

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MELVIN EARL DEAN,

Defendant-Appellant.

UNPUBLISHED

April 23, 2009

No. 283748

Kent Circuit Court

LC No. 06-010379-FH

Before: Borrello, P.J., and Murphy and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for operating a vehicle while intoxicated (OWI), third offense, MCL 257.625(9)(c), operating a vehicle on a suspended license, second offense, MCL 257.904(3)(b), and failure to stop at the scene of a property damage accident, MCL 257.618. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 210 days in jail for the OWI conviction, and 90 days in jail each for the operating on a suspended license and failure to stop at the scene of a crime convictions. Because there were no errors warranting relief, we affirm.

Defendant admits that there was sufficient evidence to support his conviction for leaving the scene of a property damage accident; however, defendant maintains that the evidence was insufficient to support his convictions for OWI and driving on a suspended license because there was no evidence that defendant was “operating” the motor vehicle. Defendant was found ten miles away from the scene, asleep in a different car. The officers admitted that there was no one at the accident scene. In reviewing the sufficiency of the evidence, this Court must view the evidence de novo in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

When officers arrived at the scene of the single vehicle rollover accident, there was no one at the scene. The officers performed an inventory of the interior of the truck involved in the accident. They found defendant’s wallet as well as other documents belonging to defendant. A license plate check revealed that the truck belonged to Lillian Whitt. Whitt told the officers that defendant had a set of keys to the truck and had been keeping the truck at his parents’ home for the past several days. When she was advised that the truck had been in an accident, she went to defendant’s parents’ home and found defendant asleep in one of their cars. Police were summoned and found defendant in an inebriated state. He had fresh scratches and cuts on his

person and also had broken glass in his vest pockets like that found at the scene of the accident. Circumstantial evidence may provide a sufficient basis for an OWI conviction. *People v Smith*, 164 Mich App 767, 770; 417 NW2d 261 (1987). Defendant's statement to police officers, denying that he had been involved in an accident, negated his later claim that another person was driving at the time of the accident. Viewed in a light most favorable to the prosecution, the circumstantial evidence presented at trial supported defendant's convictions for OWI and driving on a suspended or revoked license.

Defendant next argues that his trial counsel was ineffective for failing to call defendant as a witness. To establish ineffective assistance of counsel, a defendant must show that his trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). A defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 415. Decisions regarding what evidence to present and whether to call witnesses are presumed to be matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated not in relevant part by 453 Mich 902. A substantial defense is one that might have made a difference in the outcome of the trial. *Id.*

Defendant initially raised this issue by a motion for a new trial before the trial court. With that motion, defendant submitted an affidavit summarizing the testimony that he could have provided had he been called at trial. He averred that he met a man named "Jack" at a bar and that he and Jack took a taxi to defendant's parents' home in order to retrieve the truck at issue. Jack was driving the truck at the time of the accident and then fled. Defendant grabbed the keys and hitchhiked back to his parents' home. The trial court denied defendant's motion.

Although defendant would have liked an opportunity to testify regarding his version of events, his trial attorney's decision not to call him did not deprive him of a substantial defense. During his cross-examination of witnesses and during his closing arguments, defense counsel made it clear that his theory of the case was that defendant was merely a passenger. Because we do not have counsel's testimony, we have no way of knowing why he made the decision not to offer defendant as a witness. And the decision may have been based on sound trial strategy. Perhaps counsel did not think defendant would make a believable witness. Perhaps counsel thought defendant would have difficulty with cross-examination, especially with his lengthy history of drunken driving. Counsel may also have been concerned about the discrepancy between defendant's statement to the police, denying that he was involved in an accident, and his potential testimony that he was a passenger in the truck at the time of the accident. Thus, on this record, it cannot be said that counsel's performance fell below an objective standard of reasonableness, nor could it be said that, but for counsel's decision to not call defendant as a witness, the result of trial would have been different. *Horn, supra* at 39-40.

Affirmed.

/s/ Stephen L. Borrello

/s/ William B. Murphy

/s/ Michael J. Kelly