

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD JOSEPH BACHI,

Defendant-Appellant.

UNPUBLISHED
December 14, 2004

No. 250254
Antrim Circuit Court
LC No. 03-003651-FH

Before: Murphy, P.J., and White and Kelly, JJ.

MEMORANDUM.

Following a jury trial, defendant was convicted of operating a motor vehicle while under the influence of intoxicating liquor (“OUIL”), third offense, MCL 257.625(1) and (8)(c), and driving with a suspended license, MCL 257.904(3)(a). He was sentenced as an habitual offender, second offense, MCL 769.10, to 2-1/2 to 7-1/2 years’ imprisonment for the OUIL conviction, and three months for driving with a suspended license. He appeals as of right, and we affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the prosecutor improperly presented evidence that he refused a Breathalyzer test. Because defendant did not object to this evidence at trial, we review this issue for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Even if the evidence was not relevant to the prosecution’s case-in-chief, see MCL 257.625a(10) and *People v Duke*, 136 Mich App 798, 803; 357 NW2d 775 (1984), it was potentially relevant to rebut defense evidence suggesting that defendant was not intoxicated at the time the police found him, and that his blood alcohol level increased after his arrest. Therefore, admission of the evidence did not amount to plain error. Furthermore, in light of the trial court’s jury instruction that defendant’s refusal to take the test was not to be considered as evidence of his guilt, we conclude that any error did not affect defendant’s substantial rights.

Because admission of the evidence was not plain error, and because defendant’s substantial rights were not affected in any event, defendant was not prejudiced by trial counsel’s failure to object to the evidence. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

Lastly, the trial court did not err in scoring fifteen points for offense variable (“OV”) 18. Fifteen points are to be scored when the defendant’s blood-alcohol content is .15 grams or more but less than .2 grams per 100 milliliters of blood. MCL 777.48(1)(b). The evidence that blood

samples collected after defendant's arrest showed blood-alcohol levels of 0.162 and 0.167, together with the evidence that defendant was exhibiting signs of intoxication at the time of his arrest, was sufficient to support the trial court's scoring of OV 18. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

Affirmed.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Kirsten Frank Kelly