STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellant,

v

MARK ARNOLD NELSON,

Defendant/Appellee.
/

District Court File No. 09-2937-SD
Circuit Court File No. 09-27407-AR
HON. PHILIP E. RODGERS, JR.

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DECISION AND ORDER ON APPEAL

This is an interlocutory appeal. The Defendant is charged in the 86th District Court with operating while intoxicated, contrary to MCL 257.625(1)[1], and failure to report an

[1] MCL § 257.625 provides:

(1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, "operating while intoxicated" means either of the following applies:

(a) The person is under the influence of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance.

(b) The person has an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or, beginning October 1, 2013, the person has an alcohol content of 0. 10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

MCL § 257.625a provides, in pertinent part, as follows:

accident to fixtures, contrary to MCL 257.621. The People filed a motion in limine to preclude any testimony at trial regarding the Defendant's post-driving consumption of alcohol without a qualified expert to attest to the relevance of such evidence, pursuant to MRE 402. Apparently, the People anticipate that the Defendant will testify about consuming alcohol after he got home and an officer will testify that, when the officer arrived at the Defendant's home, the Defendant opened the door with a beer in his hand and stated he had been drinking since he got home. The District Court denied the motion and the People filed this appeal. All further proceedings in the District Court have been stayed.

The Court heard counsels' oral arguments on September 18, 2009 and took the matter under advisement. The Court now issues this written decision and order and, for the reasons stated herein, affirms the District Court's ruling.

This Court reviews rulings admitting or excluding testimony as relevant or irrelevant, as questions of law. *Van Dyke v Doughty*, 174 Mich 351, 355; 140 NW 627 (1913). "The relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs what is relevant and material." *People v VanderVliet,* 444 Mich 52, 75; 508 NW2d 114 (1993).

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* * *

(6) The following provisions apply with respect to chemical tests and analysis of a person's blood, urine, or breath, other than preliminary chemical breath analysis:

> (a) The amount of alcohol or presence of a controlled substance or both in a driver's blood or urine or the amount of alcohol in a person's breath at the time alleged as shown by chemical analysis of the person's blood, urine, or breath is admissible into evidence in any civil or criminal proceeding **and is presumed to be the same as at the time the person operated the vehicle.** (Emphasis added.)

* * *

(7) The provisions of subsection (6) relating to chemical testing do not limit the introduction of any *other admissible evidence* bearing upon any of the following questions:

> (a) Whether the person was impaired by, or under the influence of, alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance.
>
> (b) Whether the person had an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine or, beginning October 1, 2013, the person had an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

Under MRE 402, "[a]ll relevant evidence is admissible." MRE 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevant evidence may be excluded, however, by operation of MRE 403:

> [I]f its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

To sustain a conviction on the offense of operating while intoxicated, the prosecutor must establish that (a) the defendant was operating a motor vehicle on a highway or other place open to the general public or generally accessible to motor vehicles; and (b) he was intoxicated. MCL 257.625(1). Whether the defendant was intoxicated can be established either through evidence supporting a conclusion that the person is under the influence of intoxicating liquor, i.e., failure to perform field sobriety tests, slurred speech, bloodshot eyes, etc., or by a blood alcohol content of 0.08 or more per 210 liters of breath. MCL 257.625(1)(a) and (b). Evidence of a defendant's blood alcohol level is properly admitted, MCL 257.625a(6)(a), and will give rise to various legal presumptions concerning his state of intoxication. "A criminal defendant is presumed to be intoxicated at the time he is driving when his alcohol content is [0.08] grams or more per 210 liters of breath. MCL 257.625(1)(b); CJI2d 15.5(7)." *People v Calvin* 216 Mich App 403, 408-409; 548 NW2d 720 (1996); *People v Wager,* 460 Mich 118, 121; 594 NW2d 487 (1999); *People v Campbell,* 236 Mich App 490, 496; 601 NW2d 114 (1999).

The Legislature's purpose in creating this statutory presumption of intoxication is to allow the prosecution "to obtain convictions without being unduly burdened in the proof of the crime." *People v Campbell,* 236 Mich App 490, 498; 601 NW2d 114 (1999).

> Pursuant to the plain language of the statute, a chemical test, regardless of the amount of time before the test is actually performed, is assumed to be a reasonable approximation of a person's blood alcohol level at the time of the offense. The Legislature has determined that a chemical test is generally a sufficiently close indicator of a person's blood alcohol content at the time of the offense that it must be allowed into evidence. [*Id* at 496 (internal citations omitted).]

In *People v Calvin*, 216 Mich App 403, 408-409; 548 NW2d 720, 723-724 (1996), the Court held that this presumption against the defendant must be construed as permissive or rebuttable in order to ensure that the burden of proving all of the elements of the offense beyond a reasonable doubt remains on the prosecution, citing MRE 302(b), and the jury is required to determine the weight to be given the test and to consider it along with all other evidence of defendant's condition.

> [T]he validity of a presumption that arises from chemical analysis testing is within the province of the trier of fact to weigh, not in the abstract, but, rather, in connection with all the evidence in the case, and thereafter to accept or reject it. See, generally, *McCormick*, Evidence (3d ed.), § 347, pp. 991-997. *Id.*

See also, MCL § 257.625(7) which expressly provides that the admission of chemical tests and analysis does not limit the introduction of any other admissible evidence bearing upon defendant's intoxication.

In *People v Denton*, 138 Mich App 568, 571-573; 360 NW2d 245, 247-248 (1984), the Court discussed the operation of rebuttable presumptions in a criminal case, saying:

> With regard to the defense of insanity, the prosecutor is "'at liberty to rest upon the presumption that the accused was sane, *until* that presumption is overcome by the defendant's evidence.'" *People v Murphy,* 416 Mich 453, 464; 331 NW2d 152 (1982), *reh den* 417 Mich 1113 (1983), quoting *People v Garbutt,* 17 Mich 9, 22 (1868). Once a defendant has introduced any evidence of insanity, the burden is on the prosecutor to establish defendant's sanity beyond a reasonable doubt. *People v Savoie,* 419 Mich 118; 349 NW2d 139 (1984).
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> In *Murphy,* the Supreme Court reiterated and clarified the rule that, when a defendant offers evidence of insanity, the prosecutor must meet that evidence with evidence of sanity. "Merely some evidence of sanity may be sufficient to meet some evidence of insanity and yet wholly insufficient to meet substantial evidence of insanity." *Murphy, supra* at 464. Similarly, we hold that some evidence of diminished capacity must be met by some evidence of undiminished capacity. As in *Murphy,* the quantum of proof demanded of the prosecutor will vary with the nature of the proofs offered by the defendant . . .
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> * * *
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> By simply substituting the words "diminished capacity" for "insanity," we are able to discern the relative positions of the parties in a diminished capacity defense. Once the defendant presents evidence of diminished capacity, the prosecutor must counter such evidence, and the extent to which the prosecutor

must do so is dependent upon the nature and amount of the evidence furnished by the defendant . . .

> Defendant's expert witness, a psychiatrist, testified that, if defendant had consumed the amount of drugs and alcohol he said he had consumed near the time of the crime, his mental functioning would have been impaired. The doctor testified that defendant's ability to "reason about a situation" would have been affected and that defendant would not have had the "capacity to reflect at the time what am I doing, is it a sure thing, am I going to get caught here." This testimony showed that defendant might not have had the ability to adequately comprehend or appreciate the consequences of the crime or to plan it carefully. However, the doctor's testimony did not clearly establish that defendant could not, or did not, formulate the intent to actually commit the crime itself. The defense of diminished capacity is available only where it is shown that a defendant's impairment rendered him unable to formulate the specific intent to commit a crime; it is not available where testimony establishes only that a defendant could not fully appreciate the consequences of his acts. The testimony of defendant's expert witness was not a clear statement of support for a claim that defendant did not intend to commit the robbery; it was only unequivocal on the point that defendant probably did not intelligently consider the consequences before acting.
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> The remaining evidence fully supported the prosecutor's contention and the trial court's opinion that, even though the defendant may have been under the influence of alcohol and drugs, he was capable of and did form the necessary intent. Specific intent may be inferred from circumstantial evidence. *Fields, supra,* 64 at 174; 235 NW2d 95. While the testimony of psychiatrists can be of assistance to the fact-finder, the existence of specific intent is a matter to be decided by the trier of fact. *People v Fisk,* 62 Mich App 638, 641; 233 NW2d 684 (1975). [*Id.* at 571-573.]

In the instant case, the People want to preclude the Defendant from offering evidence that he drank after he drove unless the Defendant also presents an expert to testify to the effect of that drinking on his level of intoxication at the time he was driving. It is black-letter law, however, that a defendant in a criminal trial cannot be required to testify or to produce any evidence. *Griffin v California,* 380 US 609; 85 S Ct 1229; 14 L Ed 2d 106 (1965).

The Defendant's testimony that he drank after he drove coupled with the officer's testimony that when he arrived at the Defendant's house, the Defendant opened the door with a beer in his hand and informed the police officer that he had been drinking since he arrived at

home, is relevant because it goes to the intoxication element of the offense and would tend to rebut the statutory presumption of intoxication that arises from the chemical test.[2]

If he elects to assert this defense, the Defendant invites cross-examination and argument by the prosecutor about the validity and weight of the evidence in support of his theory. When the defendant "takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness . . .," *Brown v United States,* 356 US 148, 154; 78 S Ct 622, 626; 2 L Ed 2d 589 (1958), and an argument can be made on the inferences created by that evidence. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356, 367 (1995). It is ultimately up to the jury to weigh and assess the credibility of the Defendant's testimony as it is free to believe or disbelieve, in whole or in part, any of the evidence presented. *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999).

In conclusion, the Defendant may choose to offer evidence to rebut the presumption of intoxication and offer the jury a defense supported by his testimony and the testimony of the officer.[3] However, the Defendant cannot be required to produce other evidence, known and available to him, such as expert testimony about the affect of his post-driving consumption of alcohol on his level of intoxication when he was driving.

The People will have a right to challenge the Defendant's testimony and to meet the defense with an expert toxicologist. The Defendant must give sufficient notice of alleged post-driving alcohol consumption to allow the People to retain such an expert. Failure to give timely notice would deprive the People of their due process right to a fair trial and bar the introduction of such evidence. The jury will be able to consider all of the evidence, or lack of evidence, assess the credibility of the witnesses and the validity of the defense when determining whether the Defendant was intoxicated when he drove.

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[2] The Court is not called upon to decide whether a defendant's bare assertion that he only drank after he drove without more would be relevant and admissible and the Court declines to address that issue here.

[3] By offering evidence that he consumed alcohol after driving, the Defendant may be entitled to the jury instruction contained in the Use Note following CJI 15.5:

> *If the evidence warrants*, the following can be added to this paragraph: However, you have heard evidence that the defendant consumed alcohol after driving but before the [blood/breath/urine] test was administered. You may consider this evidence in determining whether to infer that the defendant's bodily alcohol content at the time of the test was the same as [his/her] bodily alcohol content at the time [he/she] operated the motor vehicle. [Emphasis added.]

For the reasons stated herein, the decision of the trial court is affirmed. This case is remanded to the District Court for further proceedings.

IT IS SO ORDERED.

This Decision and Order resolves the last pending claim and closes the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 9/29/09