STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 15, 2009
v	No. 280670 Shiawassee Circuit Court
DANNY EUGENE O'BRIEN, Defendant-Appellant.	LC No. 07-005258-FH

Before: Murray, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating a motor vehicle while intoxicated, third offense, MCL 257.625(1)(a), and operating a motor vehicle while license suspended, MCL 257.904(1)(b). Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to 28 to 90 months' imprisonment for operating while intoxicated and to time served for operating while licensed suspended. Defendant appeals as of right. We affirm.

At about 4:30 a.m. on February 17, 2007, defendant was found by off-duty Michigan State Trooper David Fiebernitz. Defendant was alone standing next to a silver Dodge Intrepid that was immovably stuck in snow in a ditch off the side of the road. After conversing with and determining that defendant appeared intoxicated, Fiebernitz reported defendant to central dispatch and left the scene. Soon after, two deputies, Jason Jenkins and Brandon Worrall, from the Shiawassee County Sheriff's Department arrived.

When the two deputies arrived, defendant was sitting in the driver's seat of the car with the engine running. Defendant told the deputies he was on his way to Perry to meet up with a female friend. Defendant briefly claimed that his mother was driving the car, but quickly changed his story and told the deputies he was alone and had been driving the car. Defendant told the police officers that he had "messed up," and he indicated he was the person driving the car. All the police officers testified they did not see any other footprints around the vehicle nor did they encounter anyone else that night at or near the scene.

Both deputies noticed defendant exhibited signs of intoxication including slurred speech, bloodshot eyes, and unsteadiness. Jenkins administered four sobriety tests, and after failing the sobriety tests, defendant was arrested. Jenkins checked defendant's driving record and found that defendant's license was suspended. Defendant was allowed to use his cellular telephone to make a call to his brother to inform him where the car was located. After defendant was

arrested, the deputies took defendant to Owosso Memorial Hospital for a blood test. The test results revealed that defendant had a blood alcohol level of .26 grams of alcohol per one hundred milliliters of blood.

Those testifying for the defense included defendant's sister and niece who had met defendant and his brother, James O'Brien, at a bar the night before the incident. Both testified they saw defendant and O'Brien leave around 2 a.m. in their mother's car, the silver Dodge Intrepid, and O'Brien was driving. O'Brien testified that he left the bar with defendant to go to Perry to pick up four tires from a female friend. However, he got lost and when he attempted a u-turn, he became stuck in a ditch. At that point, O'Brien left the car and keys with defendant to go find help. When he returned, the car and his brother were gone. O'Brien admitted during cross-examination that he had originally told the police that he was not driving the car that night and instead had loaned it to defendant to go to Perry.

On appeal, defendant argues that there was insufficient evidence to convict defendant of operating while intoxicated and operating while license suspended. Specifically, there was insufficient evidence to prove defendant was actually driving the car. Defendant's argument is based on the fact that he presented evidence that O'Brien was driving the car, and the jury had no reason to disbelieve O'Brien's testimony. This argument ignores the applicable standard of review.

This Court reviews the challenge to the sufficiency of the evidence de novo. *People v McGhee*, 268 Mich App 600, 612; 709 NW2d 595 (2005); *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). The Court must "view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 398; 614 NW2d 78 (2000); *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). "This Court will not interfere with the jury's role of determining the weight of the evidence or deciding the credibility of the witnesses." *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). The prosecution need not disprove all reasonable theories consistent with defendant's innocence; it need only introduce sufficient evidence to convince a reasonable jury of its theory of guilt despite the contradictory theory or evidence a defendant may offer. *People v Hardiman*, 466 Mich 417, 423-424; 646 NW2d 158 (2002).

To convict defendant of operating a motor vehicle while intoxicated, the prosecution must prove defendant was: 1) operating a motor vehicle, 2) on a highway or other place open to the general public or generally accessible to motor vehicles, and; 3) while under the influence of alcohol. MCL 257.625(1). Additionally, the elements of operating while license suspended are: 1) operating a motor vehicle, 2) on a highway or other place open to the general public or generally accessible to motor vehicles, and; 3) while the person's license was suspended. MCL 257.904. As previously noted, defendant only challenges the sufficiency of the evidence on both counts with respect to the element of "operating" a motor vehicle.

Evidence presented at trial demonstrated defendant was found alone on the side of the road in the driver's seat with the car running. He admitted to driving the car and explained to police how the car had ended up in the ditch. In addition, defendant admitted several times to police that he had "messed up." No footprints or other physical evidence suggested another person may have driven the car. The police did not see anyone in the area nor did they see any

footprints around the car to prove there was another person present. In addition, defendant asked to call his brother that night to tell him where the car was located, which leads to the reasonable inference that O'Brien was not with defendant when the car became stuck. According to all three police officers who came in contact with defendant at the scene, defendant exhibited signs of intoxication. Defendant failed all sobriety field tests and the blood test showed he had a blood alcohol content of .26. In *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004), this Court held there was sufficient evidence to convict the defendant of operating while intoxicated based on evidence that the police found the defendant unconscious in a car parked on the side of the road with the keys in the ignition and the engine was still warm, the defendant failed all sobriety field tests, and there was no one else in the car. *Id*. at 660-661. Similarly, we find that the evidence, viewed in a light most favorable to the prosecutor, was sufficient to prove defendant was operating the vehicle at the relevant time. Defendant argues that O'Brien's testimony proved he was not driving the car that night.

The jury, however, was charged with determining the credibility of O'Brien's testimony and that of other defense witnesses, and we will not interfere with those credibility determinations. *Fletcher, supra.*

Defendant also argues that the sentence imposed by the trial court was vindictive and disproportionate because it was significantly longer than the offered plea bargain sentence, which was rejected by defendant. Defendant argues the trial court was vindictive because defendant chose to exercise his right to a trial.

The issue was not properly preserved for appeal because no objection was raised at sentencing. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002). Because defendant failed to preserve this issue, the defendant "must show a plain error that affected substantial rights." *Id.* He cannot do so.

A presumption of vindictiveness is raised when the same judge resentences a defendant a second time and the subsequent sentence is longer than the first sentence. *People v Colon*, 250 Mich App 59, 66-67; 644 NW2d 790 (2002). A majority of our Supreme Court ruled that a "presumption of vindictiveness [] may be overcome only by objective information in the record justifying the increased sentence" *People v Mazzie*, 429 Mich 29, 42; 413 NW2d 1 (1987).

Defendant relies solely on the *Mazzie, supra* at 35-36, holding to support his claim that the trial court needed to rely on additional information to overcome the presumption of vindictiveness. His reliance on this holding is misplaced. Our Supreme Court and this Court have always emphasized that the presumption of vindictiveness is raised during resentencing by the same judge. *Mazzie, supra* at 35 (because both sentences "were imposed by the same judge, we apply the presumption of vindictiveness"); *Colon, supra* at 66-67 (defendant was resentenced after a retrial by a different judge, therefore the presumption does not apply); *People v Lyons*, 222 Mich App 319, 323; 564 NW2d 114 (1997) (the defendant was resentenced for a longer period of time by the same judge, therefore the presumption is raised). Because defendant was sentenced only once for his convictions, the presumption is not raised.

Further, the trial court did not commit a plain error during sentencing, as this was defendant's third felony conviction and his fourth conviction for driving while impaired. The sentence of 28 to 90 months' imprisonment was within the recommended minimum sentence

range under the properly scored legislative guidelines. As such, it is presumed to be proportionate and must be affirmed. MCL 769.34(10).

Affirmed.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Alton T. Davis