STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 3, 2009
v	No. 281527 Muskegon Circuit Court
ROBERT JAMES SILER, Defendant-Appellant.	LC No. 07-054790-FH

Before: Cavanagh, P.J., and Jansen and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of operating while intoxicated, third offense, MCL 257.625. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Michigan State Police Trooper Jay Sweetland testified that he was on patrol at approximately 12:45 a.m. when he noticed two vehicles in the road. One vehicle, a pickup, was in the ditch. Sweetland noticed that the wheels of the truck were moving, and he saw tire smoke in the air. He testified that, according to the marks in the snow, the vehicle had left the road shortly before he arrived. Defendant was seated in the truck, and a second person, who was not identified at trial, stood outside. Sweetland spoke with the other individual, and then released him without obtaining his name. Sweetland spoke with defendant, and detected an odor of intoxicants. Defendant also appeared unsteady. Defendant told Sweetland that his girlfriend had driven the truck into the ditch, had called him to help her, and had left when he arrived. The footprints around the truck did not match defendant's story. Sweetland placed defendant in custody. Subsequently, defendant admitted that he had been driving the truck and had run it into the ditch. Defendant had a blood alcohol content of .23 grams per milliliter.

Defendant testified that his girlfriend called him when the truck became stuck in the ditch. A friend drove defendant to the truck. Defendant saw that the truck was stuck, but realized that he should not drive it, because he had been drinking. At that point, a person arrived and offered assistance. Defendant had the person get into the truck and attempt to rock it back and forth while defendant pushed. However, the truck, which had a manual transmission, became stuck in reverse. Sweetland arrived just as defendant entered the truck to see if he could get the transmission to come out of gear.

Defendant first argues that the trial court erred when it provided expanded instructions on the operation of a motor vehicle. We disagree.

Jury instructions are reviewed as a whole rather than piecemeal. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Even if somewhat imperfect, instructions do not warrant reversal if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994). Use of the Michigan Criminal Jury Instructions is not mandatory. *People v Petrella*, 424 Mich 221, 227; 380 NW2d 11 (1985); *People v Miller*, 182 Mich App 482, 487; 453 NW2d 269 (1990).

The trial court's instructions concerning "operation" of a motor vehicle were appropriate under the circumstances. The trial court began with the language found in CJI2d 15.2, and then gave the prosecution's requested addition:

> Operating means driving or having actual physical control of the vehicle. Control means having power or authority to guide or manage the vehicle. You may determine the defendant had actual physical control over the vehicle if you find that the defendant was behind the wheel of the motor vehicle and the engine was running, regardless of whether the vehicle was in motion.

This instruction comports with the language of the statute and previous case law from the Michigan Supreme Court. In *People v Yamat*, 475 Mich 49, 51; 714 NW2d 235 (2006), the Supreme Court considered whether the defendant, who grabbed the steering wheel of a car in which he was riding and turned it, sending it off the road and into a jogger, was merely interfering with his girlfriend's operation of the car, or could be held to be operating the vehicle himself. The *Yamat* Court adopted the definition of "control" incorporated above and found that the defendant could be properly found to have control over the vehicle, and thus to be operating it. *Id*. at 53-54. Likewise, in *People v Wood*, 450 Mich 399, 402, 405; 538 NW2d 351 (1995), the Supreme Court held that a defendant who was found passed out with his car in drive and his foot on the brake could be deemed to be operating the vehicle. The latter part of the instruction above adequately reflected the holding in *Wood*.

Here, defendant was "operating" the car, with conscious control, and its wheels were in motion. The fact that the car was not traveling forward or backward at the time Sweetland chanced upon defendant does not change this result. The trial court's instruction was both proper, and applicable to the facts.

Defendant argues that this instruction erroneously would have allowed the jury to find that he was operating the truck when he entered the driver's seat "merely to confirm the clutch was not working" before he turned the power off. However, even if the jury believed this to be the case, the trial court's instructions were proper. According to defendant, the truck would not switch out of gear. Thus, in such a case, defendant would still have been operating the vehicle, with its wheels moving, during the time he was trying to allegedly check the clutch.

Defendant also argues that he was denied due process because the police and prosecution failed to obtain the name of the person present with him at the scene, and thus failed to provide exculpatory material necessary for a fair trial. Defendant did not raise this issue below; thus, our

review is for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988). See also *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992) ("[a]bsent the intentional suppression of evidence or a showing of bad faith, a loss of evidence that occurs before a defense request for its production does not require reversal"). "Defendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith." *Id*. Here, defendant has not met his burden. It is speculative whether the person who assisted defendant in attempting to move his truck would have agreed with defendant's version of the events, or with that given by Sweetland. Nor has defendant even alleged bad faith here. In addition, our Supreme Court has held that police officers have no constitutional duty to assist a defendant in developing potentially exculpatory evidence. See *People v Anstey*, 476 Mich 436, 461-462; 719 NW2d 579 (2006). Moreover, nothing prevented defendant from asking his assistant his name while the two were attempting to move defendant's truck.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Patrick M. Meter