STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 21, 2012
v	No. 301809 Kalkaska Circuit Court
KEVIN MATTHEW MINARD, Defendant-Appellant,	LC No. 10-003186-FH

Before: SERVITTO, P.J., and TALBOT and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of one count of operating a motor vehicle while intoxicated (OWI), MCL 257.625(1)(a), and one count of operating a vehicle with a suspended license, MCL 257.904(1). Defendant was sentenced to 18 months of probation with the first six months to be served in jail on the OWI conviction, and to time served plus fines and fees on the other conviction. Because the prosecutor did not misstate the law, we affirm.

At approximately 2 am, on September 13, 2009, Kalkaska deputy David Suhy observed an individual driving a moped on a public street in an erratic manner. Deputy Suhy followed the moped for half a mile, and estimated that the vehicle was traveling at a speed of about 30 mph. Deputy Suhy pulled the moped, which had pedals in addition to a gas-powered motor, over and identified defendant as the driver. He testified that upon speaking with defendant, he smelled "an odor of intoxicants" and noticed that his eyes "were glazed over." Defendant failed a number of field sobriety tests and a blood draw taken under subpoena showed a blood alcohol level of .13.

On appeal, defendant contends that the prosecutor misstated the law in his closing argument and that such misstatement deprived him of his right to a fair trial and his right to due process. Defendant further argues that counsel was ineffective in failing to object to the prosecutor's misstatement. We disagree.

Defendant argued at trial that he could not be convicted of OWI because he was pedaling the moped, not using the motor, when he was arrested and thus was not operating a "motor vehicle." "Even if you were to consider that as [a] potential theory," the prosecutor responded, "it doesn't matter for legal purposes . . . because it is itself a motor vehicle . . . Your cars are presumably parked in the parking lot right now . . . Because it is parked, it does not turn it into .

. . a rock. It remains a car; it is a motor vehicle." Defendant argues that this is a misstatement of the law.

We first note that there was more than sufficient evidence presented that defendant was not, as he asserts, pedaling the moped when he was arrested. Deputy Suhy testified that he followed the moped for approximately one half of a mile and that the moped and his patrol car were traveling at 30 mph during that time. Deputy Suhy also testified that at no time did he see defendant pedaling the moped. In any event, the prosecutor did not incorrectly state the law.

MCL 257.32b defines "moped" for purposes of the MVC:

> "Moped" means a 2- or 3-wheeled vehicle which is equipped with a motor that does not exceed 50 cubic centimeters piston displacement, produces 2.0 brake horsepower or less, and cannot propel the vehicle at a speed greater than 30 miles per hour on a level surface. The power drive system shall not require the operator to shift gears.

MCL 257.33 defines "motor vehicles" as:

> every vehicle that is self-propelled, but for purposes of chapter 4 of this act motor vehicle does not include industrial equipment such as a forklift, a front-end loader, or other construction equipment that is not subject to registration under this act. Motor vehicle does not include an electric patrol vehicle being operated in compliance with the electric patrol vehicle act. Motor vehicle does not include an electric personal assistive mobility device.

Defendant argues that the Legislature's use of the phrase "*is* self-propelled" means that only vehicles that are being self-propelled at the time an offense occurs fall within the statute's definition. According to defendant, "'is' is the present tense of the verb 'to be,' and the present tense of a criminal offense is the moment of the offense." However, "is self-propelled" can also be read as indicating that the vehicle is designed to be self-propelled, which would also include vehicles which can alternatively be self-propelled. Had the Legislature intended the time sensitive meaning advanced by defendant, it could have inserted wording such as, motor vehicles means "every vehicle that is actively self-propelled at the time an offense occurs," or even more simply, "is being self-propelled."

As the prosecutor argues, there is no indication that a car would not be defined as a motor vehicle under Michigan law unless it was in operation and being self-propelled at the moment an offense is committed. Our Supreme Court instructed in *People v Wood*, 450 Mich 399, 404-405; 538 NW2d 351 (1995):

> "[O]perating" should be defined in terms of the danger the OUIL statute seeks to prevent: the collision of a vehicle being operated by a person under the influence of intoxicating liquor with other persons or property. Once a person using a

> motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk.[1]

The moped was not in "a position of safety." It had been put into motion and presented "a significant risk of causing a collision" to other vehicles travelling on the same public road. The moped thus met the definition of a motor vehicle as it was intended under the OUIL statute. And, because the prosecution's remark was not an improper statement of the law, defense counsel as not ineffective for failing to object to the same. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004)(counsel not ineffective for failing to raise meritless or futile objections).

Affirmed.

/s/ Deborah A. Servitto
/s/ Michael J. Talbot
/s/ Kirsten Frank Kelly

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[1] In *Wood*, the defendant was arrested after being found unconscious in a van with its engine running and his foot resting on the brake. *Wood*, 450 Mich at 402. The Court noted that "[o]nly Wood's foot resting on the brake pedal kept the vehicle from moving forward." *Id.* at 404-405.