STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 6, 2004
v	No. 246033 Midland Circuit Court
DENNIS JEROME ROBINSON, Defendant-Appellant.	LC No. 02-1207-FH

Before: Zahra, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of two counts of operating under the influence of intoxicating liquor (OUIL), 3rd offense notice, OUIL with an occupant less than 16 years of age, 2nd offense notice, and driving while license suspended (DWLS), 2nd or subsequent offense notice. Defendant was sentenced to two terms of 30 months to ten years, as an habitual offender, and one year, to run concurrently.

I. FACTS

On the evening of February 23, 2002, defendant went into an auto parts store with his two children and was met at the counter by the store manager. After speaking to the store manager, defendant and his children were shown to the bathroom in the rear of the store. The store manager later described defendant as being intoxicated; he had an odor of alcohol, his speech was noticeably slurred, and he had a difficult time walking. After using the store bathroom, defendant and his children left the auto parts store and were observed getting into a vehicle. According to the store manager, no one else was present in the vehicle when they drove away except for defendant and his two children.

Almost an hour later, the store manager called authorities to report the incident and provided police with the vehicle's registration information. After running the information through their system, Michigan State Police sent a trooper over to defendant's residence to investigate the incident. When the trooper first arrived, the house was dark and there was no answer when he knocked on the door. When he later returned, defendant responded to the trooper and the two spoke in the driveway of defendant's residence.

The trooper later stated that when he approached, defendant appeared to be nervous, he stumbled when he walked, he slurred his words, he had a strong odor of intoxicants, and his eyes were bloodshot. As the trooper began to question defendant about the incident, defendant first admitted that he had been driving earlier with his children and that his license was suspended. Defendant asked the trooper to give him a break because he did get the children home safely, but the trooper refused and placed defendant under arrest. Defendant then became agitated and explained to the trooper that he would simply change his story to indicate that someone else was driving the vehicle that evening, and it would be his word against the trooper's. At the time of his arrest, defendant's blood alcohol level was .17.

During the trial, defendant's sister and her boyfriend both testified that Ms. Render was driving the vehicle that evening. Defendant's sister indicated that defendant had called her for a ride because he did not have a driver's license and that she took defendant and his two children to the auto parts store and they stopped for dinner on the way home. The boyfriend stated that he was waiting for them at defendant's house and observed defendant's sister driving the vehicle upon their return that evening.

II. SUFFICIENCY OF EVIDENCE

Defendant argues that there was insufficient evidence to support defendant's conviction of operating under the influence of intoxicating liquor.[1] We disagree.

A. Standard of Review

In reviewing the sufficiency of the evidence, this Court must view the evidence de novo and in the light most favorable to the prosecutorto determine whether a rational trier of fact could find that the essential elementsof the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). However, this Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 478 (1992) amended 441 Mich 1201 (1992).

B. Analysis

In order to prove the offense of operating a motor vehicle under the influence of intoxicating liquor, the prosecution must establish that defendant was operating a motor vehicle upon a public highway while under the influence of alcohol.[2] CJI2d 15.2; *People v Raisanen*, 114 Mich App 840; 319 NW2d 693 (1982).

---

[1] In defendant's statement of questions presented, he argues that there was insufficient evidence to convict defendant of "OUIL causing death." We assume this is a typographical error and have analyzed this issue as if defendant had made an insufficient evidence of OUIL argument.

[2] We note that in the present case, defendant has neither preserved on appeal nor raised on appeal the legal sufficiency of his arrest at his home after parking his vehicle, turning off the engine and

(continued…)

At trial, the store manager testified that he saw only defendant and his children get in the car and drive away. Furthermore, the trooper testified that defendant admitted that he had been operating the vehicle and requested that the officer "give him a break" because his children arrived at home safely. On the other hand, defendant's sister and her boyfriend both testified that defendant's sister was the one who was driving. Thus, the issue of whether defendant was operating the vehicle became one of fact and the jury then had to weigh the credibility of the various witnesses. Here the jury found the testimony of the trooper and the store manager to be more credible than that of defendant's sister and her boyfriend. We must not interfere with the factfinder's role, and so must not weigh the evidence or the credibility of the witnesses. *Wolfe, supra* at 514-515.

III. REBUTTAL TESTIMONY

Next, defendant argues that the trial court erred in admitting rebuttal evidence in the form of testimony by the auto parts store manager that he did not observe defendant's sister driving his vehicle. We disagree.

A. Standard of Review

The admission of rebuttal evidence is within the trial court's discretion, and a trial court's decision will not be disturbed on appeal absent a clear abuse of discretion. *People v Katt*, 248 Mich App 282, 301; 639 NW2d 815 (2001).

B. Analysis

With regard to the proper purposes and scope of rebuttal evidence, the Michigan Supreme Court has stated: Rebuttal evidence is admissible to contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same. The question whether rebuttal is proper depends on what proofs the defendant introduced and not on merely what the defendant testified about on cross-examination.... [T]he test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence

(…continued)

entering his home and subsequently responding to the trooper's attempt to question him about his driving from an auto parts store with minors in the vehicle. In addition, as discussed in Section II above, defendant contends that on a factual basis the prosecutor introduced insufficient evidence that he (defendant) was operating his vehicle in violation of MCL 257.625(1). However, defendant has neither preserved on appeal nor raised on appeal any issue of law concerning his "operating" a vehicle as the term is defined by the Supreme Court in *People v Wood*, 399 Mich 450; 538 NW2d 351(1995). See also, *People v Lyon*, 227 Mich App 599; 577 NW2d 124 (1998). *People v Burton*, 252 Mich App 130; 651 NW2d 143 (2002). Therefore, we make no determinations on issues surrounding the arrest of Appellant, statements made by the Appellant during conversations with a trooper and the term "operating" as analyzed in *Wood* and subsequent cases.

admitted in the prosecutor's case in chief. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996) (citations and internal punctuation omitted).

In the present case, the rebuttal evidence to which defendant objects was the testimony of the store manager on the subject of whether he observed defendant's sister in the vehicle. This testimony was introduced to contradict the testimony of defendant's sister that she was the one driving the vehicle. Thus, the evidence was properly responsive to defendant's theory that his sister was the one driving and the trial court did not abuse its discretion in allowing its admission.

IV. PROSECUTORIAL MISCONDUCT

Finally, defendant argues that he was denied a fair trial when the prosecutor commented that having the front windows of a vehicle tinted in Michigan is illegal. We disagree.

A. Standard of Review

At trial, defendant failed to object to the comments made by the prosecutor that he now contend denied him a fair trial. Appellate review of allegedly improper conduct is precluded if the defendant fails to timely and specifically object unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

Unpreserved issues are reviewed for plain error which affected substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000),

B. Analysis

In this case, the prosecutor stated:

> "It's against the law in Michigan to have your front windows tinted. Is it an illegal vehicle? I don't know because we haven't seen a picture of it."

The prosecutor's comment was in response to defendant's assertion that the store manager would not have been able to see who was driving the vehicle because the windows were tinted. Assuming, without deciding, that this comment was improper, the prejudicial effect of this comment could have been cured by a timely instruction had defendant objected. *Schutte, supra* at 721.

Affirmed.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Bill Schuette