

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LEE JOSLIN,

Defendant-Appellant.

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UNPUBLISHED

October 25, 2007

No. 271168

Delta Circuit Court

LC No. 05-007502-FH

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

PER CURIAM.

Following a jury trial, defendant was convicted of operating a motor vehicle while intoxicated (OUIL) with an occupant under age 16, MCL 257.625(7)(a)(ii). The trial court sentenced defendant to 365 days in the county jail, with one-day jail credit for time served. Defendant was also sentenced to one year of probation, with the requirement that he perform 300 hours of community service. Pursuant to a sheriff's petition, defendant's jail term was reduced to 226 days. He appeals as of right. We affirm. This case is being decided without oral argument under MCR 7.214(E).

Defendant's conviction arose from a late-night incident in which a witness observed a truck being driven erratically in Escanaba. A public safety officer responding to the reported incident saw the truck do a U-turn, then park. The officer parked his patrol car, walked up to the truck, and saw defendant in the driver's seat of the truck. The officer also saw defendant's six-year-old son sitting in the passenger seat. Because defendant smelled of alcohol, the officer performed field sobriety tests on him. Concluding that defendant was drunk, the officer placed him under arrest. A blood test later showed that defendant's blood alcohol level was .12. The prosecutor charged defendant with resisting arrest and with OUIL with a juvenile passenger. At the first trial on these charges, the jury acquitted defendant of resisting arrest but deadlocked on the OUIL. The trial court held a second jury trial on this charge, resulting in the present conviction.

On appeal, defendant asserts that his counsel was ineffective for failing to object to testimony provided by two public safety officers describing defendant's belligerent conduct after his arrest, including a callous remark defendant made about his son being placed in foster care. "[D]efendant has the burden to show both that counsel's performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding

would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007), citing *Strickland v Washington*, 466 US 668, 687, 690, 694; 1045 S Ct 2052; 80 L Ed 2d 674 (1984).

To convict defendant, the prosecutor had to prove that defendant was operating a vehicle while intoxicated with a person under age 16 in the vehicle. MCL 257.625(1)(a), (7)(a). The disputed evidence was relevant to the issue of the identity of the person actually driving the truck when it was observed swerving on the roadway, and to whether defendant was intoxicated.

Further, assuming that an objection to the disputed evidence would have been sustained by the court, defendant fails to show that the trial result was unreliable, and that the result would have been different but for counsel's failure to object. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Defendant argues that the admission of the evidence was so prejudicial that reversal here is mandated. In support, defendant notes that the first jury deadlocked on the OUIL charge. However, the first jury also heard this evidence, which undermines the assertion that it tipped the balance in favor of conviction on retrial. It cannot be assumed that the inclusion of this evidence in the second trial was responsible for the verdict given that the evidence was presented in both trials, resulting in two different verdicts.

Affirmed.

/s/ Brian K. Zahra  
/s/ Helene N. White  
/s/ Peter D. O'Connell