STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 12, 2011
v	No. 295719 Ingham Circuit Court
RUFUS LEE WASHINGTON, Defendant-Appellant.	LC No. 09-000947-FH

Before: O'CONNELL, P.J., and K.F. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating a motor vehicle while intoxicated, third offense, MCL 257.625(1), (9), and was later sentenced as a fourth habitual offender, MCL 769.12, to serve a prison term of 48 to 240 months. Defendant appeals as of right. We affirm.

On June 19, 2009, a police officer observed defendant driving on the wrong side of the road, nearly striking another vehicle. The officer initiated a traffic stop and asked defendant to open the car door or to roll down the window. Defendant failed to comply. Another officer, who had stopped to assist, opened the passenger door of defendant's car and then reached across defendant to open the driver door. Both officers detected a strong odor of intoxicants in the car. Defendant appeared to be extremely intoxicated, and the officers had to assist defendant from the car to the curb. One of the officers called an ambulance, which transported defendant to a nearby hospital. At the hospital, defendant's blood was drawn pursuant to a search warrant. Results of the blood test indicated that defendant had blood alcohol level of .32, well over the legal limit.

Defendant argues on appeal that the trial court improperly admitted the results of his blood test. Defendant specifically asserts that plaintiff failed to establish a sufficient foundation for the introduction of the blood test results, on the ground that plaintiff failed to produce the phlebotomist that drew defendant's blood. We disagree.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). In *Clark v City of Flint*, 60 Mich App 364, 367; 230 NW2d 435 (1975), this Court provided the following rules for the introduction of a blood sample analysis:

> "(T)he party seeking introduction must show (1) that the blood was timely taken (2) from a particular identified body (3) by an authorized licensed physician, medical technologist, or registered nurse designated by a licensed physician, (4) that the instruments used were sterile, (5) that the blood taken was properly preserved or kept, (6) and labeled, and (7) if transported or sent, the method and procedures used therein, (8) the method and procedures used in conducting the test, and (9) that the identity of the person or persons under whose supervision the tests were conducted be established." [Quoting *Gard v Mich Produce Haulers*, 20 Mich App 402, 407-408; 174 NW2d 73 (1969).]

Defendant argues that plaintiff failed to establish factors three (authorized medical personnel), four (sterile instruments used), and five (sample properly preserved or kept). Specifically, defendant argues that only the phlebotomist who drew defendant's blood could provide testimony to satisfy these criteria. In support of this position, defendant relies on our holding in *Rose v Paper Mills Trucking Co*, 47 Mich App 1, 5; 209 NW2d 305 (1973), in which we stated that the testimony of the medical examiner who took the plaintiff's blood sample was required to establish the first six of the criteria listed above. However, subsequent to the *Rose* opinion, we clarified that *Rose* did not create an "inelastic rule requiring that compliance with the initial six criteria be established through the testimony of a physician or nurse." *People v Cords*, 75 Mich App 415, 427; 254 NW2d 911 (1977). In *Cords*, we noted that the rules for introduction of blood sample analysis "were designed to insure that the blood tested was in fact that of the accused and to prevent the admission of test results obtained from an unreliable blood sample." *Id*. at 428.

Here, plaintiff properly established factors three, four, and five through the testimony of the forensic technician who analyzed the blood sample and of the arresting officer. This testimony demonstrated that the phlebotomist used a factory-sealed, state-issued kit equipped with all the items necessary for a proper blood draw. The kit's paperwork identified the person who performed the draw, the location of the draw, and the identity of the officer who observed the draw. Once the draw was completed, the kit was resealed and transported to the lab where it was immediately put into proper storage. Thus, although the phlebotomist did not testify at trial, the testimony that was admitted was sufficient to insure that the blood tested was in fact that of defendant and that the sample was reliable. *Id.* Accordingly, no error has been shown.

Defendant next argues the trial court erred by denying his request for an adverse inference jury instruction. We disagree. We review claims of instructional error de novo. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). However, the determination whether an instruction is accurate and applicable to a case is reviewed for an abuse of discretion. *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003).

A criminal defendant is entitled to have a properly instructed jury consider the evidence against him. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). Jury instructions must not exclude material issues, defenses, and theories that are supported by the evidence. *People v Crawford*, 232 Mich App 608, 620; 591 NW2d 669 (1998). CJI2d 5.12 allows the jury to infer that a missing witness's testimony would have been unfavorable to the prosecution if the prosecutor failed to exercise due diligence in producing an endorsed witness. *People v Perez*,

469 Mich 415, 420; 670 NW2d 655 (2003); *People v Eccles*, 260 Mich App 379, 388-389; 677 NW2d 76 (2004).

We find the trial court did not abuse its discretion in concluding that the requested instruction was inapplicable in the instant case because there is nothing in the record to suggest plaintiff failed to act with due diligence. As the above analysis shows, plaintiff could have reasonably concluded the phlebotomist was not a necessary witness to lay the proper foundation for admission of the blood test results. Defendant did not request the production of the phlebotomist until just days before trial was scheduled. Despite the short notice, plaintiff issued a subpoena and directed that it be served on the phlebotomist at her place of work. When the phlebotomist could not be found at her place of employment, the prosecutor personally attempted to serve the phlebotomist at her home. While the prosecutor was ultimately unsuccessful in this attempt, such failure does not constitute a lack of due diligence under the circumstances.

We also see no merit in defendant's argument that the failure to call the phlebotomist at trial violated defendant's rights under the Confrontation Clause.[1] The United States Supreme Court has held that this provision prohibits the admission of testimonial statements of a non-testifying witness unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine. *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004). A statement is testimonial if its primary purpose is to establish or prove past events potentially relevant to later criminal prosecution. *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006).

We find no support for defendant's assertion that the testimonial statements of a non-testifying witness were admitted against him at trial. To the extent that defendant asserts the phlebotomist's notation on the label of the blood sample was a testimonial statement, we reject the assertion. The notation on the label was not used to establish that the proper protocol for performing a blood draw was followed. Instead, the arresting officer who personally observed the blood draw and was familiar with the protocol was able to testify as to this fact. Because no testimonial statements from a non-testifying witness were used against defendant, there was no Confrontation Clause violation.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly
/s/ Amy Ronayne Krause

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[1] US Const, Am VI. See also Const 1963 art 1, § 20.