

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRENT DARRELL GOULD,

Defendant-Appellant.

UNPUBLISHED

December 1, 2000

No. 220745

Delta Circuit Court

LC No. 98-006313-FH

Before: Gribbs, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of operating a motor vehicle while under the influence of alcohol, third offense, MCL 257.625; MSA 9.2325. He was sentenced to eighteen months' to five years' imprisonment. Defendant appeals his conviction as of right. We affirm.

Defendant first asserts that the evidence was insufficient to support his conviction. The testimony at trial consisted of conflicting stories about whether the driver of the vehicle was defendant or someone else. In reviewing the sufficiency of the evidence, this Court must view the evidence 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 Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Questions of credibility should be left to the jury to resolve. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 478, amended 441 Mich 1201 (1992); *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

The evidence at trial consisted mainly of testimony from five witnesses: the two state troopers who arrested defendant, defendant, his fiancée, and the fiancée's sister. The vehicle defendant occupied, a minivan, was traveling too fast to make a turn, went off the road into a ditch, then bounced back out of the ditch and back up onto the roadway. The troopers testified that they saw defendant sitting in the driver's seat when they stopped behind the van and that they saw him slide over to the passenger's seat. Defendant told them he was not the driver. Defendant and his fiancée testified that they had been out for a ride, with the fiancée driving the whole time. They said they were drinking beer during the drive and when they realized the police were behind them, defendant told his fiancée to hide so she would not be arrested. She slid out of the driver's seat and hid between the bench seats of the van.

The testimony of the troopers provided a sufficient basis for the verdict; if they are to be believed, then defendant was the driver. Whether they should be believed was an issue of credibility that the jury settled in favor of the prosecution. The jury's determination of credibility must stand, and the conflict in the testimony likewise resolved for the prosecution.

Defendant next claims that the verdict was against the great weight of the evidence. This issue must be raised by motion in the trial court or it is waived. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). In this case, defendant failed to move for new trial and thus waived the issue on appeal. Regardless, the verdict was reasonably supported by the testimony of the troopers that they, in fact, saw defendant behind the wheel of the van.

Defendant's third claim is that he was denied a fair and impartial trial because the prosecutor asked sarcastic questions and in closing argument bolstered the credibility of the troopers. Defense counsel objected to the prosecutor's questions, preserving that issue. A preserved, nonconstitutional error is a ground for reversal only if, after an examination of the entire case, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999). However, no objection was made to the comments made by the prosecutor during closing argument; therefore, this issue is not preserved for appellate review. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998).

With regard to the prosecutor's questions, we find that they were not improper. A prosecutor may comment on the credibility of a witness, especially when there is conflicting evidence and the question of the defendant's guilt or innocence turns on which witness is to be believed. *People v Stacy*, 193 Mich App 19, 29-30; 484 NW2d 675 (1992). The credibility of defendant in this case was crucial to the defense theory. Defendant has not provided any indication of how the questions resulted in prejudice or how they affected the outcome of the case. Likewise, the prosecutor may comment on the credibility of his own witnesses, although he may not vouch for their credibility to the effect that he has some special knowledge concerning the witnesses' truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659, reh den 448 Mich 1225 (1995). Here, the prosecutor did not imply that he had some special knowledge about the truthfulness of the troopers' testimony. In fact, he emphasized to the jury that they should apply the same "yardstick" to all witnesses when assessing credibility. He noted that the troopers had experience and training in assessing drunk drivers and in observing drivers they have stopped, and advised the jurors that they were to assess the witnesses for any interest, bias, or prejudice they might have in the outcome of the case, and how accurately the witnesses reported what occurred that night. These factors were simply what the jurors were instructed to consider. Defendant provides no basis for how these comments resulted in a miscarriage of justice; he merely concludes that they were improper and, therefore, require reversal of the conviction. He has not met his burden of proving that the comments were so harmful that reversal is required.

Finally, defendant asserts that he was denied the effective assistance of counsel by defense counsel's failure to take certain actions including moving for a directed verdict and filing a motion for a new trial on the grounds that the verdict was against the great weight of the evidence. When, as here, a claim of ineffective assistance of counsel has not been raised by a motion for new trial or an evidentiary hearing, this Court's review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). The record in this case provides no evidence that counsel was ineffective.

Affirmed.

/s/ Roman S. Gribbs
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra