STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOE BABE HENTON,

Defendant-Appellant.

UNPUBLISHED
November 25, 1997

No. 195000
Allegan Circuit
LC No. 95-009846-FH

Before: Smolenski, P.J., and MacKenzie and Neff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of vehicular manslaughter, MCL 750.321; MSA 28.553, operating a motor vehicle while under the influence of intoxicating liquor ("OUIL") causing death, MCL 257.625(4); MSA 9.2325(4), OUIL causing serious injury, MCL 257.625(5); MSA 9.2325(5), and failure to stop at a serious personal injury accident, MCL 257.617; MCL 9.2317. The trial court sentenced defendant to seven to fifteen years' imprisonment for vehicular manslaughter, seven to fifteen years' imprisonment for OUIL causing death, two to five years' imprisonment for OUIL causing serious injury or death, and two to five years' imprisonment for failure to stop at a serious personal injury accident, with fifty-six days' credit for time served. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court erred in admitting defendant's alleged statements made to a police officer following his arrest because the testimony at the *Walker*[1] hearing revealed that defendant made the statements before the officer advised defendant of his *Miranda*[2] rights. We review a trial court's determination of voluntariness by examining the entire record and making an independent determination. *People v Brannon*, 194 Mich App 121, 131; 486 NW2d 83 (1992).

Our review of the entire record reveals that the only statements which the prosecutor introduced at trial were those made by defendant after the police officer advised defendant of his *Miranda* rights and before defendant invoked his right to remain silent. Although defendant denied that the officer advised him of his *Miranda* rights; this Court defers to a trial court's assessment of the credibility of the

witnesses unless we are left with a definite and firm conviction that a mistake has been made. *Brannon, supra* at 131; *People v Kvam*, 160 Mich App 189, 196; 408 NW2d 71 (1987). In the case before us, the trial court did not err in ruling that defendant's statements were admissible.

II

Defendant next argues that the results of his blood-alcohol tests should not have been admitted at trial. Defendant concedes that this issue is not preserved; therefore, we need not review this issue unless we find that there was in fact an error in admitting the evidence and the error could have been decisive of the outcome of the trial. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

In order for the results of a chemical blood-alcohol test to be admitted into evidence, the proponent of the evidence must meet the following four foundational requirements:

> First, it must be shown that the operator is qualified. Second, the proper method or procedure must be demonstrated as having been followed in the tests. Third, the tests must have been performed within a reasonable time after the arrest. Finally, the testing device must be shown to be reliable. [*People v Schwab*, 173 Mich App 101, 103; 433 NW2d 824 (1988).]

Failure to meet any of these foundational requirements will result in exclusion of the test results. *Id*.

On appeal, defendant argues that his blood test, administered approximately four hours after the accident and approximately two hours after his arrest, was not administered within a reasonable time. This Court has bestowed trial courts with wide latitude in making determinations respecting the reasonableness of a time lapse involving an alleged infraction involving alcohol consumption and the administering of a chemical blood-alcohol test. *Schwab, supra* at 104-105. Further, in the instant case, the prosecutor presented expert testimony to relate the test results back to the time of the alleged offense. In light of this expert testimony and the deference afforded to trial courts, we cannot say that the admission of the test results in the case at bar constituted error. Accordingly, we need not review this claim.

Defendant also argues that the prosecution's expert witness should not have been permitted to give an opinion of defendant's blood-alcohol level at the time of the accident because defendant's particular metabolism rate was not known to the witness or the prosecution. The expert witness hypothesized that because defendant's blood-alcohol level was .13 percent four hours after the accident, the average adult would have had a level of .19 percent at the time of the accident. Again, however, this issue is unpreserved, and we need not review this claim. *Grant, supra* at 553.

III

Defendant next argues that his trial counsel was ineffective for failing to preserve the above-discussed contentions of error. Defense counsel, however, is not required to argue a frivolous or meritless motion, *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Because no error

occurred in the admission of the results of the blood-alcohol test or in the content of the expert's testimony, trial counsel was not ineffective for not objecting at trial.

IV

Defendant next argues that the trial court erred in denying defendant's request, at the close of the prosecution's case, to issue a subpoena to Allegan General Hospital for the production of the medical records of a person who defendant hypothesized might have been driving his vehicle at the time of the accident. We disagree.

The denial of a motion for additional discovery is reviewed for abuse of discretion. *People v Valeck*, 223 Mich App 48, 50; 566 NW2d 26 (1997). An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would have concluded that there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Defendant failed to articulate to the trial court any cognizable basis for issuing the requested subpoena save for his unsupported contention that someone else might have been driving his vehicle at the time of the accident. Further, defendant waited until the close of the prosecution's case to raise this theory, for which he offered no evidence in support. Moreover, as recognized by the trial court, only the patient is empowered to waive the physician-patient privilege. MCL 600.2157; MSA 27A.2157, *People v Lawrence Johnson*, 111 Mich App 383, 388; 314 NW2d 631 (1981). Therefore, the issuance of a subpoena likely would have been futile. Accordingly, given the overwhelming evidence against defendant, his failure to establish any cognizable basis supporting his motion for additional discovery, the dilatory nature of his request, and the implications of the physician-patient privilege, we cannot say that the trial court abused its discretion in denying defendant's request.

As a related matter, defendant argues that the trial court erred in precluding him from questioning a defense witness about the activities of her fiance on the evening of the accident. The witness' fiance was apparently the individual whose medical records defendant sought to subpoena. The trial court, pursuant to MRE 403, excluded the testimony because it found that any probative value which the testimony might have was substantially outweighed by the danger that the testimony might mislead the jury. We agree with the trial court.

Pursuant to MRE 403, 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 influence, waste of time, or needless presentation of cumulative evidence. *People v Mills*, 450 Mich 61, 74-75; 537 NW2d 909 (1995). The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). Here, defendant called the witness to support his theory that the witness' fiance and not defendant might have been driving defendant's vehicle at the time of the accident. Defendant's offer of proof, however, revealed that the witness' testimony would be only minimally probative of this theory, but very likely would confuse and mislead the jury.

Accordingly, we find that the trial court did not abuse its discretion in limiting defendant's examination of the witness.

Affirmed.

/s/ Michael R. Smolenski
/s/ Barbara B. MacKenzie
/s/ Janet T. Neff

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).