STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALLEN W. OUMEDIAN,

Defendant-Appellant.

UNPUBLISHED
April 17, 2003

No. 234758
Livingston Circuit Court
LC No. 00-011896-FH

Before: Talbot, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals of right from his jury conviction of operating a motor vehicle while under the influence of intoxicating liquor (OUIL), and operating a motor vehicle with a blood alcohol level in excess of 0.10 (UBAL). MCL 257.625(1)(a), (b). He was sentenced to thirty-six months' probation with the first 180 days to be served in jail. We affirm.

I. FACTUAL BACKGROUND

In the early morning of June 25, 2000, Deputy Brian Chuff of the Livingston County Sheriff's Department observed two pickup trucks stopped next to the Grand River exit from eastbound I-96 expressway in Brighton. A gray pickup truck was stopped on the right side of the exit ramp and a white truck was in the grassy area between the exit and the expressway. Deputy Chuff noticed two occupants in the gray pickup truck; as he got out of his patrol car, the individual who was seated in the passenger's side of the gray truck got out and ran away from the vehicle in the direction of a fence that separated the berm next to the exit from nearby undeveloped land and some businesses. Deputy Chuff yelled at him, but the man ignored him, tripped and fell as he tried to climb over the fence, and then continued running away.

Deputy Chuff gave his dispatcher a description of the man and the license plate number from the white pickup truck; the dispatcher informed him that the truck was registered to defendant and a woman. Chuff examined the white pickup truck and concluded from the damage to the vehicle and the other evidence that it had been involved in a rollover accident; Chuff concluded that the driver lost control as he drove off the expressway onto the exit and rolled the truck over on the grass. He acknowledged that he did not observe the vehicle being driven, and that there were a variety of reasons the vehicle could have driven off the exit ramp. However, in Chuff's opinion, the evidence he observed at the scene did not suggest that any of these other explanations could account for the accident, implying that defendant was driving

drunk.

Police officers from Brighton and Hamburg Township assisted in searching for the man who ran away from the accident scene. A person meeting the man's description was located walking on some muddy, undeveloped land behind a nearby Home Depot. The man, who turned out to be defendant, was ordered to stop and lie facedown in the mud with his arms to his sides. As the first officer approached him, defendant exclaimed that he was sorry that he ran from the officer, that he was drunk, that he had crashed his truck, and that he did not want to go to jail. Defendant was handcuffed and escorted to a patrol car. Defendant's speech was slurred and the officers could smell the very strong odor of intoxicants from him. He was informed of his constitutional rights and asked if he would consent to a preliminary breath test, but he did not respond. The police therefore obtained a search warrant, and a sample of his blood was withdrawn at a hospital. When defendant arrived at the jail, he asked Deputy Chuff if he had hit anyone.

Subsequent testing indicated that defendant's blood alcohol level was 0.16 grams of alcohol per 100 milliliters of blood. Defendant presented an expert witness to challenge the results of the blood test, and the prosecutor presented a rebuttal expert witness to support the results. Additional facts will be presented in the course of discussing the four issues raised by defendant in this appeal.

II. MOTION TO QUASH THE SEARCH WARRANT

Defendant first contends that the trial court erred by denying his pre-trial motion to quash the search warrant. Both the Michigan and federal constitutions forbid unreasonable searches and require that search warrants issue only on a showing of probable cause. *People v Levine*, 461 Mich 172, 178; 600 NW2d 622 (1999). Given the strong preference for search warrants contained in the state and federal constitutions, a court reviewing a magistrate's decision to issue a search warrant must give deference to the magistrate's determination that probable cause existed. *People v Russo*, 439 Mich 584, 603-604; 487 NW2d 698 (1992), quoting *Illinois v Gates*, 462 US 213, 236-237; 103 S Ct 2317; 76 L Ed 2d 527 (1983); see also *People v Sloan*, 450 Mich 160, 168; 538 NW2d 380 (1995). "Probable cause to search exists when facts and circumstances warrant a reasonably prudent person to believe that a crime has been committed and that the evidence sought will be found in a stated place." *People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2000). Because the standard only requires that the officer seeking a search warrant demonstrate probable cause, search warrants and their underlying affidavits must "be read in a common-sense and realistic manner [to ensure] that there is a substantial basis for the magistrate's conclusion that there is a 'fair probability that contraband or evidence of a crime will be found in a particular place.'" *Russo*, *supra* at 604, quoting *Gates*, *supra* at 238.

Following his arrest, the police obtained a search warrant to secure blood from defendant so that a blood alcohol test could be performed. The affidavit supporting the request for a search warrant asserted that defendant was the driver of a vehicle that was involved in a rollover accident and that, based on his flight from the scene and the smell of alcohol on his person when he was apprehended, the officer concluded that defendant was intoxicated.

Defendant argued that the police officer failed to provide any facts from which it could be concluded that he was the driver of the vehicle involved in the rollover accident, or that he had actually operated the vehicle while he was intoxicated. The trial court denied defendant's motion, ruling that probable cause existed from which to logically conclude that defendant was the driver of the vehicle and to justify the issuance of the search warrant because (1) the police were investigating a vehicle accident and observed a man flee from the scene, and (2) when the police apprehended this man (defendant), they discovered the smell of alcohol on his breath. We agree with the trial court's ruling.

Indeed, the trial court read the affidavit in a common-sense and realistic manner. See *Russo, supra*. Because a rollover accident had occurred, it could reasonably be inferred that the truck involved in the accident was not driving itself. According to the affidavit, when the police attempted to question defendant, he ran away from them. Flight is an indication of a defendant's consciousness of guilt. *People v Cammarata*, 257 Mich 60, 66; 240 NW 14 (1932); *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). When defendant was apprehended, the police smelled the strong odor of intoxicants. "[I]t is altogether reasonable for a police officer to suspect that the strong smell of intoxicants on a motorist's breath was caused by the consumption of intoxicating liquor." *People v Rizzo*, 243 Mich App 151, 161; 622 NW2d 319 (2000). Experienced police officers recognize that vehicular accidents often result when drivers drink alcohol to excess. Although the police did not observe defendant in the act of driving, such observations are not necessary to support the conviction of a defendant for operating a vehicle under the influence of intoxicating liquor or operating a vehicle with unlawful blood alcohol level. MCL 257.625(1); *Rizzo, supra* at 162. Because a *conviction* may be upheld where there is no direct evidence that a defendant was operating a vehicle, it is apparent that a finding of *probable cause* may likewise be derived from circumstantial evidence. From their observation of a rollover vehicle accident and the strong smell of intoxicants on the person who is inferentially the driver of the vehicle, the police may form the reasonable conclusion that the intoxicated individual was operating the vehicle when the accident occurred.

Therefore, from these facts, and the reasonable inferences derived from them, the magistrate acted properly in authorizing a search warrant to permit the police to obtain a sample of defendant's blood for alcohol content testing. We accordingly conclude that the trial court correctly denied defendant's motion to quash the search warrant and suppress the blood alcohol evidence derived from the search.

III. ADMISSION OF DEFENDANT'S STATEMENTS IN CUSTODY

Defendant next contends that the trial court erred by denying his motion to suppress statements he made to the police while in custody. Before trial, defendant moved for a *Walker*[1] hearing and claimed that statements he made to the police were involuntary because they were taken in violation of *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). This Court reviews de novo the entire record of the *Walker* hearing, but because the trial court is in the best position to resolve credibility issues, this Court will not disturb the trial court's factual findings absent a showing that those findings are clearly erroneous. *People v Cheatham*, 453 Mich 1, 30; 551 NW2d 355 (1996).

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

The testimony at the *Walker* hearing disclosed that defendant made three sets of statements to the police and the trial court ruled that the first and third statements were admissible.[2] First, when he was initially apprehended, as Officers Tester and Bullock were approaching him, defendant stated that he was sorry he ran away from the officer, but he was scared because he did not want to go to jail, and he was drunk and had crashed his truck.[3] The trial court ruled that these statements were admissible because, even though defendant was in custody since he was ordered to stop and lie on the ground, the statements were nevertheless voluntary, spontaneous, and not made in response to police interrogation.

The third statement was made when defendant arrived at the jail with Deputy Chuff. Defendant, referring to the vehicle accident, asked if he had hit anyone. The trial court ruled that this statement was admissible because – although defendant was in custody, had received the *Miranda* warnings, and had remained silent – the statement was spontaneous and was not made in response to police questioning.

Accepting the trial court's credibility determinations because they are supported by the testimony at the *Walker* hearing, we conclude that the trial court correctly admitted the defendant's spontaneous statements to the police. With regard to all these statements, the trial court correctly ruled that defendant was in custody. The *Miranda* decision applies to statements made in response to custodial interrogation, which is defined as police questioning that occurs after a suspect has been formally taken into custody or otherwise deprived of his freedom in any significant way. *Miranda*, *supra* at 444; *People v Hill*, 429 Mich 382, 399; 415 NW2d 193 (1987). The police ordered defendant to stop and lie on the ground with his arms stretched out to his side. The police then placed him in handcuffs and led him to a waiting patrol car. This constituted a show of authority by the police that would have been interpreted by a reasonable person to mean that he was not free to leave. *People v Mamon*, 435 Mich 1, 12; 457 NW2d 623 (1990); see also *People v Tebedo*, 81 Mich App 535, 539; 265 NW2d 406 (1978) ("Laying one who has been detained on his stomach on the ground and then handcuffing him are not the elements of an investigative stop."). Accordingly, we find that the trial court correctly ruled that defendant was in police custody.

However, *Miranda* forbids only statements made in response to interrogation, not volunteered statements. *Miranda*, *supra* at 478. "There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make." *Id.* Interrogation means "either express questioning or its functional equivalent . . . [that is,] any

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[2] The second statement was made as defendant was led, in handcuffs, to the patrol car. Officer Schmidt asked defendant if the truck involved in the accident was his and if he had been driving, and defendant responded "yes." The trial court ruled that this statement was inadmissible because defendant was in custody, it was made before he received *Miranda* warnings, and it was made in response to police questioning.

[3] According to Officer Sanderson, defendant made statements to the same effect as he was being led to the patrol car in handcuffs. The trial judge accepted the recollections of Officers Tester and Bullock that defendant made these statements when he was lying on the ground as the officers initially approached him.

words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v Innis*, 446 US 291, 300-301; 100 S Ct 1682; 64 L Ed 2d 297 (1980); *People v Kowalski*, 230 Mich App 464, 479; 584 NW2d 613 (1998).

The trial court found, and the record clearly supports, that neither of the admitted statements was rendered in response to custodial interrogation; they were both volunteered statements and therefore not subject to the requirements imposed by *Miranda*. Because the trial court's determination was based on his assessment of the credibility of the police officers, we will not substitute our judgment for that of the trial court, who observed the witnesses testify. *Cheatham*, *supra*. Accordingly, we affirm the trial court's determination that defendant's volunteered statements were properly admissible at trial.

IV. ADMISSION OF REBUTTAL WITNESS' TESTIMONY

Defendant next claims that the trial court erred by permitting the prosecutor to present expert testimony in rebuttal that he should have presented in his case in chief. "Admission of rebuttal evidence is within the sound discretion of the trial judge and will not be disturbed absent a clear abuse of discretion." *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). As our Supreme Court explained in *Figgures*, *supra* at 399:

> Rebuttal evidence is admissible to "contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same." [*People v*] *Delano*, [318 Mich 557, 570; 28 NW2d 909 (1947)], quoting *People v Utter*, 217 Mich 74, 83; 185 NW2d 830 (1921). See *People v Kelly*, 423 Mich 261, 281; 378 NW2d 365 (1985). The question whether rebuttal is proper depends on what proofs the defendant introduced and not on merely what the defendant testified about on cross-examination.
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> [T]he test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. *People v Bettistea*, 173 Mich App 106; 434 NW2d 138 (1988); *Nolte v Port Huron Bd of Ed*, 152 Mich App 637, 645; 394 NW2d 54 (1986). As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief.

Defendant presented the testimony of David Schneider, Ph.D. (pharmacology). Dr. Schneider essentially testified that the results of the blood alcohol testing conducted by the Michigan State Police laboratory were suspect because insufficient controls were utilized. Dr. Schneider opined that the test results could show higher blood alcohol levels than actually existed because: (1) the wet betadine swab on the subject's skin was wiped off after only five seconds when it should have been allowed to dry for one to five minutes before blood was withdrawn; (2) the blood was delivered by unrefrigerated mail which would permit any fermentation process caused by bacteria introduced during the blood draw to continue unchecked; (3) there was no testing of the amount of sodium fluoride powder – the preservative chemical – in the blood sample to determine that a sufficient amount was present to inhibit the

production of alcohol by any bacteria that were introduced into the tube; (4) the head space injectors on the gas chromatographs that were used to analyze the blood alcohol levels of the samples had documented faults that could produce false high scores; and (5) the failure of the laboratory technicians to record the expiration dates of the sample collection kit, or the sample tubes, or of the preparation pad on the gas chromatographs, also could result in the recording of suspect data.

In response, the prosecutor presented the testimony of Michelle Glinn, Ph.D. (biochemistry), the supervisor of the forensic toxicology unit of the Michigan State Police. Dr. Glinn testified that the State Police laboratory was accredited by the American Society of Crime Lab Directors "to make sure that everything we do is in compliance with their regulations." She stated that it was only necessary to wait a few seconds after swabbing skin with the betadine solution before drawing blood; it was not necessary for the betadine to dry in order for it to be effective. She further stated that the sample collection tubes contained a total of 100 milligrams of sodium fluoride and potassium oxalate; the sodium fluoride served as a preservative to prevent the growth of bacteria in the tube after the blood sample was introduced. She explained that the manufacturer was required to prepare the tubes with that amount of sodium fluoride and potassium oxalate, and that it was impractical to test each tube because they were required to be sterile and sealed before use – testing would require tampering with the tubes.

Dr. Glinn explained that because the samples could not be refrigerated during shipment to the State Police laboratory, the tubes contained preservative and it was the preservative, rather than refrigeration, that prevented the growth of bacteria. She asserted that "there is ample documentation in the literature that the amount of preservative in those tubes is sufficient to prevent bacterial growth."

She contested Dr. Schneider's claim that if bacteria were introduced into the blood sample, fermentation could occur and the amount of alcohol could more than double. She explained that Dr. Schneider based his claim on the assertion that, in conjunction with the operation of the bacteria, the white cells in the blood sample would produce alcohol; she asserted that the potassium oxalate present in the tube served to burst all of the white cells and no fermentation could have been occurring.

With regard to Dr. Schneider's criticism of the gas chromatograph, Dr. Glinn testified that the use of the gas chromatograph – or, specifically, the head space injector of the gas chromatograph – to obtain and provide a gas sample for analysis was "the state of the art way to do alcohol analysis." Dr. Glinn also stated that the expiration dates on the sample tubes referred to the rubber stoppers on the tubes, not the preservative chemicals. She explained that if a stopper became brittle, the seal on the tube would not be effective which would permit the air inside the tube to escape; this would permit some of the alcohol in the blood sample to come out of solution and evaporate with the result that the blood alcohol level would be lowered. Dr. Glinn further testified that checking the expiration dates of the tubes was not the policy of any laboratory with which she was familiar and it was not required by the accrediting body.

Defendant argues that the prosecutor should have anticipated the substance of Dr. Schneider's testimony and therefore should have presented Dr. Glinn's testimony in his case in chief. However, as our Supreme Court stated in *Figgures*, *supra* at 399, "the test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to

evidence introduced or a theory developed by the defendant." The comparison of their testimony demonstrates that Dr. Glinn's testimony was properly responsive to Dr. Schneider's testimony. Until Dr. Schneider testified, there was no evidence suggesting that the blood alcohol evidence obtained by the police from a sample of defendant's blood was possibly invalid and, thus, there was no reason to present Dr. Glinn's testimony rebutting arguments that had not yet been offered. It was only after Dr. Schneider testified that the necessity arose to present countervailing testimony. Therefore, the trial court did not abuse its discretion by permitting the prosecutor to present Dr. Glinn's testimony in rebuttal.

V. JURY INSTRUCTIONS

Defendant finally argues that the trial court committed error requiring reversal when it denied defendant's request that particular instructions – or modifications of certain instructions – be given to the jury. Specifically, defendant argues that the trial court erred: (1) by refusing to give CJI2d 5.12[4] regarding missing witnesses; (2) by refusing to give CJI2d 5.11[5] using the same language as was used at the beginning of the trial; (3) by refusing to give a modified version of CJI2d 4.11[6] concerning evidence of uncharged offenses; (4) by refusing to give a modified version of CJI2d 4.4 concerning defendant's flight; (5) by refusing to give a modified version of CJI2d 3.3 concerning defendant's right to remain silent; and (6) by refusing to modify CJI2d 15.5, concerning the factors that may be considered in determining whether defendant was guilty of OUIL/UBAL, by reciting only subparagraphs (1) through (4) and not giving subparagraphs (5) through (10).

This Court summarized the law concerning review of jury instruction issues in *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997):

> This Court reviews jury instructions in their entirety to determine whether the trial court committed error requiring reversal. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975); *People v Harris*, 190 Mich App 652, 664; 476 NW2d 767 (1991). Jury instructions must be read as a whole rather than extracted piecemeal to establish error. *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1989). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991). Error does

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[4] CJI2d 5.12 instructs the jury that a named individual "is a missing witness whose appearance was the responsibility of the prosecution" and that the jury "may infer that the witness's testimony would have been unfavorable to the prosecution's case."

[5] CJI2d 5.11 instructs the jury: "You have heard testimony from [a witness who is a police officer/witnesses who are police officers]. That testimony is to be judged by the same standards you use to evaluate the testimony of any other witness."

[6] CJI2d 4.11 instructs the jury concerning the proper use of uncharged misconduct evidence.

not result from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction. *Harris*, *supra* at 664. A trial court need not give requested instructions that the facts do not warrant. *People v Dalton*, 155 Mich App 591, 599; 400 NW2d 689 (1986).

On its amended trial witness lists of February 27, 2001, and March 12, 2001, the prosecution listed Rene Gonzalez as a witness it intended to produce at trial. MCL 767.40a(3). On the third day of trial, the prosecutor stated that Gonzalez was the driver of the second pick up truck. The prosecutor made an offer of proof concerning the efforts the police had made to locate Gonzalez. He noted that Gonzalez had three outstanding bench warrants for failure to appear for traffic offenses and that Gonzalez' driver's license was suspended. The police unsuccessfully attempted to locate Gonzalez at the address listed for him by the Secretary of State; furthermore, a post office box listed for Gonzalez was registered to the same address, as was the information provided by Gonzalez when he was treated at a local hospital. The police checked for telephone numbers and left messages on the only telephone number listed for Gonzalez, but their messages were not returned. Detroit Edison did not have any record of providing service for Gonzalez. The police located a friend of Gonzalez', but the friend refused to disclose any information concerning Gonzalez' whereabouts, gave the police a false address, apparently failed to relay a message to Gonzalez for him to call the police, and refused to answer further police telephone calls. Efforts to locate the friend were subsequently unsuccessful; the address he provided was his mother's home and she claimed she did not know where her son currently lived. An attempt to locate another supposed acquaintance of Gonzalez was similarly unsuccessful. Defendant's counsel accepted the prosecutor's offer of proof. The prosecutor requested that the trial court find that the witness was not a res gestae witness, and also rule that the police exercised due diligence in attempting to produce him at trial. The trial court concluded that the prosecutor had shown due diligence to locate Gonzalez and, therefore, the missing witness instruction, CJI2d 5.12, would not be given to the jury. We conclude that the trial court correctly declined to instruct the jury using CJI2d 5.12.

The current res gestae witness statute provides that the prosecutor does not have a duty to produce res gestae witnesses, but does have a continuing duty to advise the defense of all witnesses that the prosecutor intends to produce at trial. MCL 767.40a(3). The prosecutor may add or delete witnesses from this list at any time by leave of the court for good cause shown. MCL 767.40a(4). The prosecutor's inability to produce Gonzalez after exercising due diligence to locate him constitutes good cause to strike him from the witness list. *People v Snider*, 239 Mich App 393, 422; 608 NW2d 502 (2000); *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000). Defendant does not challenge the trial court's conclusion that the police exercised due diligence in attempting to locate and produce Gonzalez. Accordingly, the trial court did not err in refusing to instruct the jury using CJI2d 5.12.

Defendant next contends that the trial court erred by refusing to use the same language to instruct the jury concerning its consideration of the testimony of police officer witnesses that the court used in its initial instructions to the jury at the beginning of the case. We disagree.

At the beginning of the trial, the court instructed the jury that

> the testimony of a police officer is to be given no greater weight or lesser weight. That is, he or she is not more believable or less believable because they're a police officer. They are to be treated the same as any other witness.

Then, immediately before the opening statements were presented, the court instructed the jury that

> you'll hear from witnesses who are police officers and, again, I remind you that a police officer's testimony is treated the same way as anybody else's. The fact that a person is a police officer does not make his or her testimony any more or less believable than that of any other witness.

These instructions are substantially the same as the standard instruction, CJI2d 5.11, that was used by the trial court at the conclusion of the case. The standard instruction covers the "substance of the omitted instruction." *Piper*, *supra* at 648. Furthermore, the trial court instructed the jury that it had "already given [the jury] some instructions about the law [and they] must take all [the court's] instructions together as the law [they] must follow." Therefore, reviewing the trial court's instructions as a whole, *People v Daoust*, 228 Mich App 1, 14; 577 NW2d 179 (1998), the jury was required to consider not only the court's final admonition regarding police witness testimony, but also the two initial instructions concerning how that testimony was to be considered. We conclude that no error occurred.

Regarding defendant's claim that the trial court erred by refusing to instruct the jury using defendant's modifications of CJI2d 4.11 and CJI2d 4.4, we conclude that the trial court's use of the standard instructions "fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). The requested instructions were modifications of the standard instructions, and therefore contained most of the language already found in the standard instructions. Moreover, the additional language merely emphasized, rather than changed, the meaning of the basic instructions.

Defendant also claims that error requiring reversal occurred when the trial court instructed the jury concerning the evidence of defendant's flight from the scene using CJI2d 4.4.[7] Defendant objected to the trial court instructing the jury concerning his flight from the scene of the accident. The trial court is required to instruct the jury on the law applicable to the case. MCL 768.29; *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000). The evidence presented by the prosecutor indicated that defendant fled from the scene of the vehicular accident. Further, defendant made admissions to the police that he fled because he was scared since he was drunk and had crashed his truck. The instruction on defendant's flight therefore accurately reflected the evidence presented at trial and the prosecution's theory of the case. *People v Reed*, 393 Mich 342, 350; 224 NW2d 867 (1975). Moreover, given defendant's admission that he ran away because he had crashed his truck while he was drunk, any error that

[7] The trial court instructed the jury using the standard instruction, with the addition of one sentence at the conclusion: "Keep in mind that the Defendant is not accused of wrongdoing or a crime in leaving the scene of the accident, if indeed he did that."

might have arisen from using this instruction was harmless. MCL 769.26; *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). We conclude that, given the facts of this case, it was not error for the trial court to instruct the jury using CJI2d 4.4.

Defendant's penultimate claim regarding the jury instructions is that the trial court should have given a special instruction on *Miranda* warnings. This request was made during the prosecutor's rebuttal argument when the prosecutor stated:

> Then he talked about well, gee, he left the scene. There are a lot of innocent reasons for that. I didn't hear one. Not [a] suggestion of one. Because you can't. The only reasonable explanation is he's running, because he knows he's drunk.

Defendant claimed he was entitled to a *Miranda* instruction because he had a right to remain silent and the prosecutor's statement implied that defendant had to testify; defendant did not, however, offer a particular instruction.[8] The trial court disagreed with defendant's interpretation of the prosecutor's comment and indicated that it considered the prosecutor's argument to refer to defendant's assertion in closing argument that there were innocent reasons for his flight; the trial court felt the prosecutor was only pointing out that the defense in their closing failed to suggest any of those innocent reasons. The trial court subsequently instructed the jury, using CJI2d 3.3, that "[e]very [d]efendant has the absolute right not to testify. When you decide the case, you must not consider the fact that he did not testify. It must not affect your verdict in any way." In the absence of a request for a more specific instruction, the court's instruction was sufficient to protect defendant's rights. *Bell*, *supra* at 276.

Defendant finally argues that when it instructed the jury on the offenses of OUIL/UBAL using CJI2d 15.5, the court should have confined its instruction to the first four subparagraphs and declined to use the remaining six subparagraphs. The subparagraphs to which defendant objects describe the permissible inferences arising from various blood alcohol levels: 0.07 or below permits the inference that defendant did not operate a vehicle under the influence of intoxicating liquor; more than 0.07 but less than 0.10 permits the inference that defendant's ability to operate the vehicle was impaired; 0.10 or more permits the inference that defendant operated the vehicle under the influence of intoxicating liquor and with an unlawful blood alcohol level. CJI2d 15.5(5)-(8). The remaining two subparagraphs instruct the jury that it may consider defendant's blood alcohol level at the time of the test in deciding what his level was at the time he operated the vehicle, and that the jury could give the test results whatever weight they felt it deserved. CJI2d 15.5(9), (10).

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[8] Moreover, the only explanation for defendant's flight that was offered on the record was his incriminating volunteered statement to which *Miranda* does not apply. *Miranda*, *supra* at 478. Accordingly, an instruction that, according to the *Miranda* decision, defendant had a constitutional right to remain silent in the face of custodial interrogation, would not have responded to defendant's true complaint: that, in his view, the prosecutor was commenting on defendant's decision not to testify – something that the standard instruction adequately covered.

Although defendant correctly notes that he requested that the trial court not use CJI2d 15.5(5) through (10), defendant fails to explain why the trial court's refusal to follow this request was error. By failing to analyze the issue or cite any supporting legal authority, defendant has abandoned this claim. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Even if defendant had not abandoned this claim, we still conclude it is without merit.

When defendant's requested jury instructions were discussed, he cited *People v Hempstead*, 144 Mich App 348; 375 NW2d 445 (1985), in support of his request. In *Hempstead*, *supra* at 353, this Court held that it was error to instruct the jury concerning the statutory presumptions found in the implied consent statute in a case where the blood alcohol results were obtained pursuant to a search warrant and the implied consent statute was therefore inapplicable. This decision was disapproved by the panel in *People v Thinel*, 160 Mich App 450, 458-460; 408 NW2d 474, vacated on other grounds 429 Mich 859, aff'd on remand 164 Mich App 717; 417 NW2d 585 (1987), because the *Hempstead* panel relied on the previous statute. This Court concluded that the amended statute did not prohibit the use of jury instructions regarding the statutory inference. *Thinel*, *supra* at 459-460. The current criminal jury instructions have been revised in light of the statutory amendments. We agree with *Thinel* and the criminal jury instructions that jury instructions regarding the permissible statutory inferences are proper. Therefore, the trial court properly declined defendant's request to eliminate the instructions concerning the permissible statutory inferences.

Affirmed.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Peter D. O'Connell