

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICKI SUE LEBEAU,

Defendant-Appellant.

UNPUBLISHED

April 22, 2004

No. 246114

Midland Circuit Court

LC No. 02-001121-FH

Before: O’Connell, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from her jury trial conviction for operating while impaired (OWI), MCL 257.625(3), third offense, MCL 257.625(10)(c) (now MCL 257.625(11)(c)).¹ Defendant was sentenced to two years’ probation with the first three months in jail. We affirm.

On February 6, 2002,² Michigan State Police Officer Matthew Jordan pulled defendant over because her vehicle had a loud exhaust. Officer Jordan testified that defendant “had a strong odor of intoxicants on her and about her person. She had bloodshot, glassy, watery, eyes.” Officer Jordan further testified that when he asked defendant if she had been drinking she replied that she had consumed two beers after work. Then, Officer Jordan administered several field sobriety tests, and determined that defendant was operating the vehicle under the influence of liquor. Officer Jordan found two unsealed bottles of liquor, one half full and the other one

¹ Prior to trial, defendant plead guilty to operating a vehicle with a suspended or revoked license, second offense, MCL 257.904(1) and (3)(b), and possession of an open container of alcohol in a motor vehicle, MCL 257.624a.

² We note that for drunk driving offenses committed subsequent to September 30, 2003, several significant amendments have been made to the Motor Vehicle Code, including changes to the names of the offenses and eliminating certain presumptions provided in MCL 257.625a, which are pertinent to the present case. However, the present offense was committed on February 6, 2002, and, thus, is subject to the statutory provisions in effect prior to the 2003 amendments. We further note that the criminal jury instructions that will be examined, *infra*, will be the criminal jury instructions used prior to the 2003 statutory amendments.

fifth full, in defendant's car. Defendant was arrested and transported to the Midland County Jail. While at the jail, Officer Jordan administered two separate Datamaster breath tests on defendant, and both results registered .07 grams of alcohol per 210 liters of breath.

Defendant's first issue on appeal is that reversal is required because a jury instruction for unlawful blood alcohol was given despite the lack of evidence supporting the charge. We disagree because the error was harmless.

"Questions of law, including questions of the applicability of jury instructions, are reviewed de novo." *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). In *People v McKinney*, 258 Mich App 149, 162-163; 670 NW2d 249 (2003), this Court explained the review of jury instructions as follows:

Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). It is the function of the trial court to clearly present the case to the jury and instruct on the applicable law. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001). Accordingly, jury instructions must include all the elements of the charged offenses and any material issues, defenses, and theories that are supported by the evidence. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

The trial court instructed the jury using standard criminal jury instructions, CJI2d 15.5(5) and (6), regarding inferences, as follows:

If you find that there were .07 grams or less of alcohol per hundred milliliters in Defendant's blood when she operated the vehicle, the law allows you to infer that the Defendant was not under the influence of alcohol or impaired at that time.

This means that you may find from this bodily alcohol level that the Defendant did not violate the Motor Vehicle Code, but you are not required to do so.

If you find that there were more than .07 grams, but less than .10 grams of alcohol per 100 milliliters in the Defendant's blood when she operated the vehicle, the law allows you to infer that the Defendant's ability to operate the motor vehicle was impaired.

This means that you may find from this bodily alcohol level that defendant's ability to operate was impaired, but you are not required to do so.

Defendant contends that the jury should not have been instructed as to CJI2d 15.5(6), providing that more than .07 but less than .10 permits the inference that defendant's ability to operate the vehicle was impaired, because there was no evidence to support that defendant's level was greater than the .07 Datamaster results. The trial court, when discussing instructions with the parties, indicated that the jurors could infer a blood alcohol content (BAC) beyond .07 because approximately one and a half hours had elapsed between when defendant was stopped

and when the Datamaster test was administered. Defendant argues that this underlying assumption of the trial court is improper because there was no testimony about a delay in time causing a declining BAC. The trial court, considering the evidence and arguments, did not instruct on CJI2d 15.5(7) or (8), which provide that .10 or more permits the inference that defendant operated the vehicle under the influence of intoxicating liquor and with an unlawful BAC. An instruction was given for CJI2d 15.5(9) and (10), instructing the jury that it may consider defendant's BAC at the time of the test in deciding what her level was at the time she operated the vehicle, and that the jury could give the test results whatever weight they felt the test results deserved.

Upon a de novo review, we find that the trial court erred in instructing the jury on CJI2d 15.5(6) because there was no evidence to support this instruction.³ See *Canales, supra* at 574. But we find that there is no error requiring reversal because any error was harmless, i.e., after an examination of the record, it is not more probable than not that the error was outcome determinative. See *People v Rodriguez*, 463 Mich 466, 473; 620 NW2d 13 (2000).

Evidence was presented to the jury that there was a passage of time from when defendant was pulled over until when she was administered the Datamaster test and registered .07. But there was no evidence that any time passage would have changed defendant's BAC. There was no testimony on the record that a delay in time would cause defendant to register higher on a Datamaster test. The trial court instructed the jury on CJI2d 15.5(6), without any evidence to support the instruction. The trial court indicated to the parties, not in the presence of jury, that there was an hour and a half from when defendant was pulled over until when the Datamaster test was administered, but there was no testimony to this effect. The prosecution's only witness, Officer Jordan, did not testify to how much time passed, nor did he testify that the passage of time would have affected how defendant registered on the Datamaster test. Defendant was correct in pointing out that it is improper assuming, without evidence, that a time passage would lower defendant's blood alcohol, as it would be dependant on when she consumed the alcohol, and it could be that .07 was her peak. Without evidence of why it could be beyond .07 we find it was improper to instruct the jury on CJI2d 15.5(6).⁴ Because there was no evidence supporting

³ Judge O'Connell finds no error in instructing the jury on CJI2d 15.5(6). In fact, Judge O'Connell notes that it is a standard jury instruction used in most alcohol related driving offenses.

⁴ We note that in *People v Calvin*, 216 Mich App 403, 406; 548 NW2d 720 (1996), an instruction was given for CJI2d 15.5(5), providing that .07 or less permits the inference that defendant was not under the influence or impaired, even though the result of both Breathalyzer tests was .09. But *Calvin, supra*, is distinguishable from the present case because in *Calvin, supra*, an expert testified that the defendant's actual BAC would have been less than .07 based on the evidence, and that the defendant's BAC would have been less when the defendant was arrested as his BAC would have peaked closer to when he was administered the Breathalyzer. In the present case, there was no similar type testimony regarding defendant's BAC (in the present case would need testimony that a passage of time would have lowered defendant's BAC so that her BAC was higher when she was operating the vehicle).

the CJI2d 15.5(6) instruction, it was error for the trial court to instruct the jury on CJI2d 15.5(6).⁵ But there remains the question of whether this instructional error was harmless.

⁵ We note that MCL 257.625a(9), the statutory provision providing for presumptions based on BAC, prior to the 2003 amendments, provided the following, in part:

[T]he amount of alcohol in the driver's blood, breath, or urine at the time alleged as shown by chemical analysis of the person's blood, breath, or urine gives rise to the following presumptions:

* * *

(a) If there were at the time 0.07 grams or less of alcohol per . . . 210 liters of the defendant's breath, . . . it is presumed that the defendant's ability to operate a motor vehicle was not impaired due to the consumption of intoxicating liquor and that the defendant was not under the influence of intoxicating liquor.

(b) If there were at the time more than 0.07 grams but less than .10 grams of alcohol per . . . 210 liters of defendant's breath, . . . it is presumed that the defendant's ability to operate a vehicle was impaired within the provisions of section 625(3) due to consumption of intoxicating liquor.

The presumptions provided in MCL 257.625a(9) are based on the amount of alcohol "as shown by chemical analysis." While the inferences provided for in CJI2d 15.5(5)-(8) are not limited to amounts shown by a chemical analysis but, rather, are based on what the jurors believe the blood alcohol level of the defendant was at the time the defendant was driving (allowing an inference based on factors other than a chemical analysis test).

In *People v Campbell*, 236 Mich App 490, 497; 601 NW2d 114 (1999) this Court, in a case involving the admissibility of chemical tests, interpreted the "at the time" language used in MCL 257.625a(9)(c) (which is also the same phrase used in (a) and (b)), as follows:

Notably, the Legislature stated in this subsection that the presumption existed if there were 0.10 grams or more "at the time," and not "at the time alleged." The Legislature could have used such "alleged" language had it intended to require a prosecutor to extrapolate the blood alcohol content back to the time of the offense, and indeed the Legislature proved itself capable of using this language in other sections of the statute. . . . [T]he phrase, "at the time" must be read not as requiring proof of a certain blood alcohol level at the time of the offense, but at the time of the test itself. Thus, the blood alcohol test results are statutorily deemed to relate back to the time of the alleged offense.

CJI2d 15.5(5)-(8) provides for inferences based on whether the jurors believed the defendant has a certain amount of alcohol in his or her system when he or she is

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A preserved nonconstitutional error is presumed to be harmless and the defendant bears the burden of showing that the error resulted in a miscarriage of justice. *People v Lukity*, 460 Mich 484, 493-494; 596 NW2d 607 (1999). In *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000) our Supreme Court explained preserved nonconstitutional review as follows:

In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative. [*Lukity, supra* at 495-496.] An error is deemed to have been "outcome determinative" if it undermined the reliability of the verdict. See *People v Snyder*, 462 Mich 38, 45; 609 NW2d 831 (2000), citing *Lukity*, 460 Mich at 495-496. In making this determination, the reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence. See *Lukity, supra* at 495; *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996).

Michigan's OWI statute, MCL 257.625(3), prior to the 2003 amendments,⁶ provided:

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operating the vehicle. In *Campbell, supra* we related back the BAC level from the time the chemical test was taken to the time the defendant was operating the vehicle for purposes of the presumptions provided for in MCL 257.625a and, thus, CJI2d 15.5(5)-(8) can be read in harmony with the statute for purposes of the time period. But the jury instructions, CJI2d 15.5(5)-(8), allow jurors to base an inference on any evidence for BAC, while the statute is limited to amounts provided by chemical tests. Yet, in *Calvin, supra* at 410-411, this Court found "that CJI2d 15.5 in general, and CJI2d 15.5(5) in particular, are consistent for the most part with the Legislature's intent in enacting the statute." But the panel in *Calvin, supra* at 410 n 2, noted that:

Although we have concluded that CJI2d 15.5 is consistent with subsection 625a(9)(a), we expressly decline to place our imprimatur on the language of the jury instruction. . . . We believe this language detracts from the underlying premise, which has been adopted by the Legislature in its enactment of § 625a, that properly conducted chemical tests for BAC are entitled to a rebuttable presumption of accuracy.

We note the inconsistency between the statute, MCL 257.625a(9) (prior to the 2003 amendments), and the criminal jury instructions, CJI2d 15.5 (also prior to the 2003 amendments), but decline to address the inconsistency, as it is unnecessary for resolution of this issue. And, as previously noted, the 2003 amendments eliminated the presumptions discussed above. See MCL 257.625a

⁶ We note that the 2003 amendment only makes minor changes to MCL 257.625(3) in that it substitutes "alcoholic" for "intoxicating."

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 when, due to the consumption of an intoxicating liquor, a controlled substance, or a combination of an intoxicating liquor and a controlled substance, the person's ability to operate the vehicle is visibly impaired. If a person is charged with violating subsection (1) [operating under the influence of intoxicating liquor (OUIL) provision], a finding of guilty under this subsection may be rendered.

“A defendant commits OWI by driving when the ‘defendant's ability to drive was so weakened or reduced by consumption of intoxicating liquor that defendant drove with less ability than would an ordinary, careful and prudent driver. Such weakening or reduction of ability to drive must be visible to an ordinary, observant person.’” *Oxendine v Secretary of State*, 237 Mich App 346, 354; 602 NW2d 847 (1999) quoting *People v Lambert*, 395 Mich 296, 305; 235 NW2d 338 (1975). “The degree of a person's intoxication may be established by chemical analysis tests of the person's blood, breath, or urine or by testimony of someone who observed the impaired driving.” *Calvin, supra* at 407-408, citing *Lambert, supra* at 305. Thus, the degree of defendant's intoxication can not only be established by the Datamaster test, but also by Officer Jordan who observed her driving and administered field sobriety tests at the scene of the traffic stop.

According to Officer Jordan, when he approached defendant, she pleaded with him to take her home because “she had already learned her lesson.” Officer Jordan testified that defendant “had a strong odor of intoxicants on her and about her person. She had bloodshot, glassy, watery, eyes.” Officer Jordan also testified, regarding his observations of defendant and her performance during the field sobriety tests, as follows: 1) while reciting the alphabet defendant was hesitant; 2) when asked to count backwards from 67 to 55 defendant stopped at 63; 3) during the “stand and balance test” defendant wavered approximately six inches; 4) during the “finger to nose test” defendant touched the bridge of her nose with her left hand instead of the tip; 5) during the “one legged stand” test defendant was asked to stand on one leg and count to twenty and she stopped at twelve; 6) during the “walk and turn test” defendant started before Officer Jordan finished his instructions and she did not count her steps out loud as instructed; and 7) the “Horizontal Gaze Nystagmus test” indicated that defendant was under the influence of alcohol as she had nystagmus. Officer Jordan further testified that defendant acknowledged she had been drinking and had consumed two beers after work. In addition, Officer Jordan found two unsealed bottles of liquor, one half full and the other one fifth full, in defendant's car. Officer Jordan testified that his assessment was that defendant was operating under the influence of intoxicating liquor and that is why he arrested her.

The question for the jury was whether defendant was operating her vehicle under the influence of liquor or while impaired. Defendant was not found guilty of OUIL, but was found guilty of OWI.⁷ When compared to OUIL, “the threshold for OWI is much lower.” *Oxendine*,

⁷ In *Oxendine, supra* 354-355, this Court explained the elements of OUIL as follows:

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supra at 354. Defendant's ability at the time she was operating the vehicle is what is pertinent for purposes of whether she was operating a vehicle while impaired. See *id.* The Datamaster test was evidence as to what defendant's blood alcohol level was, and allowed the jury to infer that defendant was not impaired while operating the vehicle. However, a sufficient amount of evidence was presented to rebut this inference. The presumption in favor of the defendant in subsection MCL 257.625a(9)(a) "must be construed as permissive, rather than as a conclusive presumption of innocence, because it is not an essential element of the offense of [OWI] that a person's BAC exceed 0.07 percent." *Calvin, supra* at 409. "The Legislature clearly contemplated that a person whose BAC was 0.07 percent or less could still be visibly impaired." *Id.* The testimony of Officer Jordan clearly supported that defendant, at the very least, was driving with less ability than would an ordinary, careful and prudent driver, and that her reduction in driving ability was visible to an ordinary, observant person. See *Lambert, supra* at 305; *Oxendine, supra* at 354. Defendant has not overcome the presumption that the error was harmless, nor has she established that the error resulted in a miscarriage of justice. We do not believe that the error was outcome determinative in light of the testimony from Officer Jordan who witnessed and administered field sobriety tests to defendant soon after witnessing her driving. Therefore, we find that, although it was error for the trial court to instruct the jury on CJI2d 15.5(6), it was harmless error.

Defendant's second issue on appeal is that reversal is required because the trial court abused its discretion in allowing the jury to consider the fact that defendant did not have a driver's license. We disagree.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

An error in the admission of evidence is not a ground for reversal unless refusal to take this action appears inconsistent with substantial justice. MCR 2.613(A); MCL 769.26. Reversal is required only if an error is prejudicial. *Mateo, supra* at 210, 212. Whether erroneously admitted evidence requires reversal depends on the nature of the error and its effect in light of the weight of the properly admitted evidence. *People v Smith*, 456 Mich 543, 555; 581 NW2d

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OUIL would be committed if a defendant drove when the "defendant's ability to drive was *substantially and materially affected* by consumption of intoxicating liquor." [*Lambert, supra* at 305] (emphasis supplied). An alternative formulation of this test for OUIL is whether "the person is substantially deprived of [his/her] normal control or clarity of mind at the time [he/she] is operating the motor vehicle." *People v Walters*, 160 Mich App 396, 400; 407 NW2d 662 (1987), quoting CJI 15:1:01(8).

654 (1998). A defendant claiming an evidentiary error must show that it is more probable than not that the alleged error affected the outcome of the trial in light of the weight of the properly admitted evidence. *People v Whittaker*, 465 Mich 422, 426-427; 635 NW2d 687 (2001).

During the prosecution's direct examination of Officer Jordan the following colloquial occurred:

Q. And when you made contact with the Defendant, did you approach her car, or how did you come into contact with her?

A. I approached her vehicle, but she had already gotten out of the vehicle and she approached me.

And at that point, I asked her for her driver's license. And she told me she did not have one.

During closing argument, the prosecutor stated that defendant "chose to drive without her license."

Defendant contends that the testimony of Officer Jordan and statement by the prosecutor, regarding defendant not having her license, should not have been permitted because the trial court agreed to suppress reference to prior offenses and agreed that a pretrial plea for having a suspended license would take any reference to a suspended license out of the trial. We note that the trial court did not specifically suppress reference to defendant's suspended license. At a preliminary hearing, defense counsel discussed the possibility of getting the misdemeanors "out of the picture" so there would be no need to reference the suspended license, and was inquiring if it would be a possibility. The trial court responded "I believe so." And, at trial there was no specific reference to defendant having a suspended license. Several inferences could be made from the fact that defendant did not have a driver's license with her when she was pulled over.

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402, *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). Evidence is admissible if it is helpful in throwing light on any material point. *Aldrich, supra* at 114. To be material, evidence need not relate to an element of the charged crime or an applicable defense, but the relationship of the elements of the charge, the theories of admissibility, and the defenses asserted govern relevance and materiality. *People v Brooks*, 453 Mich 511, 518; 557 NW2d 106 (1996); *People v Kevorkian*, 248 Mich App 373, 442; 639 NW2d 291 (2001). Evidence that is admissible for one purpose is not inadmissible because its use for a different purpose is precluded. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000).

Officer Jordan was providing the basic foundation testimony regarding the stop and arrest of defendant. The prosecution was required to lay the foundation surrounding defendant's traffic stop and subsequent arrest. The fact that defendant did not have a license on her is not particularly relevant, but provided foundation for what led up to defendant's arrest. It was material as to whether the Officer Jordan followed proper procedure, and how he became aware

that defendant had been drinking. And, the fact that defendant spoke to Officer Jordan so he could smell her breath is marginally relevant because it was after she made statements that he recognized she was drinking⁸ and this is relevant, even if the fact that she did not have a license on her was not relevant. The trial court did not abuse its discretion in allowing Officer Jordan's brief testimony regarding defendant's driver's license, and by failing to give a curative instruction, as no error exists. *Hine, supra* at 250; *Snider, supra* at 419.

Defendant also argues that the prosecutor improperly argued that no license meant defendant was intoxicated. A reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, ___ Mich App ___; ___ NW2d ___ (Docket No. 243817, issued February 3, 2004) slip op p 2. A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994); *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), but he is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case, *Bahoda, supra* at 282; *Schutte, supra*.

A review of the prosecutor's closing argument does not support defendant's contention that the prosecutor argued the fact that defendant did not have a license meant that she was intoxicated. All the prosecutor stated was that defendant "chose to drive without her license." The prosecutor did not argue that defendant was intoxicated because she did not have a license. Reviewing the statement that defendant contends requires reversal, in context, the prosecutor made a statement that was supported by the admitted evidence, and did not argue that defendant was intoxicated just because she did not have a driver's license with her. See *Thomas, supra*. Thus, the prosecutor did not err in commenting on defendant not having a license on her at the time she was pulled over.⁹

⁸ We note that even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403, *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000). The prejudicial effect of evidence is best determined by the trial court's contemporaneous assessment of the presentation, credibility and effect of the testimony. *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659 (1995). The trial court allowed the statement in without an instruction to the jury, and did not abuse its discretion in failing to find that the probative value of the evidence was substantially outweighed by the undue prejudice; because the statement was minimally prejudicial, at best.

⁹ Regardless, defendant has not shown that it is more probable than not that any alleged error affected the outcome of the trial in light of the weight of the properly admitted evidence. See *Whittaker, supra* at 426-427. Any error was harmless, as the fact that defendant did not have her license with her is insignificant to whether she was operating a vehicle while impaired. The fact that defendant did not have a license was briefly stated in Officer Jordan's testimony and noted in the prosecutor's closing argument does not require reversal because it did not affect defendant's substantial rights and was not outcome determinative. Consequently, with regard to the statements made concerning defendant not having a license, no error exists requiring reversal. See *Mateo, supra* at 210, 212.

Defendant's third issue on appeal is that reversal or remand is required because her trial counsel was ineffective for failing to call a known res gestae witness who would have directly contradicted the only prosecution witness. We disagree.

When reviewing defendant's claim of ineffective assistance of counsel, our review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *Id.* at 579. The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and the failure to call witnesses can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. See *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). A substantial defense is one that might have made a difference in the outcome of the trial. *Id.*

After arresting defendant, Officer Jordan had to wait for Bonnie St. Louis, defendant's sister, to pick up defendant's daughter, who was in the car when defendant was pulled over. During a hearing on defendant's motion for a new trial, St. Louis testified that when she picked up defendant's daughter, defendant's speech was good, her eyes were clear, and that she did not appear to be intoxicated. Under the current res gestae witness statute, MCL 767.40a, the prosecutor has "an obligation to provide notice of known [res gestae] witnesses and reasonable assistance to locate witnesses on defendant's request." *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995). A res gestae witness is one who witnessed some event in the continuum of a criminal transaction, and whose testimony would aid in disclosing all the facts. *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001). St. Louis was not a res gestae witness because she was not a witness in the continuum of a criminal transaction. The criminal action was the operating of the vehicle while under the influence of alcohol or while impaired. St. Louis was not a witness when defendant was operating the vehicle, nor did she witness Officer Jordan administer the field sobriety tests to defendant. As such, St. Louis was not a res gestae witness.

But defense counsel could have called St. Louis as a supporting witness. The failure to call supporting witnesses does not inherently amount to ineffective assistance of counsel, *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996), and the failure to present witnesses can

be considered acceptable trial strategy. *People v Calhoun*, 178 Mich App 517, 524; 444 NW2d 232 (1989). Defense counsel knew that the witness existed. During the hearing on defendant's motion for a new trial, defense counsel indicated that he "thought for awhile that the prosecution was going to bring her forward." This indicates that defense counsel did become aware at some point that the prosecution was not going to call St. Louis as a witness, and made a decision not to call her on behalf of defendant. It could be that defense counsel decided not to call St. Louis because he believed that the jury would not find her credible as she was related to defendant and did not directly observe defendant during any material time period. The fact that defense counsel did not call St. Louis after the prosecution failed to call her evidences a decision on defense counsel's part not to call her as a witness. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Therefore, after a review of the record, we do not believe defendant has overcome the presumption that she received effective assistance of counsel.

Further, if defendant had overcome the presumption that defense counsel's decision not to call St. Louis to testify constituted sound trial strategy, she still could not prove that this failure deprived her of a substantial defense and, thus, prejudiced her right to a fair trial. See *Carbin, supra* at 600; *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Carbin, supra*. Accordingly, defendant must show that, if St. Louis had testified, it is reasonably probable that the jury would not have convicted defendant of OWI. St. Louis did not view defendant when she was operating the vehicle, or when she was administered the field sobriety tests. St. Louis did not witness defendant until some time had passed and, thus, this testimony was, at best, marginally relevant to how defendant appeared when she was operating the vehicle, which is the relevant time period for purposes of observation. See *Calvin, supra* at 407-408 ("The degree of a person's intoxication may be established . . . by testimony of someone who observed the impaired driving."). The important time period was when defendant was operating the vehicle, and the best assessment of her vision and speech would have been immediately after she was pulled over. We find that even if the testimony of St. Louis had been admitted it would not have changed the outcome of the proceedings. See *Carbin, supra* at 600; *Kelly, supra* at 526.

Based on the record, upon a de novo review of this constitutional issue, defendant has not established the deficient performance and prejudice required to succeed on a claim of ineffective assistance of counsel. See *LeBlanc, supra* at 579.

Defendant's final issue on appeal is that the cumulative effect of the alleged errors discussed, hereinbefore, deprived her of a fair trial. We disagree. Because defendant has identified no actionable error and only one error that we found to be harmless, we reject her

claim that the cumulative effect of several errors denied her a fair trial. See *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

Affirmed.

/s/ Peter D. O'Connell

/s/ Kathleen Jansen

/s/ Christopher M. Murray