STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

MATTHEW ALAN KURILIK

Defendant-Appellant

UNPUBLISHED
September 28, 2001

No. 219150
Oakland Circuit Court
LC No. 98-161152-FC

Before: Collins, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendant was charged with several offenses arising from an automobile accident when he struck another vehicle while intoxicated and driving at a high rate of speed. The driver of the other vehicle subsequently died and the passenger received serious injuries. Defendant pleaded guilty to four counts: (1) operating a motor vehicle under the influence of intoxicating liquor [OUIL] causing serious injury, MCL 257.625(5); (2) felon in possession of a firearm, MCL 750.224f; (3) driving with a suspended license, MCL 257.904(1); and (4) having open intoxicants in a vehicle, MCL 257.624a. Immediately following his guilty plea, defendant was tried and convicted by a jury of involuntary manslaughter with a motor vehicle, MCL 750.321, and OUIL causing death, MCL 257.625(4). Defendant was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of fifteen to thirty years each for the involuntary manslaughter and OUIL causing death convictions, five to ten years for the OUIL causing serious injury conviction, two to ten years for the possession of a firearm by a felon conviction, and ninety days each for the driving with a suspended license and open intoxicants convictions. Defendant appeals as of right. We affirm.

I

First, defendant claims that the trial court erred in denying his motion to suppress statements that he made to a police detective in the hospital several hours after the accident. On appeal, defendant does not contend that the statements were involuntary. Rather, he claims that, due to his intoxication and hospitalization, he did not have the degree of understanding to make a knowing and intelligent waiver of his *Miranda*[1] rights. We conclude that the trial court did not

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

clearly err in ruling, following a *Walker*[2] hearing, that defendant's statements were made freely, knowingly, and intelligently, with the understanding that they could be used against him. See *People v Daoud,* 462 Mich 621, 629-630; 614 NW2d 152 (2000).

Given defendant's concession that his statements were voluntary, the critical inquiry is whether defendant had the degree of understanding to provide a knowing and intelligent waiver of his *Miranda* rights. *People v Cheatham,* 453 Mich 1, 28 (Boyle J.), 44 (Weaver, J.); 551 NW2d 355 (1996). "To establish a valid waiver, the state must present evidence sufficient to demonstrate that the accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him." *Id.* at 29, citing *Moran v Burbine,* 475 US 412, 423; 106 S Ct 1135; 89 L Ed 2d 410 (1986); accord *Daoud, supra* at 637. A suspect need not understand the ramifications and consequences of waiving his rights, and the test is not whether it was "wise or smart" to admit his culpability. *Id.* at 636; *Cheatham, supra* at 28-29. The accused need only know of his available options and make a rational decision, not necessarily the "best" one. *Id.* at 28.

Defendant was advised, and by all indications understood, that he did not have to speak to the detective without an attorney being present. *Moran, supra.* As in *Cheatham,* it is undisputed that the police officer who questioned defendant administered *Miranda* warnings,[3] sought to insure that defendant understood the warnings, and obtained an express written waiver before questioning him. *Cheatham, supra* at 30. The written waiver is strong evidence that defendant's waiver of his rights was valid. *Id.* at 31. Defendant also provided appropriate answers to questions that were intended to determine whether defendant was oriented to time and events. By his question to the detective of what he was being charged with, defendant also exhibited comprehension of what was occurring.

The record also indicates that defendant was advised of, and knew, that the police intended to use his statements against him. Moreover, defendant had two prior felony convictions. "A defendant's previous experience with the police is 'an important consideration in determining whether an inculpatory statement was made voluntarily and understandingly.'" *Cheatham, supra* at 35, quoting *State v Fincher,* 30 NC 1, 20; 305 SE2d 685 (1983). Further, defendant was advised that other people were injured in the accident, that the detective was investigating the accident and would turn his report over to the prosecutor's office for review, and that the prosecutor's office would be seeking a warrant against defendant.

Accordingly, the trial court did not clearly err in determining that defendant's statements to the detective were knowingly and intelligently made.

II

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

[3] *Miranda* warnings were given to defendant despite the fact that the detective advised him that he was no longer under arrest. *Miranda* warnings are not required unless the accused is subject to a custodial interrogation. *People v Hill,* 429 Mich 382, 384; 415 NW2d 193 (1987).

Second, defendant claims that he was denied the effective assistance of counsel by trial counsel's failure to seek suppression of defendant's blood alcohol test results.

We note that defendant did not preserve this issue for our review by making a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Therefore, our review is precluded unless the details of the alleged deficiencies are apparent on the already-existing record. *People v Sabin (On Second Remand)*, 242 Mich App 656; 620 NW2d 19 (2000).

Defendant presented no facts below, and presents none on appeal, to indicate that his consent to have his blood withdrawn was invalid. Therefore, the blood alcohol level test results were admissible into evidence against defendant. *People v Borchard-Ruhland*, 460 Mich 278; 597 NW2d 1 (1999). Because the blood alcohol test results were admissible, defendant was not deprived of the effective assistance of counsel due to counsel's failure to move to suppress the test results. Defendant, therefore, has failed to establish that there was a reasonable probability that, but for counsel's error, the result would have been different. *Hoag, supra* at 6-7.

Regarding defendant's claim that both trial and appellate counsel were ineffective for failing to raise the issues that defendant raises in his Standard 11 brief in this Court, this claim must similarly fail because none of the issues raised by defendant have merit. Counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

III

Defendant next contends that he was denied a fair and impartial trial by the prosecutor's impeachment of him with a prior conviction of breaking and entering with intent to commit a larceny. MRE 609.

Because defendant failed to object to the prosecutor's elicitation that he had a prior theft conviction, we review the alleged error under the plain error rule, that is, whether a plain error occurred that prejudicially affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant has shown neither plain error in the admission of the evidence regarding his prior conviction, nor prejudice to his substantial rights by the admission of the evidence. See *People v Bartlett*, 197 Mich App 15, 19-20; 494 NW2d 776 (1992). See also *People v Allen*, 429 Mich 558, 611-612, 644; 420 NW2d 499 (1988); *People v Rice (On Remand)*, 235 Mich App 429, 438-439; 597 NW2d 843 (1999). Defendant's claim accordingly fails.

IV

Defendant also argues that the prosecutor made several improper, prejudicial comments during closing and rebuttal arguments, only one of which was preserved below with an appropriate objection.

In reviewing a claim of prosecutorial misconduct, we review the prosecutor's comments in context to determine whether they denied defendant a fair trial. *People v Bahoda*, 448 Mich

261, 266-267; 531 NW2d 659 (1995). However, as to those comments to which defendant failed to object below, we limit our review to plain error. *Carines, supra; People v Schutte,* 240 Mich App 713, 720; 613 NW2d 370 (2000).

We find no error in the prosecutor's remarks. Viewed in context, the remarks in closing argument were proper commentary on the evidence and on defendant's credibility. *Bahoda, supra* at 282; *People v Buckey*, 424 Mich 1, 14-16; 378 NW2d 432 (1985). Each of the remarks by the prosecutor in rebuttal of which defendant now complains were made in response to arguments by defense counsel in his closing argument and, therefore, were not improper. *Schutte, supra* at 721.

V

Lastly, defendant contends that his rights against double jeopardy were violated.

The prosecution was not precluded from prosecuting defendant at trial on two charges after he pleaded guilty to four other charges arising from the criminal transaction at issue. With regard to the four counts of which defendant pleaded guilty, jeopardy did not attach until the date defendant was sentenced for those crimes, which was the same date defendant was sentenced for the crimes for which the jury convicted him. *People v Johnson*, 396 Mich 424, 431, n 3; 240 NW2d 729 (1976). Thus, double jeopardy protections did not attach until that time and did not preclude the jury trial on the remaining counts after defendant's guilty plea. Moreover, because defendant voluntary consented to the bifurcation of the adjudication of the two groups of offenses, he cannot now claim that this was error. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995).

Further, defendant's right against double jeopardy was not violated due to the fact that he was convicted of both OUIL causing death and involuntary manslaughter. See *People v Price*, 214 Mich App 538, 546; 543 NW2d 49 (1995).

Affirmed.

/s/ Jeffrey G. Collins
/s/ William B. Murphy
/s/ Kathleen Jansen