# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 24, 2009 |
| v | No. 286172<br>Kent Circuit Court |
| NAOMI ELIZABETH REESE,<br><br>Defendant-Appellant. | LC No. 07-008476-FH |

Before: Meter, P.J., and Murphy, C.J., and Zahra, J.

PER CURIAM.

Defendant appeals as of right her conviction for operating a vehicle under the influence of intoxicating liquor (OUIL), third offense, MCL 257.625(1). We affirm.

At about 2:00 a.m. on June 27, 2007, two individuals stopped their car to assist defendant. She was standing near her boyfriend's car, which was out of fuel and parked on the side of a public road. One assisting witness, David McNeil, testified that defendant stated that she was driving to find a store where she could buy cigarettes and ran out of fuel. The two witnesses assisted defendant in obtaining gasoline from a nearby gas station. While they attempted to refuel the stranded car, Deputy Beth Dykstra drove up to the scene. Both Dykstra and McNeil thought defendant might be drunk; Dykstra testified that she had this suspicion because defendant's speech was slurred and she smelled of alcohol. Dykstra testified at trial that defendant specifically told her she had been driving, and subsequently Dykstra administered several field sobriety tests, which defendant failed. Defendant was arrested, and only then told Dykstra that she had not driven the car. Defendant did not identify who had driven the car. Defendant had a blood alcohol content of 0.28 grams of alcohol per 100 milliliters of blood. Defendant and her boyfriend both testified at trial that he had actually been driving the car that night, but after it ran out of fuel, they argued and he left the car and defendant on the side of the road, and then walked over four miles to return home.

On appeal, defendant argues that there was insufficient evidence to support her conviction for OUIL. In reviewing a claim of insufficiency of the evidence, we review the evidence de novo. *People v Schumacher*, 276 Mich App 165, 167; 740 NW2d 534 (2007).

> The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt. . . . The

> standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. [*People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).]

Additionally, "[t]his 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).

Defendant was convicted of OUIL under MCL 257.625(1)(b), which provides, in relevant part:

> (1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, "operating while intoxicated" means . . .
>
> (b) The person has an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine . . . .

Defendant does not dispute that the vehicle was on a public highway, that her blood alcohol content exceeded 0.08 grams of alcohol per 100 milliliters of blood at the time, or that this was her third offense. Defendant argues only that there was insufficient evidence to prove beyond a reasonable doubt that she actually operated the vehicle.

In determining whether an individual was "operating" a vehicle, the Michigan Supreme Court held in *People v Wood*, 450 Mich 399, 404-405; 538 NW2d 351 (1995), that

> "operating" 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.

When an individual is not operating a vehicle at the time police find him, he may still be convicted of OUIL if sufficient evidence establishes that he "*had* operated his vehicle while under the influence at some point *before* he was arrested." *People v Schinella*, 160 Mich App 213, 216; 407 NW2d 621 (1987) (emphasis in original). See also *People v Solmonson*, 261 Mich App 657, 662-663; 683 NW2d 761 (2004), and *People v Stephen*, 262 Mich App 213, 219; 685 NW2d 309 (2004) ("an officer does not have to observe a defendant operating a vehicle for the defendant to be arrested and prosecuted for OUIL . . . .").

We conclude that in the present case, there was sufficient evidence to establish that defendant "*had* operated [her] vehicle while under the influence at some point *before* [she] was arrested." *Schinella*, *supra* at 216. Viewing the evidence in the light most favorable to the prosecutor, defendant told both Dykstra and McNeil that she had been driving the car. Further, the hood of the car was warm, indicating that it had recently been driven. Another police officer

who subsequently arrived at the scene testified that she did not see anyone (such as defendant's boyfriend) walking on the roads in the area. Defendant told Dykstra that she had not driven the car only after she was arrested, and even then, defendant never stated who was driving instead of her. Further, defendant had the keys to the car in her purse. Circumstantial evidence that defendant was driving was sufficient to support the conviction. *Solmonson*, *supra* at 662-663. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have concluded, beyond a reasonable doubt, that defendant operated the vehicle before the witnesses and police came upon her. *Nowack*, *supra* at 399-400. In reaching our conclusion, we will not disturb the jury's implicit determination that it found the assisting witnesses and Dykstra to be more credible than defendant and her boyfriend. *Fletcher*, *supra* at 561.

Finally, we note that defendant was also convicted of operating with a suspended license, MCL 257.904(1). On appeal, she does not specifically challenge that conviction. Regardless, because there was sufficient trial evidence to establish that defendant drove the car, any challenge to the sufficiency of the evidence supporting the operating with a suspended license conviction on the ground of "not driving" would also be meritless. MCL 257.904(1) provides that an individual with a suspended license "shall not operate a motor vehicle upon a highway or other place open to the general public . . . ." "Operate" for purposes of this statute is defined in the same way as it is under the OUIL statute as set forth in *Wood*, *supra* at 404-405. *People v Burton*, 252 Mich App 130, 147; 651 NW2d 143 (2002).

Affirmed.

/s/ Patrick M. Meter
/s/ William B. Murphy
/s/ Brian K. Zahra