

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KIMBERLY SUE MIDDLEL,

Defendant-Appellant.

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UNPUBLISHED

October 23, 2007

No. 272309

Oakland Circuit Court

LC No. 2006-206433-FH

Before: Zahra, P.J., and White and O’Connell, JJ.

PER CURIAM.

Defendant was convicted of operating a motor vehicle under the influence of liquor (OUIL) – third offense, MCL 257.625(1); MCL 257.625(9), and operating a motor vehicle with a suspended license, MCL 257.904(3)(a). Defendant was sentenced to 90 days in jail with 44 days of credit, and 24 months’ probation. Defendant appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues on appeal that her convictions are not supported by sufficient evidence. We disagree. When deciding whether there was insufficient evidence to support a conviction, this court reviews the record de novo. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), aff’d 466 Mich 39 (2002). This court analyzes the evidence in the light most favorable to the prosecution in order to determine whether a rational trier of fact could determine that the elements of the charged offense were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

In order to prove that an individual is guilty of OUIL, the prosecutor must prove beyond a reasonable doubt “(1) that defendant was operating a motor vehicle upon a highway or other place open to the general public; (2) that while so driving he was under the influence of alcohol; and (3) that as a result of the drinking, defendant was substantially deprived of normal control or clarity of mind.” *People v Raisanen*, 114 Mich App 840, 844; 319 NW2d 693 (1982). All the elements of the offense can be proven by circumstantial evidence and the reasonable inferences created by said evidence. *People v Solmonson*, 261 Mich App 657, 659; 683 NW2d 761 (2004).

In the present case, the parties stipulate to the fact that defendant was found to have an alcohol content of 0.16 grams per 210 liters of breath, which is twice the legal limit of .08. As a result, the outcome of the trial depended on the jury’s determination of how defendant arrived at the residence of Dan Slocum, defendant’s former boyfriend. If the jury believed defendant drove

herself to Slocum's, it follows that the defendant operated her vehicle on a public highway or a place open to the general public while intoxicated and was thus guilty of OUIL. If the jury believed defendant's daughter drove her to Slocum's, no conviction could follow. Therefore, this Court must determine whether a rational trier of fact could conclude that defendant drove herself to Slocum's, thus satisfying the "operating" element of OUIL. Under the Michigan Vehicle Code, operate means "being in actual physical control of a vehicle regardless of whether or not the person is licensed under this act as an operator or chauffeur." MCL 257.35a.

At trial, Officers Wakerly and Will both testified that defendant said she "took the back roads" to get to Slocum's on the night in question. Defendant never said or implied that someone else had driven her to Slocum's, and there was no evidence indicating that anyone else had been present at the scene that night. Although defendant's daughter, Brandi, testified that she drove defendant to Slocum's residence and was then picked up by her then boyfriend in a separate vehicle, Officer Wakerly testified that the only tire tracks seen in the snow that night belonged to defendant's truck, and there was only one set of foot prints seen in the snow, which also presumably belonged to defendant. Similarly, Officer Will testified that the only tire tracks she observed belonged to defendant's truck and Officer Wakerly's vehicle. Additionally, Brandi contradicted herself during the course of her testimony, such as when she initially stated that she collided with Slocum's vehicle fairly hard upon arriving at the residence and then later said she did not really hit the vehicle very hard. The testimony of Officers Wakerly and Will, along with the appearance of the scene of the crime, cast doubt on the credibility of Brandi's testimony.

Issues of credibility are to be decided by the jury. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). A rational jury could have concluded that the testimony of Brandi was not credible based on the aforementioned inconsistencies. As a result, the jury could have concluded that defendant drove herself to Slocum's on the night in question, thus satisfying the "operating" element of OUIL.

Similarly, a rational trier of fact could have found defendant guilty of driving with a suspended license. In order to convict defendant of driving with a suspended license, the prosecutor must prove beyond a reasonable doubt "(1) that the defendant's license has been suspended; (2) that the defendant has been notified of the suspension; and (3) that the defendant operated a motor vehicle on a public highway while his license was suspended." *People v McMaster*, 154 Mich App 564, 572; 398 NW2d 469 (1986).

At trial and on appeal, defendant has never contended that her license was not suspended or that she was unaware of a suspension. Defendant's sole contention on appeal is that she was not operating a vehicle on the night in question and thus cannot be convicted of driving with a suspended license. As described above, a rational trier of fact could conclude, based on defendant's statements to Officers Wakerly and Will, the lack of tire tracks or footprints belonging to anyone but defendant, the inconsistent testimony of defendant's daughter and the

lack of evidence placing anyone but defendant at the scene, that defendant drove her vehicle to Slocum's residence that night. As a result, sufficient evidence existed to convict defendant on that charge.

Affirmed.

/s/ Brian K. Zahra

/s/ Helene N. White

/s/ Peter D. O'Connell