

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAWN MARIE SPEARS,

Defendant-Appellant.

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UNPUBLISHED

July 27, 2010

No. 290385

Wayne Circuit Court

LC No. 08-011585-FH

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating a vehicle while intoxicated, third offense, MCL 257.625(1) and (9). She was sentenced to probation for two years, with 30 days in jail. She appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

We first address defendant's claim that the evidence was insufficient to support her conviction. When reviewing a challenge to the sufficiency of the evidence in a criminal case, this Court reviews the record de novo and, viewing the evidence in a light most favorable to the prosecution, determines whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich at 508, 515; 489 NW2d 748 (1992); *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). The standard of review is deferential. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). A reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury's verdict. *Id.*

Defendant does not argue that the evidence was insufficient to prove that she was intoxicated. Rather, she argues that it was insufficient to prove that she operated her vehicle in her intoxicated condition. We disagree. The evidence supported a finding that defendant's pickup truck was being driven in an erratic manner shortly before the police arrived at defendant's home. According to the witness, the vehicle crossed the line on the right side of the vehicle and nearly struck a guardrail, swerved sharply across the center line on two occasions, and then veered sharply to the right and struck a guardrail. The truck was registered to defendant. The only people at defendant's house when the police arrived were defendant and her boyfriend, Kim Kulczyk. Defendant admitted recently traveling along the route in question after she got off work at 6:00 p.m., which was consistent with the timing of the other motorist's observations. Although defendant's truck had fresh damage that was consistent with having

struck a guardrail, and a guardrail in the area had paint and rubber abrasion transfer that was consistent with having been struck by defendant's truck, defendant claimed that the damage to her truck occurred weeks earlier. A trier of fact could reasonably infer that defendant's account of the damage was inconsistent with the actual evidence and that she lied about the cause of the damage, which was evidence of her consciousness of guilt. Although defendant testified that another party drove her truck home and then left during the short interval before the motorist located the truck at her home, the jury was not required to accept defendant's testimony. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant, who was intoxicated, drove her vehicle in her intoxicated condition.

Next, we address defendant's arguments that defense counsel was ineffective for failing to call Pedro Montanez as a witness at trial, and for failing to move to suppress the blood test results on the basis that defendant was arrested without probable cause.

"[T]o establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Seals*, 285 Mich App 1, 18; 776 NW2d 314 (2009). Where a trial court makes factual findings following an evidentiary hearing on a claim of ineffective assistance of counsel, this Court reviews the factual findings for clear error and reviews the question whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Defendant argues that defense counsel was ineffective for failing to call Pedro Montanez to testify that he drove defendant's truck to defendant's house on the evening in question, while defendant rode to her house in a separate vehicle with Montanez's friend. The decision whether to call a witness to testify is presumed to be a matter of trial strategy, and a defendant must meet a heavy burden to overcome the presumption that counsel employed effective trial strategy. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Generally, the failure to call a witness can establish ineffective assistance of counsel only if the failure deprives the defendant of a substantial defense. *Id.*

After considering Montanez's testimony at the posttrial evidentiary hearing, we agree with the trial court that trial counsel's decision not to call Montanez was not objectively unreasonable and did not affect the outcome. Regardless of whether trial counsel's concerns about perjury were well founded, Montanez's account would not have been helpful to defendant because it was contradicted by the evidence and conflicted with the defense testimony. His account of a momentary period of distracted driving caused by a dropped cigarette was not consistent with the repeated episodes of erratic driving described by the other motorist. Further, Montanez did not claim that he struck a guardrail. In addition, Montanez testified that when he arrived at defendant's house, he saw Kulczyk open the door to the house and let defendant inside. Kulczyk, however, testified that he did not know when defendant arrived home, and claimed that he first saw her sitting in the living room. Kulczyk did not know when defendant arrived home or who was driving.

By not calling Montanez at trial, defense counsel was still able to present the defense theory that a friend drove defendant's vehicle to her house, and at the same time avoid the risk of undermining that theory by presenting testimony from Montanez that was inconsistent with the other testimony. Under these circumstances, trial counsel's decision not to call Montanez as a witness, whom he reasonably believed was not credible, was not constitutionally deficient performance.

Lastly, we also reject defendant's argument that defense counsel was ineffective for failing to move to suppress the blood test results on the basis that the police lacked probable cause to arrest defendant. "By statute, an arresting officer must possess information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it." *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996), citing MCL 764.15. A challenge to probable cause assesses "whether the facts available to the arresting officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected individual had committed the felony." *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998). Our analysis of the sufficiency of the evidence likewise demonstrates that the police had probable cause to believe that defendant, who the police unquestionably had probable cause to believe was intoxicated, was the person who had recently driven her vehicle. The motorist's observations, defendant's admission that she had recently returned home from work along the route described by the motorist, the fresh damage to defendant's vehicle, and defendant's inconsistent explanation for the damage, was sufficient to establish probable cause to arrest defendant for operating her vehicle while intoxicated. Thus, any motion to suppress would not have been successful. Counsel is not ineffective for failing to bring a futile motion. *People v Flowers*, 222 Mich App 732, 737-738; 565 NW2d 12 (1997).

Affirmed.

/s/ David H. Sawyer  
/s/ Richard A. Bandstra  
/s/ William C. Whitbeck