

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEBORAH MARIE ALLEN,

Defendant-Appellant.

UNPUBLISHED

September 14, 2010

No. 292295

Wayne Circuit Court

LC No. 09-001753-FH

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of operating while impaired, MCL 257.625(3), third offense, MCL 257.625(11). She was sentenced to two years of probation and 30 days in jail. Defendant appeals as of right, and we affirm.

A pedestrian was walking on a sidewalk near a park with his headphones on when he had an “eerie feeling” that he was being watched. He turned and looked behind him to see a vehicle driven by defendant traveling on the sidewalk. He moved out of the way, and defendant drove by him. Defendant drove her vehicle into a construction zone where the vehicle became lodged on a curb with the front tires spinning. The pedestrian told defendant to place the vehicle in park and asked her if she had been drinking. She responded that she had not been drinking alcohol, but she had taken some cough medicine. Defendant said that a relative would help tow her vehicle and that the police did not need to be called. Police received a radio bulletin of a single car crash and found defendant approximately three blocks from the scene of the accident. The pedestrian identified defendant as the driver of the vehicle that was stuck in the construction zone.

A police officer who apprehended defendant testified that she exhibited signs of being under the influence of intoxicating liquor or a controlled substance, which included slurred speech, unsteady gait, and failed field sobriety tests. When interviewed by a police officer near the scene, defendant stated that she had taken cough medicine with codeine. However, defendant later reported that she was a limited sighted person who mistakenly took her granddaughter’s dental sedation medication, Midazolam, instead of cough medicine. Following a bench trial, defendant was acquitted of the charged crime of operating while intoxicated, MCL 257.625(1), but was convicted of the offense of operating while impaired (OWI), MCL 257.625(3), third offense, MCL 257.625(11). When finding defendant guilty of the lesser offense, the trial court seemingly gave credence to defendant’s testimony that she had mistakenly

ingested the sedation medication. However, the trial court held that defendant chose to drive home from cheerleading practice knowing that she was experiencing ill effects from medication, regardless of the type of medication ingested.

Defendant filed a motion for new trial, asserting that the trial court should have acquitted defendant of the driving while intoxicated offense upon finding that defendant mistakenly ingested Midazolam. The trial court denied the motion for new trial. In denying the motion, the trial court made clear that defendant's testimony was not credible. The trial judge stated that he acknowledged defendant's characterization of the ingestion as a mistake, but he found that "she deliberately took the substance."

Defendant first alleges that the trial court was required to acquit defendant upon accepting defendant's testimony that she accidentally ingested Midazolam. We disagree. A challenge to the sufficiency of the evidence is reviewed de novo. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). When reviewing a claim of insufficient evidence, this Court reviews the record in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *In re Contempt of Henry*, 282 Mich App 656, 677; 765 NW2d 44 (2009). Appellate review of a challenge to the sufficiency of the evidence is deferential. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The reviewing court must draw all reasonable inferences and examine credibility issues in support of the jury verdict. *Id.* When assessing a challenge to the sufficiency of the evidence, the trier of fact, not the appellate court, determines what inferences may be fairly drawn from the evidence and the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). This Court must not interfere with the jury's role as the sole judge of the facts when reviewing the evidence. *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005). A trial court's factual findings may not be set aside unless they are clearly erroneous. *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.*

A defendant commits OWI by driving when the defendant's ability to drive was so weakened or reduced by the consumption of intoxicating liquor, a controlled substance, or a combination of the two, that defendant drove with less ability than would an ordinary, careful and prudent driver. MCL 257.625(3); *Oxendine v Secretary of State*, 237 Mich App 346, 354; 602 NW2d 847 (1999). The weakening or reduction in the ability to drive must be visible to an ordinary, observant person. *Oxendine*, 237 Mich App at 354. In the present case, a pedestrian walking on the sidewalk near the park turned around to find defendant driving her vehicle on the sidewalk behind him. He moved out of the way and observed defendant drive into a construction zone where her vehicle became lodged on a curb with the wheels spinning. A blood test revealed the presence of Midazolam. Additionally, in her own testimony, defendant acknowledged that she was not feeling well, but chose to drive home anyway. There was sufficient evidence to support the conviction for OWI. Defendant admitted that she consumed a controlled substance, and she operated her vehicle with less ability than an ordinary, prudent driver when she drove on a park sidewalk instead of the designated roadway.

Defendant contends that she mistakenly took the Midazolam instead of cough syrup because she was not wearing her glasses. However, the offense at issue punishes the weakened

or reduction in the ability to drive because of the consumption of a controlled substance. The statute at issue places no qualification on the circumstances surrounding the consumption of the intoxicating liquor or controlled substance.¹ More importantly, the trial court expressly stated that it did not believe that defendant's consumption of the controlled substance was accidental. Rather, the trial court held that it merely acknowledged defendant's testimony of mistake, but the consumption of the granddaughter's sedation medication was conscious and deliberate. Therefore, defendant's reliance on the trial court's factual findings is misplaced.²

Next, defendant alleges that the OWI statute violates due process rights if an individual is unable to "raise the defense of accident or involuntary ingestion and lack of knowledge of having ingested a controlled substance." Appellate courts do not unnecessarily decide constitutional issues. *People v Riley*, 465 Mich 442, 447; 636 NW2d 514 (2001). Judicial review of constitutional questions must not be decided if a case may be disposed of on other grounds. *J & J Constr Co v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich 722, 733-734; 664 NW2d 728 (2003). The trier of fact determines the weight of the evidence and the credibility of the witnesses. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). We defer to the trial court's credibility determinations, and any conflicts in the evidence must be resolved in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

It is unnecessary for us to address the constitutional issue raised here because the facts do not support the claimed denial of due process of law. The trial court considered the claim of accidental or involuntary ingestion, but concluded that the testimony offered in support of that theory was not credible. Defendant's challenge to the constitutionality of the statute based on mistake is contrary to the factual findings of the trial court. Because defendant cannot support the factual predicate to challenge the statute, this issue is without merit.

¹ The text of MCL 257.625(3) provides, in relevant part: "A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state when, due to the consumption of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance, the person's ability to operate the vehicle is visibly impaired."

² Defendant contends that the prosecutor had to prove that she knowingly took a controlled substance and made the decision to drive after knowingly ingesting the controlled substance, relying on *People v Derror*, 475 Mich 316; 715 NW2d 822 (2006), overruled in part by *People v Feezel*, 486 Mich 184; 783 NW2d 67 (2010), and *People v Schaefer*, 473 Mich 418; 703 NW2d 774 (2005) overruled in part by *Derror*, 475 Mich at 334. However, the case law relied upon by defendant addressed the crimes of operating a motor vehicle causing death or serious impairment of a body function and operating a motor vehicle with the presence of a schedule 1 controlled substance in the body, MCL 257.625(4), (5), and (8), crimes not at issue here. The plain language of the operating while impaired statute, MCL 257.625(3), does not contain any qualification regarding the knowing consumption of alcoholic liquor or a controlled substance. Irrespective of the language of the statute, the prosecutor presented police testimony wherein defendant admitted that she took cough medicine with codeine, a controlled substance. Therefore, the requirement that defendant seeks to impose was satisfied by the proofs presented at trial, and this claim of error is without merit.

Lastly, defendant contends that trial counsel was ineffective for failing to call defendant's daughter as a witness and failed to introduce defendant's vision records into evidence. We disagree. To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was objectively unreasonable compared to prevailing professional norms, and that, but for counsel's errors, a different outcome reasonably would have resulted. *People v McCauley*, 287 Mich App 158, 162; 782 NW2d 520 (2010). The outcome of the proceedings would not be different when the claimed deficiency involves the failure to seek admission of cumulative evidence. See *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003). In the present case, defendant testified that she was a limited sighted person because she was legally blind in her left eye and that she mistakenly took the wrong medication. The proposed evidence was cumulative to the evidence admitted at trial and did not impact the outcome.

Affirmed.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood