STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 30, 2006
v	No. 263186 Monroe Circuit Court
CHARLES WILLIAM MORRIS, Defendant-Appellant.	LC No. 04-033955-FH

Before: Wilder, P.J., and Kelly and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of operating a vehicle under the influence of intoxicating liquor (OUIL), MCL 257.625(1)(a), third offense, MCL 257.625(6)(d).[1] Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 2½ to 20 years' imprisonment for his OUIL conviction. For the reasons set forth in this opinion, we affirm the conviction and sentence of defendant.

This case arises out of defendant's arrest on May 30, 2004. On the evening of May 30, 2004, defendant and Deanna Eighmey were at a social gathering. Eighmey testified that sometime during the gathering, defendant approached her with another person and asked if they could use Eighmey's car, which was a black 1990 Nissan Maxima. Eighmey agreed to let defendant and the other person use her car. Later that evening, a telephone call was placed to police indicating that an older black car, which was later determined to be Eighmey's car, drove into Morgan Johnston's yard at 831 Cole Road in Frenchtown Township and hit a vehicle in Johnston's driveway. The force of the collision caused the vehicle that was originally in Johnston's driveway to hit a truck, which crashed into a third car that was also in the driveway.

Deputy Brian Francisco testified that around 7:33 p.m., on May 30, 2004, a "be on the lookout" ("BOL") call was issued for a black passenger vehicle that had been involved in a hit and run accident in the area of Cole and Vivian Streets near Frenchtown Township. While

[1] Defendant was also charged with operating a vehicle with a suspended or revoked license, MCL 257.904(3)(a), second offense, MCL 257.904, and failure to stop after a collision, MCL 257.620. Both charges were subsequently dismissed at trial.

driving northbound on Vivian, Francisco received another "BOL" that the vehicle at issue was near the area in which he was patrolling. Francisco discovered a black, four-door Nissan Maxima with "heavy front end damage" on the east side of War Road "sitting nose down off a concrete culvert in a ditch" and saw defendant walking about 200 yards away from the vehicle. There were no other people in the area besides Francisco and defendant.

Francisco drove toward and approached defendant after calling out to him. Defendant, however, ignored Francisco and walked away. Francisco was able to take defendant into custody; he then placed defendant in the patrol car and advised him of his *Miranda*[2] rights. After defendant was in the patrol car, Francisco asked defendant to lift his shirt and saw a red mark extending across defendant's chest from the upper left area towards the lower right area. Francisco explained that this type of injury is consistent with an injury caused by a seatbelt worn by an individual sitting in the driver's side of a vehicle.

As part of his investigation, Francisco searched the area around the Maxima and discovered a piece of white drywall with a cardboard or paper surface. Francisco explained that although it was not raining at the time of his investigation, it had rained earlier in the day, which resulted in mud surrounding the Maxima in the ditch. Francisco noticed one set of footprints in the mud next to the driver's door. He did not see any footprints around the passenger's side of the vehicle nor around the rear door of the driver's side. Further, Francisco noted that nothing was blocking any of the Maxima's doors. Based on his findings, Francisco determined that defendant was the driver of the Maxima.

Francisco spoke to defendant during the course of his investigation and observed that defendant's speech was slurred and incoherent, that his eyes were bloodshot, glassy, and watery and that his breath and the air around him smelled of intoxicants. A later test confirmed that defendant had consumed alcohol well above the legal limit.

On appeal, defendant argues that there was insufficient evidence to support his conviction. Due process requires the evidence to show guilt beyond a reasonable doubt to sustain a conviction. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In determining the sufficiency of the evidence, this Court reviews the evidence de novo in the light most favorable to the prosecution. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). The Court does not consider whether any evidence existed that could support a conviction, but rather, must determine whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), citing *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979).

In determining the sufficiency of the evidence, it is the role of the trier of fact rather than this Court to draw reasonable inferences from the evidence and accord the proper weight to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Issues of credibility and intent are also left to the trier of fact rather than this Court. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). In addition, this Court must resolve all conflicts of

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 1966).

evidence in the favor of the prosecution, who need not negate every reasonable theory of innocence, but only prove its case beyond a reasonable doubt despite any contradictory evidence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000); *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004).

Defendant was convicted of OUIL, third offense. When charging an individual with OUIL, the prosecution must show: (1) that a person was operating a motor vehicle on a public highway or other place open to the general public while under the influence of intoxicating liquor, and (2) that person voluntarily decided to operate the vehicle knowing that he had consumed alcohol and might be intoxicated.[3] MCL 257.625(1)(a); *People v Lardie*, 452 Mich 231, 259-260; 551 NW2d 656 (1996), overruled on other grounds 473 Mich 418 (2005).

Given that "[c]ircumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime," *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993), sufficient evidence exists to support defendant's conviction. Deanna Eighmey explained that on May 30, 2004, she gave defendant permission to use her car and gave her car keys to defendant's female companion. Eighmey noted that her car was a black Nissan Maxima. This same Nissan Maxima was found in a ditch off of War Road on the evening of May 30, 2004. The only individual police found in the area of the Maxima was defendant, who was wandering 200 yards away from the Maxima when police arrived. After securing defendant, Francisco discovered that defendant had a red mark extending from his left shoulder to the lower right area of his chest. Francisco noted that this injury was consistent with injuries sustained in crashes by drivers wearing seatbelts.

Defendant told Francisco and deputy Alan Willingham that the owner of the vehicle, rather than himself, had been driving and that she had fled into the woods. However, the automatic seatbelt on the passenger's side of the car was in its upright position, indicating to Francisco that no one had been in that seat or left the vehicle from the passenger's side. In contrast, the automatic driver's seatbelt was in the forward position, indicating to Francisco that the driver's door had been opened. Moreover, police found only one set of footprints around the Maxima. These footprints were next to the driver's door. Police also found footprints on a piece of drywall outside the driver's door of the Maxima. In addition, nothing was blocking any of the Maxima's doors.

It is worth noting that shortly before finding Eighmey's Maxima, Francisco had received a "BOL" from central dispatch for a black passenger vehicle that had been involved in a hit and run at Johnston's house. Johnston indicated that the hit and run occurred when an older black car crashed into a vehicle in her driveway and then drove away from the accident northbound on Vivian Street. Johnston saw only one person in the black car. It was along this route that Francisco proceeded before locating defendant and Eighmey's Maxima. In light of the fact that

[3] The prosecution is not required to prove defendant's prior two OUIL convictions at trial as elements of an OUIL third offense because the OUIL statute establishes a sentencing scheme rather than a separate crime. *People v Weatherholt*, 214 Mich App 507, 512; 543 NW2d 34 (1995).

issues of credibility are to be resolved by the jury, *Avant*, *supra* at 506, and the prosecution need not negate every reasonable theory of innocence, *Nowack*, *supra* at 400, it is reasonable to infer from these facts that defendant was operating the Maxima on a public highway.

Further, when Francisco found defendant at the scene, Francisco recalled that defendant slurred his speech and his eyes were "bloodshot, glassy, [and] watery" and that defendant's breath and the air around him smelled of intoxicants. Francisco even administered field sobriety tests to defendant and determined that defendant was intoxicated and unable to drive safely. Moreover, after police took defendant to the jail, defendant made insulting and threatening comments to Willingham, who also observed that defendant's speech was slurred and that his eyes were bloodshot and glassy. Willingham subsequently administered a breathalyzer test. The results indicated that defendant had a blood alcohol content (BAC) of .19. Given these facts, it is reasonable to infer that defendant voluntarily operated the Maxima after he had consumed alcohol with knowledge that he was intoxicated. Therefore, sufficient evidence exists to support defendant's conviction.

Defendant next argues that he was denied the effective assistance of counsel. We disagree. Claims of ineffective assistance of counsel involve a mixed question of fact and law, which this Court reviews, respectively, for clear error de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Although defendant preserved this issue for appeal, the trial court did not conduct a *Ginther* hearing. Therefore, this Court limits its review to mistakes apparent on the existing record. *People v Sabin* (*On Second Remand*), 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

The United States and Michigan Constitutions guarantee a defendant the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. To establish ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that a reasonable probability exists that, but for counsel's errors, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Defendant argues that defense counsel was ineffective because he failed to call expert witnesses to challenge police investigation techniques, including their failure to document their findings at the scene, collect evidence, and report their findings. This argument is without merit. It is presumed that defense counsel's decisions regarding what evidence to present or whether to call and question witnesses constitute trial strategy, which this Court will not review with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Here, the police explained in detail that defendant was the only individual at the scene and found that the only footprints around the vehicle were near the driver's door, defendant had a red mark across his chest consistent with injuries sustained by a driver wearing seatbelt in a crash, and only the driver's seatbelt was in a position indicating that someone had left the vehicle. Photographs taken at the scene by Willingham supported each of these assertions. Moreover, Francisco discovered that Eighmey was the owner of the Maxima through checking the LEIN system. Finally, the determination at the scene that defendant was intoxicated was confirmed by a breathalyzer test that indicated defendant had a BAC of .19. Thus, the officers' incriminating testimony was supported by independent evidence. Therefore, it was not an objectively unreasonable trial strategy for defense counsel to not call expert witnesses to

challenge the investigation and evidence the police obtained. *Effinger*, *supra* at 69. Further, in light of this incriminating evidence, defense counsel's actions were not outcome determinative. *Id*.

Defendant also claims that he was denied the effective assistance of counsel because defense counsel failed to obtain an investigator. This argument also fails. Although a defense counsel's failure to reasonably investigate a case may constitute ineffective assistance, this Court must afford deference to counsel's strategic judgments. *Wiggins v Smith*, 539 US 510, 521-522; 123 S Ct 2527; 156 L Ed 2d 471, 485, 489 (2003); *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Here, the record is devoid of any evidence that would indicate that further investigation would have supported defendant's version of events. On the contrary, the record reveals that the police thoroughly investigated the scene and found incriminating evidence as noted above. Thus, defendant has failed to establish a factual predicate showing that defense counsel's failure to investigate was objectively unreasonable or outcome determinative. See *People v Hoag*, 460 Mich 1, 6-7; 594 NW2d 57 (1999) ("A defendant must establish the factual predicate for his claim of ineffective assistance.")

Affirmed.

/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello