

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KARL PAUL GASPER,

Defendant-Appellant.

UNPUBLISHED

May 4, 1999

No. 201658

Montcalm Circuit Court

LC No. 96-000207 FH

Before: Kelly, P.J., and Gribbs and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted by a jury of OUIL third offense, MCL 257.625 (7); MSA 9.2325(7), and habitual offender fourth, MCL 769.12; MSA 28.1084. He was sentenced to serve not less than forty-two months, nor more than 120 months in prison. However, the parties subsequently stipulated that one predicate offense could not be used to establish the OUIL third offense. Defendant then entered a guilty plea to OUIL second, and was resentenced to time served. Defendant appeals as of right. We affirm.

Defendant argues that his breath test results should not have been admitted because the foundation for admission was inadequate. These requirements are: (1) the operator administering the test is qualified; (2) the proper method or procedure was followed in administering the test; (3) the test was performed within a reasonable time after the arrest; and (4) the testing devise was reliable. *People v Jacobsen*, 205 Mich App 302, 305; 517 NW2d 323 (1994), rev'd on other grounds 448 Mich 639 (1995), citing *People v Kozar*, 54 Mich App 503, 509 n2; 221 NW2d 170 (1974). Defendant alleged five errors in this regard, but failed to raise four of these issues below and therefore did not preserve them. *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994). Only defendant's claim that the fifteen minute observation period was not satisfied is properly before this Court for review.¹

Regarding the fifteen minute observation requirement, we find no abuse of the trial court's discretion in overruling defendant's objection on this ground. See *People v McGough*, 164 Mich App 674, 677 (1987); *People v Krulikowski*, 60 Mich App 28; 230 NW2d 290 (1975). The results of Breathalyzer tests are not admissible unless the proper method of procedure was followed in

administering the test. *Jacobsen, supra*, 205 Mich App at 305. The Michigan Department of State Police administrative rules require that an individual be administered a breath alcohol test “only after being observed for 15 minutes by the operator before collection of the breath sample, during which period the person shall not have smoked, regurgitated, or placed anything in his or her mouth” 1994 AC, R 325.2655(1)(e). Here, the operator observed defendant from 11:27 p.m. until 12:09 a.m. but looked away to type in some information on the evidence ticket and to sign her name on the videotape log. She testified that defendant did not put anything in his mouth, and did not vomit, have a cigarette, or have anything to drink during the observation period.

In *People v Wujkowski*, 230 Mich App 181; 583 NW2d 257 (1998), the operator continually observed the defendant from 5:05 a.m. until 5:23 a.m. except for the few seconds it took the officer to walk over and check the datamaster to determine if the fifteen minutes had elapsed. *Id.*, 185. This Court held “that the momentary time that the officer did not observe defendant was so minimal that the test results cannot be assumed to be inaccurate,” noting that “there was no allegation that defendant placed anything in his mouth or regurgitated. Under these circumstances, the Circuit Court erred in ruling that the violation of the administrative rule required suppression of the results of the Breathalyzer test.” *Id.* at 186. Compare *People v Boughner*, 209 Mich App 397, 399; 531 NW2d 736 (1995) (fifteen minute rule was violated where a thirty-five minute videotape of the defendant failed to establish that he had not put anything in his mouth or vomited, and the operator of the Breathalyzer showed up eight minutes before the test was given, and did not observe the defendant continually during those eight minutes). There is also no allegation in this case that defendant placed anything in his mouth or regurgitated. Therefore, the small break in defendant’s observation period was so minimal that the test results cannot be assumed to be inaccurate, and the trial court did not abuse its discretion in admitting the evidence.

Defendant next argues that the trial court erred in failing to grant defendant’s motion for judgment notwithstanding the verdict because the prosecution failed to prove that venue was in Montcalm County.

Although defendant never argued that there was insufficient evidence of venue to submit the case to the jury, he later brought a motion for judgment notwithstanding the verdict, essentially arguing that the evidence was insufficient. Despite defendant’s failure to bring a motion for a directed verdict of acquittal, we will review sufficiency issues for the first time on appeal. *People v Patterson*, 428 Mich 502, 514-515; 410 NW2d 733 (1987).

We note that the question of whether venue was proper is a question of fact for the jury. *People v Watson*, 307 Mich 596; 12 NW2d 476 (1943); *People v Campbell*, 26 Mich App 196; 182 NW2d 4 (1970). At trial, one witness testified that the accident took place on M-46, east of Edmore, near Cedar Lake, which impliedly is in Montcalm County. The police officer who responded to the accident was from Home Township, and defendant was taken to the Montcalm County Jail. Although there was no direct statement that the accident took place in Montcalm County, we conclude that this was sufficient circumstantial evidence from which the jury could infer that the accident did indeed take place in Montcalm County. See *People v Andrews*, 360 Mich 572; 104 NW2d 199 (1960). Viewing the evidence in the light most favorable to the prosecution, we conclude that

reasonable persons could not have differed as to the meaning of the evidence, and that defendant's motion was properly denied. *People v Duenaz*, 148 Mich App 60, 65-66; 384 NW2d (1985).

Affirmed.

/s/ Michael J. Kelly

/s/ Roman S. Gribbs

/s/ E. Thomas Fitzgerald

¹ Defendant did not raise any arguments regarding the time delay between the accident, the arrest, and the breathalyzer test, and therefore there is no analysis provided by the trial court to aid appellate review.