

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE CITY OF ROCKWOOD,

Plaintiff-Appellant,

v

WALTER OGRODOWSKI,

Defendant-Appellee.

UNPUBLISHED

October 5, 2001

No. 223477

Wayne Circuit Court

LC No. 98-900105

Before: Cavanagh, P.J., and Markey and Cooper, JJ.

MEMORANDUM.

The city appeals by leave granted from a circuit court order reversing defendant's conviction of operating a motor vehicle under the influence of intoxicating liquor and ordering a new trial. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The circuit court ruled that defendant was entitled to a new trial because the district court admitted evidence that defendant had been offered and had refused a chemical test and permitted the prosecutor to impeach a defense witness with evidence of his failure to come forward with information. The trial court's ruling on the admission of evidence is reviewed for an abuse of discretion. *People v Gould*, 225 Mich App 79, 88; 570 NW2d 140 (1997).

Pursuant to statute, the evidence was admissible to show that a test was offered, but not as evidence in determining guilt or innocence. MCL 257.625a(10). The evidence was also relevant in this case because it showed the reason for the delay in administering the Breathalyzer test, which delay defendant used to challenge the accuracy of the test results. See *People v Campbell*, 236 Mich App 490, 503; 601 NW2d 114 (1999). In addition, the trial court instructed the jury several times throughout the trial about the limited purpose for which the evidence could be considered. See MCL 257.625a(10). Therefore, the trial court did not abuse its discretion in admitting the evidence and the circuit court erred in reversing defendant's conviction on this ground.

The impeachment evidence was arguably proper because the witness was in possession of facts showing that defendant had not consumed alcohol until after the single-car accident giving rise to the charge. See *People v Emery*, 150 Mich App 657, 666; 389 NW2d 472 (1986); *People v Perkins*, 141 Mich App 186, 196; 366 NW2d 94 (1985). Moreover, given the overwhelming evidence that defendant was intoxicated while driving, including his own statement that he had a

few drinks with a friend before going home, his erratic driving, and his unusual behavior, it is unlikely that the evidence affected the outcome of the trial. Therefore, defendant failed to establish a right to relief based on this unpreserved error, *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), and the circuit court erred in reversing defendant's conviction on this ground.

Reversed and remanded for reinstatement of the district court's judgment. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Jane E. Markey

/s/ Jessica R. Cooper