

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOUIS WILLIAM JOHNSON,

Defendant-Appellant.

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UNPUBLISHED

September 23, 2004

No. 247672

Calhoun Circuit Court

LC No. 02-003415-FH

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of operating a vehicle under the influence of intoxicating liquor, third offense, MCL 257.625, and driving while license suspended, MCL 257.904, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was arrested after a state trooper found him sitting in the driver's seat of a vehicle that was stopped on the road. The prosecution sought to exclude testimony from defendant's proposed witnesses, his son and his girlfriend, on the ground that defendant's witness list was filed in an untimely manner the day before trial. The trial court found that no justification existed for the failure to disclose the name of his girlfriend prior to filing the list, and allowed defendant's son, only, to testify. Defendant's son testified that defendant's girlfriend was driving the vehicle, and that after she and defendant argued she stopped the vehicle in the road, took her keys, and left the scene.

A trial court may impose sanctions as it deems just when a party fails to obey an order to provide discovery. MCR 2.313(B). Sanctions may include exclusion of testimony or evidence. MCR 6.201(J). We review a trial court's decision regarding sanctions for an abuse of discretion. *People v Elkhoja*, 251 Mich App 417, 439; 651 NW2d 408 (2002), vac in part on other grounds 467 Mich 916; 658 NW2d 153 (2002).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must

show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.* at 600.

Defendant argues that the trial court abused its discretion by prohibiting his girlfriend from testifying, and that defense counsel rendered ineffective assistance by failing to file the witness list in a timely manner. We disagree.

Defendant's girlfriend's name was not contained in the police report, the report did not indicate that another person had left the scene, and apparently no mention was made of her alleged involvement until defendant's witness list was filed. Defendant made no showing that his girlfriend could offer relevant evidence, MRE 401, and the trial court did not abuse its discretion by excluding her testimony. MCR 6.201(J); *Elkhoja, supra*.

The failure to call a witness can constitute ineffective assistance only if the failure deprived the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vac in part on other grounds 453 Mich 902; 554 NW2d 899 (1996). Defendant placed his theory that his girlfriend was driving the vehicle before the jury via his son's testimony; however, the jury was entitled to reject that testimony and to infer from the trooper's testimony that defendant was driving the vehicle. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990). Defendant has not shown prejudice in that he has not shown that but for counsel's error, it is reasonably probable that the result of the proceedings would have been different. *Carbin, supra*.

Affirmed.

/s/ Stephen L. Borrello  
/s/ Christopher M. Murray  
/s/ Karen M. Fort Hood