

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

CARLTON MATTHEW WHISMAN,

Defendant-Appellant.

UNPUBLISHED

August 26, 2008

No. 278771

St. Joseph Circuit Court

LC No. 06-013846-FH

Before: Cavanagh, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Defendant was convicted by a jury of operating a vehicle while intoxicated, MCL 257.625(1), and was sentenced as a third habitual offender, MCL 769.11, to 10 months in jail and 24 months of probation. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In the evening of October 12, 2006, defendant lost control of his car and crashed into the drainage ditch on the side of the road. Between 9:30 and 9:55 p.m., Trooper Thyng responded to the accident and observed defendant walking in the roadway approximately two-tenths of a mile from the scene of the accident. Upon making contact with defendant, Trooper Thyng smelled the odor of intoxicants on his breath and noted that his speech was slurred. Defendant admitted to Trooper Thyng that he drank four beers earlier. Based on his observations and defendant's admission, Trooper Thyng performed sobriety tests on defendant. Defendant failed one test and demonstrated impaired balance in the other tests. Trooper Thyng administered to defendant a Preliminary Breath Test (PBT) at approximately 10:20 p.m., which registered 0.102. Trooper Thyng arrested defendant at approximately 10:30 p.m. At approximately 11:33 p.m., defendant had his blood drawn at the hospital. Defendant's blood registered a blood alcohol level of 0.14.

At trial, defense counsel noted that two of defendant's witnesses, Mr. Gowan and Ms. Schemenaur, had not appeared in court. Defendant maintained that these witnesses were critical to his defense because they would testify that defendant consumed alcohol at their home after he crashed his car, thereby promoting his theory of the case that he was not intoxicated at the time he operated the vehicle; rather, he became intoxicated after he crashed his vehicle. The court found that the prosecution had taken reasonable efforts to obtain defendant's witnesses and denied defendant's request for an adjournment.

Defendant first argues on appeal that he was denied a fair trial when the trial court found that the prosecution exercised due diligence in attempting to procure Mr. Gowan and Ms. Schemenaur as witnesses at trial. We review constitutional issues de novo. *People v Hickman*, 470 Mich 602, 605; 684 NW2d 267 (2004).

MCL 767.40a governs the prosecutor's duty in procuring witnesses for trial. The prosecution's burden is to give initial and continuing notice of all known res gestae witnesses, identify witnesses the prosecutor intends to produce, and provide law enforcement assistance to investigate and produce witnesses the defense requests. *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001).

Defendant incorrectly bases his argument on the failure of the prosecution to exercise due diligence to produce an *endorsed* witness. Notably, Mr. Gowan and Ms. Schemenaur were not res gestae witnesses. MCL 767.40(a)1. "A res gestae witness is a person who witnesses some event in the continuum of a criminal transaction and whose testimony will aid in developing a full disclosure of the facts." *People v O'Quinn*, 185 Mich App 40, 44; 460 NW2d 264 (1990), overruled in part on other grounds *People v Koonce*, 466 Mich 515; ___ NW2d ___ (2002). The criminal transaction in this case consisted of operating the vehicle while under the influence of alcohol. Mr. Gowan and Ms. Schemenaur were not witnesses when defendant operated the vehicle and were not witnesses to defendant's intoxication, or lack thereof, at the time of the accident.

Further, the prosecution did not endorse Mr. Gowan and Ms. Schemenaur as trial witnesses pursuant to MCL 767.40a(3). Rather, Mr. Gowan and Ms. Schemenaur were only listed on defense counsel's witness list. Thus, the prosecutor was only required to provide to the defendant, upon written request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness. MCL 767.40a(5); *Long, supra* at 585. Defendant failed to request the prosecution's assistance in writing to procure Mr. Gowan and Ms. Schemenaur for trial; therefore, the prosecution had no obligation to provide reasonable assistance to locate and serve process upon these witnesses.¹ Regardless, the prosecution did attempt to locate and serve process upon Mr. Gowan and Ms. Schemenaur. The prosecution sent police to the address provided by defendant on three separate occasions, and did not find Mr. Gowan or Ms. Schemenaur at the residence on any of these occasions. Under these circumstances, the prosecution went beyond its statutory burden and gave reasonable assistance to defendant to locate Mr. Gowan and Ms. Schemenaur. Defendant was not denied his right to a fair trial.

Defendant next argues on appeal that the prosecution failed to present sufficient evidence for a rational jury to find him guilty of operating a vehicle while intoxicated. We disagree. A sufficiency of the evidence challenge in a criminal trial is reviewed de novo. *People v Cox*, 268 Mich App 440, 443; 709 NW2d 152 (2005), lv den 474 Mich 1099 (2006). In reviewing the sufficiency of the evidence, we review the evidence to determine whether the evidence, when viewed in the light most favorable to the prosecution, would warrant a trier of fact in finding that

¹ At trial, defense counsel asserted that she did request the prosecutor's assistance in subpoenaing these witnesses.

all the elements of the crime were proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

To support a conviction of operating a vehicle while intoxicated, the prosecution must prove the following elements: (1) operating a motor vehicle, (2) on a highway or other place open to the general public, (3) while under the influence of liquor or a controlled substance, or a combination of the two, or with a blood alcohol content of .08 grams or more. MCL 257.625(1). Under the influence means that defendant “was substantially deprived of normal control or clarity of mind.” *People v Raisanen*, 114 Mich App 840, 844; 319 NW2d 693 (1982).

Defendant only challenges the sufficiency of the evidence with respect to the element of intoxication. Specifically, defendant argues that he did not drive his vehicle while intoxicated, but rather became intoxicated after he drove his vehicle into the drainage ditch. Defendant asserts that because his blood alcohol level was higher than his PBT, his blood alcohol level peaked at 11:30 p.m., and thus he consumed alcohol no earlier than 9:00 to 9:30 p.m.²

In reviewing the evidence in the light most favorable to the prosecution, defendant’s rising blood alcohol level does not exclude the possibility that he was intoxicated at the time of the accident. There was no evidence presented to show that defendant had not been drinking at the time of the accident and that the drinks consumed at the neighbors were not cumulative to those already drunk. Rather, the evidence presented at trial could warrant a rational trier of fact in finding that defendant was operating a motor vehicle while intoxicated. The prosecution presented evidence that severe “s curves” led up to the scene of defendant’s car in the drainage ditch, defendant had slurred speech and smelled of intoxicants, defendant admitted to Trooper Thyng that he drank four beers earlier, defendant failed one sobriety test and had compromised dexterities, defendant’s PBT registered 0.102, and defendant’s blood alcohol level registered 0.14. Viewed in a light most favorable to the prosecution, we find that the evidence was sufficient to support defendant’s conviction of operating a vehicle while intoxicated.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly

² Ms. Gormley, the toxicologist who testified at trial, stated that a person’s blood alcohol level will peak anywhere from 15 minutes on an empty stomach to an hour and a half after a large meal.