IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. James Wallberg, Defendant and Appellant.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20061024-CA F I L E D (January 31, 2008) 2008 UT App 34

Eighth District, Duchesne Department, 051800108
The Honorable John R. Anderson

Attorneys: Julie George, Salt Lake City, for Appellant
Mark L. Shurtleff and Ryan D. Tenney, Salt Lake City, for Appellee

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Before Judges Bench, Davis, and McHugh.

BENCH, Judge:

Defendant first contends that his jury verdict is not supported by the evidence. "We reverse the jury's verdict in a criminal case [only] when we conclude as a matter of law that the evidence was insufficient to warrant conviction." State v. Nelson, 2007 UT App 34, ¶ 7, 157 P.3d 329 (alteration in original) (internal quotation marks omitted). Thus, "[w]e will reverse only if the evidence is so inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime." Id. ¶ 8 (alteration in original) (internal quotation marks omitted). "In other words, 'if reasonable jurors could have reasonably believed' that the elements of Defendant's crimes were met, 'the verdict must stand.'" Id. (quoting State v. Robbins, 2006 UT App 324, ¶ 10, 142 P.3d 589). In evaluating an insufficiency claim, "we view the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict." State v. Honie, 2002 UT 4, ¶ 2, 57 P.3d 977.

The evidence in the present case, as well as the reasonable inferences drawn therefrom, supports Defendant's conviction for

speeding, driving without valid registration, driving without evidence of security, and driving on a revoked license. The police officer initiated a traffic stop because Defendant was traveling at eleven miles per hour over the speed limit, as indicated by the officer's radar. The officer was certified to operate the radar, the radar was calibrated, and no other cars were in the officer's line of sight when he aimed the radar at Defendant's vehicle. Once he pulled Defendant over, the officer observed that the temporary registration certificate on the window of Defendant's truck had expired. Defendant did not, as requested, provide any documentation indicating that he had current registration or insurance on his vehicle. Although Defendant orally assured the officer that he had both, Defendant did not produce any documentation to support that assurance, even by the time he went to trial. At trial, the State provided a certified copy of Defendant's driving record, which showed that Defendant's license was revoked in 2003.

Additionally, the evidence supports Defendant's conviction for driving under the influence of alcohol. After initiating a valid traffic stop, see State v. Sepulveda, 842 P.2d 913, 917 (Utah Ct. App. 1992), the officer noticed the smell of alcohol on Defendant's breath and emanating from the interior of the truck. Defendant admitted to drinking alcohol previously that day, but he provided the officer with conflicting explanations as to his consumption. The officer also noticed an eighteen-pack of beer in the truck that was still cold and missing eight cans. The officer further noticed Defendant's slurred speech, red and glossy eyes, and questionable balance. The combination of these facts led the officer to conclude that Defendant was incapable of operating a motor vehicle safely.

Having reasonable suspicion based on the above facts that Defendant was operating his vehicle under the influence, see State v. Worwood, 2007 UT 47, ¶¶ 25-26, 164 P.3d 397; State v. Hogue, 2007 UT App 86, ¶ 8, 157 P.3d 826, the officer asked Defendant to submit to field sobriety testing. Defendant agreed to take just one test, which he failed. Pursuant to a warrant obtained by the officer, Defendant submitted to a blood test approximately three and a half hours after the initial traffic stop. At trial, two experts testified that the results of Defendant's blood test indicated a blood-alcohol content over the legal limit at the time of the initial traffic stop.

While Defendant asserts that the experts' testimony was flawed because it did not take into account factors that may have affected his rate of alcohol absorption, this assertion addresses only the credibility of the experts' testimony and does not undermine the sufficiency of the evidence underlying Defendant's

conviction. "[T]he existence of contradictory evidence or of conflicting inferences does not warrant disturbing the jury's verdict" because "it is within the exclusive province of the jury to judge the credibility of the witness and the weight of the evidence." State v. Hardy, 2002 UT App 244, ¶ 11, 54 P.3d 645 (internal quotation marks and citations omitted).

Defendant next contends that his conviction of driving under the influence should be overturned due to ineffective assistance of counsel. "When an ineffective assistance of counsel claim 'is raised for the first time on appeal without a prior evidentiary hearing, it presents a question of law.'" State v. Holbert, 2002 UT App 426, ¶ 26, 61 P.3d 291 (quoting State v. Bryant, 965 P.2d 539, 542 (Utah Ct. App. 1998)). "To prove ineffective assistance of counsel, defendant must show: (1) that counsel's performance was objectively deficient, and (2) a reasonable probability exists that but for the deficient conduct defendant would have obtained a more favorable outcome at trial." State v. Clark, 2004 UT 25, ¶ 6, 89 P.3d 162. "Failure to satisfy either prong will result in our concluding that counsel's behavior was not ineffective." State v. Diaz, 2002 UT App 288, ¶ 38, 55 P.3d 1131. Further, where a defendant bases his ineffective assistance claim on counsel's alleged failure to investigate or call certain witnesses, and the defendant "does not offer any evidence about who these potential witnesses are or what their testimony would entail," the record is inadequate. State v. Bradley, 2002 UT App 348, ¶ 65, 57 P.3d 1139; see also Fernandez v. Cook, 870 P.2d 870, 877 (Utah 1993) ("Proof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality."). "Where the record appears inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively." State v. Litherland, 2000 UT 76, ¶ 17, 12 P.3d 92.

While Defendant identifies one witness whom he claims counsel should have called--the doctor who actually drew Defendant's blood--he does not identify that doctor by name and offers only speculative information regarding the content of the doctor's testimony. Defendant's insistence that his counsel should have subpoenaed a separate expert witness to counter the prosecution's theory of Defendant's level of intoxication is even more lacking. Defendant does not identify this supposed expert by name, nor does he generally indicate who this expert may be. Defendant offers only his belief that this expert's testimony would have countered the prosecution's extrapolation theory. With only these speculative allegations, Defendant has failed to

provide an adequate record to demonstrate that counsel's conduct was deficient.

Accordingly, we affirm.

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Russell W. Bench, Judge

WE CONCUR:

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James Z. Davis, Judge

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Carolyn B. McHugh, Judge