical test results and instituted the more common tests for admissibility – relevance and reliability. *Id.* at 126. See also *People v Campbell*, 236 Mich App 490, 504; 601 NW2d 114 (1999).

As noted in *Campbell, supra*, the statute itself does not set forth any prerequisites to admissibility and simply states that the amount of alcohol in a driver's body at the time alleged, as shown by chemical analysis of the person's blood, urine, or breath, is admissible into evidence. *Campbell, supra* at 496. Accordingly, normal evidentiary rules govern, and the only prerequisite to the admissibility of chemical tests is a threshold relevancy requirement as codified under MRE 401, 402, and 403. Suppression of test results is required only when there is a deviation from the administrative rules that call into question the accuracy of the test. *Id.* at 504. Any further challenges would merely influence the weight given to the result by the trier of fact. *Id.* at 507.

In the case at bar, relevancy is not at issue and defendant's challenge concerns the accuracy of the breathalyzer results; defendant essentially argues that the test administrator's instruction to "blow hard" was prohibited by the breathalyzer manual, resulted in an incorrect reading, and should have been excluded. *People v Fosnaugh*, 248 Mich App 444, 450; 639 NW2d 587 (2001). Our review of the authorities and the administrative rules fails to discern support for defendant's position. To the contrary, 1994 AACRS R 325.2655(b) instructs, "[A]ll analyses *shall* be conducted using the department-approved procedures and report forms as required." (Emphasis added.) It is unchallenged that the testing officer followed accepted departmental procedures, although these procedures contradicted the instructions contained in the breathalyzer manual. Both parties presented competing positions regarding the methodology of testing and the effect "blowing hard" would have on the test results and properly attempted to influence the weight given to the result by the trier of fact. *Campbell, supra* at 507. Accordingly, there was no error.

Defendant also argues that absent the improperly admitted breathalyzer test, the other evidence standing alone was insufficient to sustain a conviction on OUIL/UBAL. We disagree.

In reviewing the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 478, amended 441 Mich 1201 (1992); *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). In deciding whether there was sufficient evidence to sustain a conviction, all conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

To sustain a conviction on the offense of OUIL/UBAL, the prosecutor must establish that (a) the defendant was operating a motor vehicle on a highway or other place open to the general public or generally accessible to motor vehicles; (b) he did so while under the influence of alcohol, controlled substances, or a combination of these; (c) as a result of the drinking he or she was substantially deprived of normal control or clarity of mind; and (d) he was unable to drive normally. MCL 257.625(1); *People v Raisanen*, 114 Mich App 840, 844; 319 NW2d 693 (1982).

Under the clear terms of MCL 257.625, a violation can be established either through evidence supporting a conclusion that the person is under the influence of intoxicating liquor or by a blood alcohol content of 0.10 or more per 210 liters of breath. MCL 257.625(1)(a) and (b). Therefore, the prosecution must present sufficient direct or circumstantial evidence that the defendant was unable to drive normally. *People v Walters*, 160 Mich App 396, 403; 407 NW2d 662 (1987). See also CJI2d 15.5(1). Alternatively, evidence of defendant's blood alcohol level was properly admitted and gave rise to various legal presumptions concerning his state of intoxication. A criminal defendant is presumed OUIL when his alcohol content is 0.10 grams or more per 210 liters of breath. MCL 257.625(1)(b); CJI2d 15.5(7); *People v Calvin* 216 Mich App 403, 408-409; 548 NW2d 720 (1996).

Here, defendant's claim that the evidence, ostensibly without the breathalyzer results, was insufficient to support his conviction is unsupported. See *People v Hanna*, 223 Mich App 466, 475-476; 567 NW2d 12 (1997) (evidence defendant stumbled out of his car unsteadily, admitted he had been drinking, failed field sobriety test, refused to take breath test, and vomited in his jail cell was relevant to establish defendant's drunkenness and allow conclusion that the defendant was intoxicated); *Calvin*, *supra* at 407-408 (degree of person's intoxication may be established by chemical analysis tests of the person's blood, breath, or urine or by testimony of someone who observed the impaired driving).

A jury is free to believe or disbelieve, in whole or in part, any of the evidence presented. *People v Perry* 460 Mich 55, 63; 594 NW2d 477 (1999). In the instant case, the evidence, when viewed in the light most favorable to the prosecution, that defendant's tested blood alcohol level was 0.12 to 0.13 and that defendant displayed slurred speech, glassy eyes, an inability to stand without swaying and performed poorly on his field sobriety tests, was sufficient, either jointly or standing alone, to allow a rational finder of fact to conclude that the essential elements of the crime charged were proven beyond a reasonable doubt. *Wolfe*, *supra*; *Herndon*, *supra*.

Affirmed.

/s/ Richard Allen Griffin
/s/ Harold Hood
/s/ David H Sawyer