STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LEE HOLTZLANDER,

Defendant-Appellant.

UNPUBLISHED
February 25, 1997

No. 185972
Ottawa Circuit Court
LC No. 94-018350-FH

Before: Sawyer, P.J., and Neff and A. L. Garbrecht,* JJ.

PER CURIAM.

Defendant appeals as of right his conviction by a jury of operating a motor vehicle under the influence of intoxicating liquor (OUIL) causing death, MCL 257.625(4); MSA 9.2325(4). Defendant was sentenced to three to fifteen years of imprisonment. We affirm.

Defendant and Steven J. Albin were the drivers of two cars that collided. Albin died as a result of the accident.

I

Defendant argues that there was insufficient evidence introduced at trial to prove that he was intoxicated at the time of the accident. Specifically, defendant argues that the prosecutor presented evidence only of the alcohol content of defendant's blood serum, not of his whole blood, and that this evidence is insufficient to prove that defendant was intoxicated. We disagree.

A

The elements of OUIL causing death are: (1) the defendant operated a motor vehicle while intoxicated; (2) the defendant voluntarily decided to drive knowing that he had consumed alcohol and might be intoxicated; and (3) the defendant's intoxication was a substantial cause of the victim's death. *People v Lardie*, 452 Mich 231, 259-260; 551 NW2d 656 (1996); MCL 257.625(4); MSA 9.2325(4). To prove that a person is intoxicated, the prosecutor must show either of the following:

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* Circuit judge, sitting on the Court of Appeals by assignment.

> (a) The person is under the influence of intoxicating liquor or a controlled substance, or a combination of intoxicating liquor and a controlled substance.
>
> (b) The person had an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or 67 milliliters of urine. [MCL 257.625(1); MSA 9.2325(1).]

An alcohol content of 0.10 grams thus represents a threshold, above which a defendant is considered to be in the same category as someone under the influence of intoxicating liquor. *Lardie*, *supra* at 246.

The amount of alcohol in the driver's blood, breath or urine at the time alleged as shown by chemical analysis of the person's blood, breath, or urinegives rise to the following presumption:

> If there were at the time 0.10 grams or more of alcohol per 100 milliliters of the defendant's blood . . . it is presumed that the defendant was under the influence of intoxicating liquor. [MCL 257.625a(9)(c); MSA 9.2325(1)(9)(c).]

This presumption is permissive and rebuttable. *People v Calvin*, 216 Mich App 403, 408-409; 548 NW2d 720 (1996). The validity of a presumption arising from a blood alcohol level test is for the trier of fact to determine in connection with all the evidence. *Id*. at 409.

B

In the present case, Dan Steelandt, a medical technologist, tested the serum portion of defendant's blood to determine the level of alcohol in defendant's blood. Steelandt testified that the test revealed an alcohol content of .171 by weight. Steelandt further testified that test results based on blood serum are, on average, fifteen percent higher than state police lab tests performed on whole blood.

Dr. Daniel McCoy also provided testimony regarding defendant's blood test. McCoy testified that assuming a hypothetical man of defendant's size drank seven and one-half beers in five and one-half hours, and had a blood serum alcohol level of .171, that person's whole blood alcohol level would be in the range of .07 to .13 percent. McCoy also testified that, on average, test results based on blood serum reveal an alcohol content of fifteen to eighteen percent higher than tests performed on whole blood. Using the eighteen percent differential, McCoy translated the blood serum test result of .171 percent into a whole blood alcohol level of .145 percent.

C

An appellate court reviews a claim of insufficient evidence by viewing the evidence in the light most favorable to the prosecution and determining whether a rational trier of fact could find that each element of the offense was proven beyond a reasonable doubt. *People v Smith,* 205 Mich App 69, 71; 517 NW2d 255 (1994), *aff'd sub nom People v Peterson*, 450 Mich 349 (1995). The question

is not whether there was conflicting evidence, but whether there was evidence which, if believed by the jury, would justify convicting the defendant. *Id*.

Here, the record reveals conflicting evidence regarding defendant's whole blood alcohol level. However, if the jury chose to believe the testimony that a blood serum alcohol level of .171 percent is fifteen to eighteen percent higher than a whole blood alcohol level, resulting in a whole blood alcohol level of .145 to .149 percent, this evidence would be sufficient to allow the jury to conclude beyond a reasonable doubt that defendant was intoxicated.

In sum, we find the evidence sufficient to sustain defendant's conviction for OUIL causing death.

II

Defendant next contends that he was denied effective assistance of trial counsel because his attorney did not move for a directed verdict even though the prosecution failed to prove the alcohol content of defendant's blood, or otherwise establish that defendant was intoxicated at the time of the accident.

As demonstrated above, the prosecution presented sufficient evidence for the jury to conclude beyond a reasonable doubt that defendant's blood alcohol level was .10 grams per milliliter of blood or more and that defendant was therefore intoxicated. A motion for a directed verdict certainly would have been denied. Defense counsel was not ineffective for failing to argue a meritless motion. *People v Chinn*, 141 Mich App 92, 98; 366 NW2d 83 (1985).

III

Finally, defendant argues that he was denied a fair trial because the prosecutor misrepresented crucial blood alcohol level evidence in his closing argument. Specifically, defendant contends that the prosecutor improperly argued in his closing argument that at the time of the accident defendant had fully absorbed all of the alcohol he had drunk. Based on that misrepresentation, the prosecutor argued that defendant's blood alcohol level was .155 percent when the accident occurred. Defendant also complains that the prosecutor improperly implied that had defendant been more precise in his testimony about when he drank each beer, and if McCoy had accounted for the small quantity of food eaten by defendant before the accident, McCoy's estimate of defendant's whole blood alcohol level would have been more accurate.

The prosecutor is free to relate the facts adduced at trial to his theory of the case and to argue the evidence and all reasonable inferences arising therefrom to the jury. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Additionally, a prosecutor may argue from the facts that the defendant or another witness is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Evaluating the prosecutor's remarks in context reveals that the prosecutor's closing remarks were based on evidence adduced at trial and the prosecutor properly related

reasonable inferences arising from such evidence to the jury. The prosecutor's remarks did not deny defendant a fair trial.

Affirmed.

/s/ David H. Sawyer
/s/ Janet T. Neff
/s/ Allen L. Garbrecht