

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANGELA L. EASLEY,

Defendant-Appellant.

UNPUBLISHED

January 12, 2001

No. 215207

Wayne Circuit Court

LC No. 97-009053

Before: Neff, P.J., and Talbot and J.B. Sullivan*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of vehicular manslaughter, MCL 750.321; MSA 28.553, and operating a motor vehicle under the influence of intoxicating liquor causing death, MCL 257.625(4); MSA 9.2325(4). She was sentenced to two concurrent terms of seven to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred in refusing to strike incriminating statements she made to an officer at her home after the car accident. Defendant contends that the statements were extracted during a custodial interrogation without the requisite warnings. As an initial matter, we note that defendant did not move to suppress the statements before trial or at trial, did not request a hearing on the issue, and did not object during the officer's testimony. Instead, defendant moved to strike the statements sometime after the officer had already testified. Under these circumstances, we conclude that the issue is not properly preserved for appellate review. See *People v Ray*, 431 Mich 260, 269; 430 NW2d 626 (1988); *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992); *People v Robinson*, 79 Mich App 145, 152; 261 NW2d 544 (1977), rev'd in part on other grounds, 434 Mich 482; 456 NW2d 10 (1990). We briefly address the issue nonetheless because it involves a constitutional question. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999).

*Miranda*¹ warnings are not required unless the accused is subject to a custodial interrogation. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). The issue

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

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

whether a person is in custody for purposes of *Miranda* is a mixed question of law and fact that must be answered independently after de novo review of the record. *Id.* To determine whether a defendant was in custody at the time of an interrogation, we look at the totality of the circumstances, with the key question being whether the accused reasonably could have believed that he was not free to leave. *People v Mendez*, 225 Mich App 381, 382-383; 571 NW2d 528 (1997). The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned. *Zahn*, *supra* at 449..

Applying these principles, and assuming the officer did not give defendant the requisite warnings, we hold that defendant was not in custody at the time she made the statements. The officer testified that she arrived at defendant's home in full uniform shortly after the incident. The officer was invited into the home where others were present, whereupon she spoke with defendant regarding her injuries and the circumstances of the incident. See *People v Mayes (After Remand)*, 202 Mich App 181, 198; 508 NW2d 161 (1993) (Corrigan, J., concurring), citing *Minnesota v Murphy*, 465 US 420; 104 S Ct 1136; 79 L Ed 2d 409 (1984) and *Beckwith v United States*, 425 US 341; 96 S Ct 1612; 48 L Ed 2d 1 (1976) (questioning in the familiar and neutral surroundings of a suspect's home is usually viewed as noncustodial because the same pressures associated with the police-dominated atmosphere of the station house are not present). Further, there is no indication that defendant was arrested or placed under any physical or psychological restraint at the time she made the statements. *People v Peerenboom*, 224 Mich App 195, 197; 568 NW2d 153 (1997) (“[a]n officer's obligation to give *Miranda* rights to a person attaches only when the person is in custody, meaning that the person has been formally arrested or subjected to a restraint of movement of the degree associated with a formal arrest.”). Under these circumstances, we cannot conclude that defendant was in custody at the time she made the statements such that *Miranda* warnings were required. Accordingly, the trial court did not err in refusing to strike the statements defendant made at her home.

Relying on the “cat out of the bag theory” set forth in *Oregon v Elstad*, 470 US 298; 105 S Ct 1285; 84 L Ed 2d 222 (1985), defendant also argues that the trial court erred in admitting her second statement at the police station after she had been given her *Miranda* warnings. Again, this issue is not preserved because defendant did not move to suppress the statement and did not object to its admission at trial. *Considine*, *supra* at 162; *Robinson*, *supra* at 152. In fact, the record reveals that defense counsel also elicited the basic contents of the second statement from defendant at trial and that defendant testified without objection to additional information in the statement on cross-examination. It is well established that a defendant is not permitted to assign error on appeal to something his own counsel deemed proper at trial because to do so would allow a defendant to harbor error as an appellate parachute. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). Defendant is therefore not entitled to relief based on this issue.

Defendant next contends that the prosecutor improperly impeached a defense witness concerning her delay in reporting exculpatory information to the police, thereby suggesting that her testimony was fabricated. Because defendant did not object to the prosecutor's questioning at trial, our review is limited to determining whether she has demonstrated a plain error that affected her substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Prosecutorial

misconduct issues are decided case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's conduct in context. *Schutte, supra* at 720.

Even assuming that the prosecutor's line of questioning was improper, defendant has failed to establish that it affected her substantial rights. *Carines, supra* at 763. Defense counsel's questioning of the witness on direct-examination concerning when and what she told police opened the door to the brief and innocuous questions asked by the prosecutor. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996) (holding that no prejudicial error occurred where defendant opened the door to the questions asked by the prosecutor); see also *Schutte, supra* at 721 (prosecutorial comments must be evaluated in light of defense arguments). Further, defense counsel seized the opportunity to effectively rehabilitate the witness using the statement she gave to the police. Finally, any prejudice resulting from the prosecutor's conduct could have been cured by a timely objection and instruction. *Id.*, citing *Green, supra* at 693. Accordingly, defendant's argument lacks merit.

Defendant next argues that she was denied the effective assistance of counsel because her attorney failed to move to suppress her blood alcohol test results on grounds of unreasonable delay between the accident and the administration of the test. We disagree. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was objectively unreasonable and (2) counsel's representation so prejudiced the defendant as to deprive her of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Nimeth*, 236 Mich App 616, 624-625; 601 NW2d 393 (1999). A defendant must overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 545 NW2d 637 (1996).

In *People v Wager*, 460 Mich 118, 126; 594 NW2d 487 (1999), our Supreme Court recently held that the question of the reasonableness of the delay in the administration of a blood test goes to the weight of the evidence and not its admissibility, thereby overruling the cases defendant cites in support of her position. Defendant's blood test results were therefore admissible under *Wager* as a matter of law. Defendant has not shown, and we are not persuaded, that the delay in this case would have precluded admission of the test results even under the contrary authority cited on appeal. See, e.g., *People v Wager*, 233 Mich App 1; 592 NW2d 289 (1998); *People v Schwab*, 173 Mich App 101; 433 NW2d 824 (1998). It is therefore unlikely that a motion to suppress the blood test results would have been successful. Because defense counsel is not required to make useless motions at trial, *People v Tullie*, 141 Mich App 156, 158; 366 NW2d 224 (1985), we are not persuaded that defendant was denied the effective assistance of counsel.

Lastly, defendant challenges the proportionality of her concurrent seven-year minimum sentences. This Court reviews a trial court's sentencing decision for an abuse of discretion. *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Here, defendant crashed into another vehicle while driving in a highly intoxicated state and then left the

scene. The driver of the other vehicle, who was thrown from the vehicle, was nearly severed in half and the lives of the two other occupants were placed in serious danger. The record further reveals that defendant was on probation at the time she committed the instant offense, that she had prior misdemeanor convictions, and that the trial court considered her apparent lack of remorse. *People v Houston*, 448 Mich 312; 323; 532 NW2d 508 (1995). The trial court did not abuse its sentencing discretion.

Affirmed.

/s/ Janet T. Neff
/s/ Michael J. Talbot
/s/ Joseph B. Sullivan