

IN THE  
SUPREME COURT  
OF THE  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

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COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,  
Plaintiff-Appellee,

v.

**JETRO METTAO,**  
Defendant-Appellant.

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**SUPREME COURT NO. TR-05-0015-GA**  
SUPERIOR COURT NO. 04-05397

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**Cite as: 2008 MP 7**

Decided April 9, 2008

Joseph James Norita Camacho, Saipan, Northern Mariana Islands, for Appellant.  
Kevin A. Lynch, Assistant Attorney General, Commonwealth Attorney General's Office, for Appellee.

BEFORE: ALEXANDRO C. CASTRO, Associate Justice; JOHN A. MANGLONA, Associate Justice;  
ROBERT J. TORRES, JR., Justice Pro Tem

CASTRO, J.:

¶ 1 Defendant Jetro U. Mettao appeals his conviction of driving under the influence of alcohol, arguing that the trial court erred in (1) refusing to conduct a pre-trial voluntariness hearing, (2) denying his motion to suppress his confession and the results of his breathalyzer and field sobriety tests, (3) convicting him of an offense with which he was not charged, and (4) allowing the Commonwealth to amend the charges against him in order to circumvent his motion for discovery. We find that the trial court was not required to conduct a separate hearing to determine the voluntariness of Mettao's confession. Additionally, because Mettao did not object at trial to the admissibility of his confession or the results of his breathalyzer and field sobriety tests, he did not preserve the issue for appellate review. Finally, we hold that Mettao was convicted of the offense with which he was charged, and the Commonwealth's amended charges did not adversely affect Mettao's substantial rights. Accordingly, the trial court's decision is AFFIRMED.

## I

¶ 2 Late in the evening on October 4, 2004, Officer Vicente Sablan ("the officer") observed a vehicle traveling northbound along Middle Road at a high rate of speed. As the officer pursued the vehicle, he noticed it swerve across the road, at one point narrowly avoiding a collision with another vehicle. After the officer stopped the vehicle, he identified Mettao as the driver and ordered him out of the vehicle. The officer then placed Mettao in his police car. The officer noticed that Mettao had bloodshot eyes, a flushed face, and smelled strongly of alcohol. The officer also noticed that Mettao reacted slowly to his instructions. Based on these observations, the officer arrested Mettao for reckless driving and read him his Miranda rights. However, the officer did not ask Mettao whether he understood or waived those rights.

¶ 3 Before taking Mettao to the police station, the officer questioned him regarding his driving and alcohol consumption. Mettao responded that he drank four beers two hours prior to driving. He also told the officer that he drove his vehicle sixty to sixty-five miles per hour along the highway, which has a speed limit of forty-five miles per hour.

¶ 4 At the police station, Mettao performed two field sobriety tests, one testing his coordination and another testing his balance. During the coordination test, the officer instructed Mettao to touch his nose with his right index finger while keeping his left arm extended straight in front of his body. Mettao failed to keep his left arm straight during the test. During the

balancing test, the officer instructed Mettao to take ten steps in a straight line, making heel-to-toe contact on each step. Mettao did not to make a heel-to-toe contact on the seventh step. Following the field sobriety tests, Mettao signed a consent form to take a breathalyzer test. The breathalyzer test indicated that Mettao's blood-alcohol concentration ("BAC") was 0.13, which exceeded the Commonwealth's legal limit of 0.08. The officer then gave Mettao a written form that explained his constitutional rights, which included the right to remain silent. Mettao signed the form and indicated that he did not wish to make any statements to the police.

¶ 5 The Commonwealth charged Mettao with speeding, reckless driving, driving without a license, and driving under the influence of alcohol. In charging Mettao with driving under the influence of alcohol in violation of 9 CMC § 7105, the Commonwealth did not specify which subsection Mettao allegedly violated. Although Section 7105(a) contains five subsections, the Commonwealth simply charged him with violating Section 7105. Mettao assumed that because he received a citation for having a BAC above the legal limit, the Commonwealth was charging him with violating Section 7105(a)(1). Section 7105(a)(1) states that "[a] person shall not drive, operate or be in actual physical control of any vehicle while having a Blood Alcohol Concentration of .08 percent or more as measured by a breath or blood test . . . ."

¶ 6 In preparation for trial, Mettao requested discovery information pertaining to the breathalyzer machine used by Mettao. Rather than complying with this discovery request, the Commonwealth amended the charges against Mettao from 9 CMC § 7105 to 9 CMC § 7105(a)(2). Section 7105(a)(2), which states that "[a] person shall not drive, operate or be in actual physical control of any vehicle while under the influence of alcohol . . . ." In amending the charges, the Commonwealth stated that Mettao's discovery request was rendered moot, thus justifying its failure to provide Mettao with the requested breathalyzer information. Mettao objected to the amended charges, arguing that because he received a citation for having a BAC above the legal limit, the Commonwealth should charge him under Section 7105(a)(1), as opposed to Section 7105(a)(2). The trial court permitted the Commonwealth's amendment and, at the same time, granted Mettao a continuance to prepare for trial.

¶ 7 Before trial, Mettao moved to suppress all of his statements to the officer while in custody, including those relating to his alcohol consumption. Mettao also moved to suppress the results of his breathalyzer and field sobriety tests, claiming they were fruits of an illegally-obtained confession. In support of his motion to suppress, Mettao signed an affidavit claiming that the officer did not advise him of his Miranda rights until after questioning him. Additionally, Mettao argued that even if he was advised of his Miranda rights, he did not understand them, as

he didn't realize he had the right to remain silent until after he answered the officer's questions. Therefore, Mettao argued that before ruling on the motion to suppress, the trial court should conduct a voluntariness hearing regarding Mettao's statements to the officer.

¶ 8 The trial court did not conduct a pre-trial suppression hearing to determine whether Mettao's statements were voluntary and whether the results of his breathalyzer and field sobriety test were the fruits of an illegally-obtained confession. Instead, the trial court denied the motion to suppress without prejudice, stating that Mettao could question the officer at trial regarding the voluntariness of his statements. At trial, defense counsel questioned the officer about Mettao's statements and the results of his breathalyzer and field sobriety tests. Mettao, however, neither objected to the admissibility of the evidence nor renewed his motion to suppress. Thereafter, the trial court found Mettao guilty of reckless driving and driving under the influence of alcohol.<sup>1</sup>

## II

### *Voluntariness Hearings in Non-Jury Trials*

¶ 9 Mettao argues that the trial court erred in refusing to conduct a separate pre-trial hearing regarding the voluntariness of his alcohol-related statements. We therefore address whether a defendant is entitled to a separate voluntariness hearing apart from a bench trial.

¶ 10 When a defendant alleges facts demonstrating that his or her confession was involuntary, the defendant has a constitutional right to a "reliable and clear-cut determination of the voluntariness of the confession . . . ." *Jackson v. Denno*, 378 U.S. 368, 391 (1964). Voluntariness hearings are "designed to safeguard the right of an individual, entirely apart from his guilt or innocence, not to be compelled to condemn himself by his own utterances." *Lego v. Twomey*, 404 U.S. 477, 485 (1972). Voluntariness hearings ensure that both the underlying factual issues and the voluntariness of the defendant's confession are fairly determined. *Jackson*, 378 U.S. at 377. If the trial judge finds the confession involuntary, it may be suppressed. See *Rogers v. Richmond*, 365 U.S. 534, 541 (1961).

¶ 11 Mettao relies on the United States Supreme Court decision in *Jackson* to support his contention that he was entitled to a separate pre-trial voluntariness hearing. In *Jackson*, the Court held that if a criminal defendant objects to the admission of a confession on grounds that it was not obtained voluntarily, the defendant has the right to a separate hearing on the voluntariness

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<sup>1</sup> The trial court sentenced Mettao to thirty days imprisonment, all of which were suspended except three days, and one year of supervised probation. Additionally, the trial court suspended Mettao's driver's license for 30 days, ordered him to attend an alcohol information class, as well as pay \$885 in fines and fees.

issue “uninfluenced by the truth or falsity of the confession.” 378 U.S. at 376-77. However, the Court’s rationale for the separate hearing concerned the effect on the jury, not the judge. *Id.* at 382-83. The Court reasoned that a jury “may find it difficult to understand the policy forbidding reliance upon a coerced, but true, confession,” and that “matters pertaining to the defendant’s guilt will infect the jury’s finding of fact bearing upon voluntariness, as well as its conclusion upon that issue itself.” *Id.*

¶ 12 Although the United States Supreme Court stated that jurors are presumed unable to determine the issue of voluntariness objectively, the Court never stated that judges are unable to objectively determine the voluntariness of a confession. Rather, the *Jackson* Court specifically noted that its holding did not question procedures whereby “the judge hears the confession evidence himself, resolves evidentiary conflicts, and gives his own answer to the coercion issue . . . .” *Id.* at 378 n.8. In fact, federal and state courts generally presume that trial judges’ conclusions are “based only on relevant and admissible evidence.” *Allen v. McCotter*, 804 F.2d 1362, 1364 (5th Cir. 1986) (citing *United States v. Dillon*, 436 F.2d 1093, 1095 (5th Cir. 1971)); *see also State v. Gonzales*, 111 Ariz. 38, 41 (1974).

¶ 13 We extend this presumption to trial judges’ rulings in the Commonwealth, and find it unnecessary for a trial judge in a non-jury trial to conduct a separate hearing on voluntariness. *United States ex rel. Placek v. Illinois*, 546 F.2d 1298, 1304-05 (7th Cir. 1976); *see also Allen*, 804 F.2d at 1363-64 (holding that defendant in bench trial was not entitled to a separate suppression hearing regarding the voluntariness of his confession); *United States v. Martinez*, 555 F.2d 1269, 1272 (holding that there is “no need for the [trial] court to conduct a separate voluntariness hearing apart from the [bench] trial”). We, therefore, presume that a trial judge, sitting as fact finder, can put aside the irrelevant considerations of a confession’s truthfulness when considering the confession’s voluntariness. In so doing, we rely on the Seventh Circuit’s rationale, which explained that *Jackson*’s separate hearing requirement:

was premised largely on [the] concern that lay jurors were unable to separate considerations going solely to the voluntariness of a confession from matters affecting its reliability as proof of the defendant’s guilt or innocence. However, a trial judge, unlike a juror, is trained by learning and experience to segregate evidence bearing on a confession’s voluntariness from evidence bearing on its reliability and the defendant’s culpability.

*Placek*, 546 F.2d at 1304.

¶ 14 Mettao made no showing that his rights were prejudiced by the trial judge’s contemporaneous consideration of evidence of guilt along with evidence related to the

voluntariness of his statements. Absent any factual support, we will not presume that the reliability of the trial judge's voluntariness finding was undermined by the procedure employed in this case. At trial, Mettao was permitted to object to the admissibility of the allegedly involuntary statements regarding his alcohol consumption. Mettao was also allowed to cross-examine the officer concerning the statements at issue. No essential purpose would have been served in delaying the trial proceedings in order to hold a separate evidentiary hearing whereby the same testimony would have been presented before the same trier of fact. The trial court, therefore, did not err in refusing to conduct a voluntariness hearing apart from the bench trial.

*Motion to Suppress Mettao's Statements*

¶ 15 After arresting Mettao for reckless driving, the officer advised Mettao of his Miranda rights, but did not ask if he understood or waived those rights. The officer then asked a number of questions related to Mettao's alcohol consumption. In response, Mettao told the officer that he began drinking approximately two hours prior to driving, and drank a total of four beers. Mettao argues that because he did not understand or waive his Miranda rights, his statements were involuntary and the trial court erred in admitting them into evidence. Whether a criminal defendant's confession is voluntary is a mixed question of fact and law and is reviewed de novo. *Commonwealth v. Shoiter*, 2007 MP 20 ¶ 6.

¶ 16 Due process requirements exist to prevent fundamental unfairness in the use of evidence. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (citing *Lisenba v. California*, 314 U.S. 219, 236 (1941)). The Fifth Amendment of the United States Constitution<sup>2</sup> ensures that defendants are protected against self-incrimination and the inherently coercive effects of custodial interrogations. U.S. Const. amend. V; *see also* NMI Const. Art. I § 5. A defendant in a criminal case is deprived of due process when a conviction is founded, in whole or in part, upon an involuntary confession. *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961). A motion to suppress evidence is used to remove involuntary confessions from consideration, as well as other evidence in a criminal trial that is secured coercively or in an otherwise illegal manner. *Commonwealth v. Campbell*, 4 NMI 11, 14 n.1 (1993), *aff'd*, 42 F.3d 546 (9th Cir. 1994).

¶ 17 In *Miranda v. Arizona*, the United States Supreme Court determined that statements stemming from a custodial interrogation are inadmissible unless the defendant is first apprised of

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<sup>2</sup> The Fifth Amendment of the United States Constitution is applicable in the Commonwealth via the Covenant. COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA, 48 U.S.C. § 1801 note, *reprinted in* CMC at lxxxii, § 501(a); *see, e.g., Commonwealth v. Cabrera*, 4 NMI 240, 244-45 (1995).

his or her constitutional right to silence and assistance of counsel. 384 U.S. 436, 445 (1966). Defendants are in “custody” when they are formally arrested or otherwise deprived of their freedom of action in any significant way. *Id.*; *see also Orozco v. Texas*, 394 U.S. 324, 327 (1969). Additionally, “‘interrogation’ under *Miranda* refers not only to express questioning, but also any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Commonwealth v. Yan*, 4 NMI 334, 338 (1996) (quoting *Rhode Island v. Innis*, 446 U.S. 289, 301 (1980)).

¶ 18 Mettao stated that he drank four beers two hours prior to driving only after the officer arrested him for reckless driving, handcuffed him, placed him in the police squad car, and asked him several questions about his alcohol consumption. Thus, there is no question that Mettao made statements about his alcohol consumption during a custodial interrogation. We therefore must determine whether Mettao voluntarily waived his constitutional right to silence by answering the officer’s questions.

¶ 19 The Commonwealth has the burden of establishing that a defendant “intelligently, knowingly, and voluntarily waived his or her procedural due process rights.” *Shoiter*, 2007 MP 20 ¶ 8. Thus, “[w]here *Miranda* safeguards apply, the prosecution may not introduce evidence procured without the protection afforded by both proper warnings and a valid waiver of those warnings.” *Yan*, 4 NMI at 338 (citing *Commonwealth v. Cabrera*, 4 NMI 240, 253 (Atalig, J., dissenting)). In assessing whether a defendant validly waived his or her *Miranda* rights, “we examine the totality of the circumstances.” *Commonwealth v. Ramangmau*, 4 NMI 227, 235 (1995). Relevant circumstances include “the characteristics of the defendant and the details of questioning by the government.” *Id.* Additionally, we examine whether a defendant endured “physical threats of harm, deprivation of sleep or food, lengthy questioning, and psychological persuasion.” *Id.* at 236. We also examine whether the “police knew that the respondent was unusually disoriented or upset at the time of [the] arrest.” *Yan*, 4 NMI at 338 (quoting *Innis*, 446 U.S. at 303). Absent coercive police activity, a confession will not be considered involuntary. *Cabrera*, 4 NMI at 246 (1995).

¶ 20 The problem in the present case is that the officer questioned Mettao regarding his alcohol consumption without first asking Mettao whether he understood or waived his constitutional right to silence. Mettao never explicitly waived his right to silence. In *Miranda*, the United States Supreme did not require that police officers specifically ask defendants whether they understand their constitutional rights. *See generally Miranda*, 384 U.S. 436; *see also State v. Lather*, 110 Ohio St. 3d 270, 273 (2006) (holding that a “suspect need not be asked directly

whether he or she understands Miranda rights”). Furthermore, the United States Supreme Court in *North Carolina v. Butler* held that “an explicit statement of waiver is not invariably necessary to support a finding that the defendant waived the right to remain silent . . . .” 441 U.S. 369, 373 (1979); *see also United States v. Wyatt*, 561 F.2d 1388, 1390 (1977) (stating that “an express waiver is not necessary in order to waive the right to remain silent”); *United States v. Hayes*, 385 F.2d 375, 377-78 (1967) (finding that an express oral or written statement is not necessary to establish a valid waiver); *Dotson v. State*, 288 Ala. 727, 728 (1971) (stating that an express waiver of the right to remain silent is not constitutionally required). However, “a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.” *Butler*, 384 U.S. at 475.

¶ 21 We find that Mettao’s mere silence regarding the waiver of his Miranda rights, coupled with his responses to the officer’s questions, did not constitute a valid waiver. Although the Commonwealth argues that Mettao did not ask for a clarification of his rights, we reiterate that the Commonwealth bears the burden of establishing that a defendant’s waiver is voluntary. The record, however, contains no persuasive facts indicating that Mettao understood his Miranda rights. The officer admitted at trial that he never asked Mettao if he understood or waived his Miranda rights. Additionally, Mettao never gave an affirmative statement that he understood his rights. Furthermore, the Commonwealth presented no evidence that Mettao, by virtue of his background or education, understood his rights. The record does not indicate Mettao’s familiarity with either the English language or the constitutional right to remain silent. To the contrary, the record suggests that Mettao may not have understood or waived his Miranda rights until after he answered the officer’s questions, arrived at the police station, and read a form that explained his constitutional rights. After reading the form, Mettao indicated he did not wish to make any statements to the police. Thus, we find that the Commonwealth failed to meet its burden of proving that Mettao knowingly, intelligently, and voluntarily waived his constitutional right to remain silent.

¶ 22 Although the Commonwealth failed to demonstrate that Mettao voluntarily waived his right to silence, Mettao fails to demonstrate why he never objected to the trial court’s admission of the alcohol-related statements at trial. The Commonwealth Rules of Evidence state that “[e]rror may not be predicated upon a ruling which admits . . . evidence unless a *substantial right* of the party is affected, and . . . a *timely objection* or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context . . . .” Com R. Evid. 103(a)(1) (emphasis added); *see also Commonwealth v. Peters*, 1 NMI 466, 476



(1991).

¶ 23 Contrary to the requirements set forth in Com. R. Evid. 103(a)(1), Mettao did not object to the admissibility of his alcohol-related statements at trial. Mettao apparently assumed that because he filed a pre-trial motion to suppress, he did not need to object at trial. However, when the trial court denied Mettao's pre-trial motion to suppress his alcohol-related statements, it did so without prejudice, indicating that its ruling was conditional and Mettao was free to revisit the issue at trial. This Court, along with a majority of other courts, holds that when a trial court conditionally denies a pre-trial objection, the objecting party must renew his or her objection at trial or waive it on appeal. *See, e.g., Wilson v. Williams*, 182 F.3d 562, 565-67 (7th Cir. 1999) ("Until a conditional or tentative decision has been made definitive, it is subject to reconsideration, and the party *must preserve* his position at trial.") (emphasis added); *State v. Hayes*, 350 N.C. 79, 80 (1999) (stating that a motion in limine is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence when it is offered at trial). *See also United States v. Graves*, 5 F.3d 1546, 1552 (1993); *McEwen v. City of Norman*, 926 F.2d 1539, 1544 (10th Cir. 1991); *Hendrix v. Raybestos Manhattan, Inc.*, 776 F.2d 1492, 1504 (11th Cir. 1985). The rationale for requiring parties to renew their objections at trial even after the trial court denied the same objection in a pre-trial motion to suppress hearing is "to allow the trial judge to reconsider his . . . ruling with the benefit of having been witness to the unfolding events at trial." *United States v. Graves*, 5 F.3d 1546, 1552 (5th Cir. 1993).

¶ 24 The record indicates that after the trial court denied Mettao's motion to suppress without prejudice, Mettao never again objected to the admissibility of his alcohol-related statements despite numerous opportunities to do so. Because Mettao failed to object at trial, we can only consider the voluntariness of his statements on appeal if "(1) it is one of law not relying on any factual record; (2) a new theory or issue has arisen because of a change in law while the appeal is pending; or (3) plain error occurred and an injustice might otherwise result unless we consider the issue." *Commonwealth v. Santos*, 4 NMI 348, 350 (1996) (quoting *Castro v. Hotel Nikko Saipan, Inc.*, 4 NMI 268, 276 (1995)).

¶ 25 It is clear that the trial court's admission of Mettao's alcohol-related statements do not meet the first two exceptions set forth in *Santos*. The only arguably relevant exception is the third exception, which allows this Court to review plain errors. *Id.*; *see also* Com. R. Crim. P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."). Reversing a trial court decision under the plain error rule

“is appropriate only when necessary to safeguard the integrity and reputation of the judicial process or to forestall a miscarriage of justice.” *Peters*, 1 NMI at 476 (quoting *United States v. Lancelloti*, 761 F.2d 1363, 1367 (9th Cir. 1985)).

¶ 26 The United States Supreme Court holds that the admission of an involuntary statement at trial is not subject to a plain error analysis, but a harmless error analysis. *Arizona v. Fulminante*, 499 U.S. 279, 303 (1991). The Commonwealth Rules of Criminal Procedure sets forth the harmless error standard and provides that “[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.” Com. R. Crim. P. 52(a). The harmless error concept was developed by appellate courts “to embody and implement the truism that no litigant is assured a perfect trial, only a fair one.” *Commonwealth v. Rabauliman*, 2004 MP 12 ¶ 41 (citing *Commonwealth v. Lucas*, 2003 MP 9 ¶ 13 n.10). The harmless error doctrine “serve[s] a very useful purpose insofar as [it] block[s] setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.” *Chapman v. California*, 386 U.S. 18, 22 (1967); see also *Lucas*, 2003 MP 9 ¶ 13 n.10 (stating that the harmless error rule allows a reviewing court to omit objectionable evidence and then examine the remaining untainted evidence in order to see whether the same result would follow).

¶ 27 In issuing its decision, the trial court did not rely on Mettao’s involuntary statements regarding his alcohol consumption. On the contrary, it explicitly excluded Mettao’s statements and focused on the fact that Mettao was pulled over for reckless driving, he smelled of alcohol, he had a BAC above the legal limit, and he performed poorly on two field sobriety tests.<sup>3</sup> Appellant’s Excerpts of Record (“ER”) at 109. In fact, in refusing to consider Mettao’s statements in rendering its decision, the trial court essentially granted Mettao’s motion to

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<sup>3</sup> In rendering its decision from the bench, the trial court stated:

The court finds that the Police Officer an experienced Sergeant dealing with traffic cases in D.U.I., and *probable cause to stop the defendant* for reckless . . . (unintelligible) stop him and for reckless driving. The court further finds after the stop for reckless driving he detected the *odor of alcohol* and thereupon proceeded to implement the statutory checks for D.U.I. The Sobriety test and the Breathalyzer test which was – which had a reading above the legal limit . . . 1.3, [and the] legal limit is .08. With respect to defendant’s claimed [sic] that he did not waive his Miranda rights while traveling in the car, the court does not deemed [sic] that to be a . . . (unintelligible) here, because of the fact that the Police Officer, without, *if we remove whole statement in the car* then the probable cause, one from the stop where was probable cause to the Breathalyzer test . . . (unintelligible) probable cause of stopping. And based on that, *he had the right to go ahead and implement the D.U.I. procedures*, which he did. *And based on that*, he was in violation of 9 CMC § 7105. The finds [sic], in view of the totality of the circumstances beyond a reasonable doubt that the defendant is violated [sic] 9 CMC § 7105 and 9 CMC § 7104.

ER at 109 (emphasis added).

suppress his alcohol-related statements at the conclusion of the trial. In denying Mettao's motion to suppress without prejudice at the onset of the trial, the trial court did not adversely affect any of Mettao's substantial rights.

*Motion to Suppress Mettao's Breathalyzer and Field Sobriety Tests*

¶ 28 Mettao argues that the trial court erred in admitting the results of his breathalyzer and field sobriety tests because they are fruits of an illegally-obtained confession. Mettao's reliance on the fruit of the poisonous tree doctrine, which requires courts to suppress evidence as the tainted "fruit" of unlawful governmental conduct, had its genesis in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). There, the United States Supreme Court held that the exclusionary rule applies not only to the illegally obtained evidence itself, but also to other incriminating evidence derived from the primary evidence. *Id.* at 391-92. The Court extended the exclusionary rule in *Wong Sun v. United States* to evidence that is the indirect product or fruit of unlawful police conduct. 371, U.S. 471, 487-88 (1963).<sup>4</sup> "The core rationale consistently advanced . . . for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections." *Nix v. Williams*, 467 U.S. 431, 442-43 (1984).

¶ 29 The "fruit of the poisonous tree" doctrine is not without exceptions. One such exception is the inevitable discovery rule, which allows for the admission of tainted evidence when the prosecution can show by a preponderance of the evidence that its discovery by lawful means was inevitable. *Commonwealth v. Pua*, 2006 MP 19 ¶ 25 (citing *Nix*, 467 U.S. at 443-44). "The purpose of the inevitable discovery rule is to block setting aside convictions that would have been obtained without police misconduct." *Nix*, 467 U.S. at 444 n.4.

¶ 30 In light of the inevitable discovery rule, the trial court did not err in admitting the results of Mettao's breathalyzer and field sobriety tests. The record clearly indicates that even without Mettao's alcohol-related statements, the officer would have asked Mettao to take the breathalyzer and field sobriety tests. The officer testified that he observed Mettao driving at a high rate of speed. He also observed Mettao's vehicle swerve across the road, at one point narrowly avoiding a collision with another vehicle. After pulling Mettao over and arresting him for reckless driving,

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<sup>4</sup> Although *Silverthorne* and *Wong Sun* involved Fourth Amendment violations, the United States Supreme Court also applied the "fruit of the poisonous tree" doctrine to Fifth Amendment violations, *see e.g.*, *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 79 (1964), and Sixth Amendment violations, *see e.g.*, *United States v. Wade*, 388 U.S. 218, 239-42 (1967).

the officer said he “pick[ed] up all detections of . . . intoxication.” ER at 47. The officer testified that Mettao had bloodshot eyes, a flushed face, and smelled strongly of alcohol. He also stated that Mettao reacted slowly to his instructions. It was only after the officer made these observations that Mettao made his statements regarding his alcohol consumption. Under the circumstances, we doubt that any competent police officer, particularly one with thirteen years of experience, would have failed to request a breathalyzer and field sobriety test based on Mettao’s driving and appearance. Thus, the record indicates that the officer would have acquired the same evidence even if Mettao never made his alcohol-related statements. Accordingly, the trial court did not err in admitting the results of Mettao’s breathalyzer and field sobriety tests, as they fall under the purview of the inevitable discovery rule.

*Adequacy of Notice*

¶ 31 Mettao argues that the trial court erroneously convicted him of an offense with which he was not charged. The Commonwealth initially charged Mettao with driving under the influence of alcohol in violation of 9 CMC § 7105. Although Section 7105 has five subsections, the Commonwealth did not initially specify which subsection Mettao allegedly violated. The Commonwealth later amended its charges, alleging that Mettao violated Section 7105(a)(2), which states that “[a] person shall not drive . . . any vehicle while under the influence of alcohol . . .” Mettao claims that although he was charged with driving under the influence of alcohol in violation of Section 7105(a)(2), he was actually convicted of driving with a BAC over the legal limit in violation of Section 7105(a)(1). Thus, Mettao argues that the trial court erred in convicting him of an offense with which he was not charged. Whether a defendant receives adequate notice of the charges is a question of law reviewed de novo. *Commonwealth v. Martinez*, 2000 MP 5 ¶ 4.

¶ 32 In the Commonwealth, criminal defendants must be put on notice of the charges levied against them. *See id.* ¶¶ 7-12. Notice serves two primary purposes: “(1) it enables the defendant to adequately prepare his defense and (2) it enables him to plead double jeopardy against a second prosecution.” *Id.* ¶ 7 (quoting *United States v. Martin*, 783 F.2d 1449, 1452 (9th Cir. 1986)). Charging documents, therefore, are tested by whether they “apprise the defendant of what evidence he must be prepared to meet.” *Id.* (quoting *Martin*, 783 F.2d at 1452).

¶ 33 Mettao correctly states in his brief that, in rendering its decision from the bench, “the trial court did not state on the record the specific subsection [Mettao] violated . . . .” Appellant’s Opening Br. at 7. Rather, the trial court simply convicted Mettao of violating 9 CMC § 7105. This proves problematic for Mettao in that it is difficult to prove the trial court convicted him of

driving with a BAC over the legal limit when the trial court never did so in the record. Nonetheless, Mettao claims the trial court convicted him of driving with an illegal BAC by implication, in that the sole basis of the trial court's conviction rested on the result of his breathalyzer test.

¶ 34 Contrary to Mettao's claim, we find no credible evidence indicating that the trial court convicted him of driving with a BAC over the legal limit in violation of Section 7105(a)(1) as opposed to driving under the influence of alcohol in violation of Section 7105(a)(2). The basis of Mettao's conviction did not rest solely on the results of his breathalyzer test as Mettao claims. While the trial court considered Mettao's BAC, it also considered a number of other factors. The trial court stated that the officer had probable cause to stop Mettao based on his erratic driving. ER at 109. The trial court also mentioned Mettao's strong odor of alcohol and poor performance in his field sobriety tests. *Id.* In fact, it specifically stated that the basis of Mettao's conviction rested on the officer's implementation of the "D.U.I. procedures." *Id.* These procedures included the officer's observations – such as Mettao's bloodshot eyes, flushed face, strong odor of alcohol, and slow reactions – along with Mettao's failure to follow the officer's instructions in both the coordination and balancing tests. Thus, the evidence indicates that the trial court properly convicted Mettao of driving under the influence of alcohol in violation of Section 7105(a)(2).

#### *Amended Charges*

¶ 35 Mettao argues that in allowing the Commonwealth to amend its charges, the trial court, in essence, permitted the Commonwealth to circumvent the discovery process. As stated earlier, the Commonwealth initially charged Mettao with violating Section 7105, but did not specify which subsection Mettao allegedly violated. Mettao assumed that because he received ticket for having a BAC above the legal limit, the Commonwealth was charging him under Section 7105(a)(1). He therefore requested discovery information from the Commonwealth related to the officer's use of the breathalyzer machine. The Commonwealth, however, did not provide the requested information, but instead amended its charges in order to specify that it was charging Mettao with driving under the influence of alcohol in violation of Section 7105(a)(2), as opposed to driving with a BAC above the legal limit in violation of Section 7105(a)(1). In amending the charges, the Commonwealth stated that Mettao's discovery requests were rendered moot, thus justifying its failure to provide Mettao with the requested breathalyzer information. However, the Commonwealth subsequently introduced the results of Mettao's breathalyzer test at trial. Therefore, Mettao claims that in amending its charges, the Commonwealth circumvented the discovery process, and, in turn, the trial court erred in admitting evidence of Mettao's BAC.

¶ 36

The Commonwealth's failure to comply with Mettao's discovery request is troubling on a variety of levels. Commonwealth law clearly establishes that after Mettao made his discovery request regarding the breathalyzer test, he was entitled to "full information regarding the test." 9 CMC § 7107(b). For example, Mettao was entitled to information such as "who administered [the test], the qualifications of the officer administering it, maintenance logbook, etc." *Peters*, 1 NMI at 475 (stating that requesting such information "enable[s] [defendants] to question the credibility of the test result"). In failing to provide Mettao's requested information, the Commonwealth hindered his ability to question the credibility of the breathalyzer test result. Furthermore, the Commonwealth's failure to provide Mettao with his requested information calls into question the prosecuting attorney's forthrightness and professional competency.

¶ 37

Notwithstanding the Commonwealth's failure to comply with Mettao's discovery requests, we decline to accept Mettao's arguments. As mentioned above, we have consistently held that in order to claim error in the admission of evidence, an appellant must meet a two-prong test. *Peters*, 1 NMI at 475. "The first part of the test is to determine if a substantial right of the party is affected. The second part requires that a timely objection or motion to strike be made." *Id.* Additionally, the Commonwealth Rules of Evidence require the party making the timely objection to state the specific basis of the objection, if it is not apparent from the context. Com. R. Evid. 103(a)(1); *Dilutaoch v. C & S Concrete Block Prods.*, 1 NMI 478, 485-86 (1991) (stating that appellant's failure to properly state the specific ground of his objection precluded his subsequent claim of error on appeal); *Wilson v. Williams*, 182 F.3d 562, 567 (7th Cir. 1999) (stating that Fed. R. Evid. 103(a)(1) "requires a litigant to state a specific ground for an objection to evidence; grounds not presented cannot be raised later . . .").

¶ 38

Mettao's arguments do not satisfy either the "substantial right" or "timely objection" prongs of the *Peters* test. In *Peters*, the defendant appealed his conviction for driving under the influence of alcohol on the grounds that the trial court erred in admitting the results of his breathalyzer test. 1 NMI at 470. In affirming the defendant's conviction, we held that although the Commonwealth did not provide proper foundation to admit the breathalyzer test into evidence, the trial court did not adversely affect the defendant's substantial rights. *Id.* at 476. We stated that "the finding of guilt was not based solely on the result of the breathalyzer test. Other evidence supported the conviction." *Id.* The Court then stated that in addition to the breathalyzer test, the Commonwealth presented evidence that the defendant had a flushed face, bloodshot eyes, slurred speech, and a strong odor of alcohol. *Id.* at 476-77. The defendant also failed two field sobriety tests. *Id.* at 477. Thus, even though the trial court improperly admitted the breathalyzer

test, the defendant's substantial rights were not adversely affected because there was sufficient evidence to support the conviction without the breathalyzer test. *Id.* at 476-77. *See, e.g., Commonwealth v. Wu*, 2007 MP 29 ¶ 15 (stating that evidence of defendant's flushed face, bloodshot eyes, slurred speech, and odor of alcohol was sufficient to sustain a conviction for driving under the influence of alcohol).

¶ 39 In the present case, we reiterate the fact that the officer observed Mettao driving erratically and at a high rate of speed. After pulling Mettao over, the officer noticed that Mettao had bloodshot eyes, a flushed face, and smelled strongly of alcohol. In addition, the officer stated that Mettao reacted slowly to his instructions and performed poorly in two field sobriety tests. Just as in *Peters*, even without the breathalyzer test, the evidence is sufficient to sustain Mettao's conviction. Thus, the trial court did not adversely affect Mettao's rights in admitting the results of the breathalyzer test.

¶ 40 Additionally, even if the trial court adversely affected Mettao's substantial rights, he still does not satisfy the "timely objection" prong from the *Peters* test. As already noted, Mettao filed a pre-trial motion to suppress the results of his breathalyzer test on the grounds that the test was a fruit of an involuntary confession. However, Mettao never renewed that objection at trial. Furthermore, the Commonwealth Rules of Evidence require that the party making the timely objection must state the specific basis of the objection, if it is not apparent from the context. Com. R. Evid. 103(a)(1); *Dilutaoch v. C & S Concrete Block Prods.*, 1 NMI 478, 485-86 (1991) (stating that appellant's failure to properly state the specific ground of his objection precluded his subsequent claim of error on appeal); *Wilson v. Williams*, 182 F.3d 562, 567 (7th Cir. 1999) (stating that Fed. R. Evid. 103(a)(1) "requires a litigant to state a specific ground for an objection to evidence; grounds not presented cannot be raised later . . ."). At trial, Mettao never objected to the admission of his breathalyzer test on any grounds, let alone on the Commonwealth's failure to provide discovery. Although Mettao argued before trial that the breathalyzer test result should be excluded as a fruit of an involuntary confession, our holding in *Dilutaoch* required Mettao to also object to the breathalyzer based on the Commonwealth's failure to provide discovery. He therefore failed to preserve his objection for appellate review.

¶ 41 Finally, the record indicates that the trial court clarified a great deal of confusion in allowing the Commonwealth's amended charges. The Commonwealth Rules of Traffic Procedure state:

The court may amend or permit to be amended any process or pleading for any omission or defect therein, or for any variance between the complaint and

the evidence adduced at the trial. If the defendant is substantially prejudiced in the presentation of this case as a result of the amendment, the court shall adjourn the hearing to some future time, upon such terms as he shall think proper.

Com. R. Traf. P. 12. Mettao admits that before the Commonwealth amended the charges, there was confusion as to what subsection Mettao allegedly violated. In fact, Mettao incorrectly assumed that because he received a BAC ticket, the Commonwealth was charging him with driving with a BAC over the legal limit in violation of 9 CMC § 7105(a)(1). Therefore, the trial court was justified in permitting the Commonwealth to amend the charges, as the amendment both cured a defect in the original charging document and clarified the charges against Mettao. Furthermore, in granting the Commonwealth's amended charges, the trial court allowed Mettao additional time to prepare for trial in accordance with Com. R. Traf. P. 12. Thus, the trial court did not err in allowing the Commonwealth to amend the charges against Mettao.

### III

¶ 42 Mettao contends that the trial court committed a number of errors in convicting him of driving under the influence of alcohol. As stated earlier, Mettao claims that the trial court erred when it: (1) refused to hold a pre-trial voluntariness hearing apart from his bench trial, (2) denied his motion to suppress his alcohol-related statements and the results of his breathalyzer and field sobriety tests, (3) convicted him of an offense with which he was not charged, and (4) allowed the Commonwealth to amend its charges to circumvent the discovery process. However, Mettao states that none of those errors, standing alone, warrant the reversal of his conviction. Therefore, Mettao argues that the cumulative effect of the trial court's errors necessitates the reversal of his conviction.

¶ 43 Under a cumulative error analysis, we determine “whether the overall effect of multiple errors amounts to prejudice.” *Commonwealth v. Camacho*, 2002 MP 6 ¶ 23; *see also United States v. Rivera*, 900 F.2d 1462, 1470 (10th Cir. 1990) (stating that under a cumulative error analysis, a court aggregates all errors that, standing alone, may be harmless, and “analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless”). In *Camacho*, we stated that “[i]n some cases, although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant.” *Id.* ¶ 120. In such instances, we determined that a “‘balkanized, issue-by-issue harmless error review’ is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant.” *Id.* (quoting *United States v. Frederick*, 78 F.3d 1370,



1381 (9th Cir. 1996)).

¶ 44 We find that Mettao is not entitled to a reversal of his conviction for driving under the influence of alcohol. First, we already determined that the trial court did not err in refusing to conduct a pre-trial voluntariness hearing or in admitting the results of Mettao's field sobriety tests into evidence. We also determined that, contrary to Mettao's claims, the trial court convicted him of an offense with which he was charged. Furthermore, we reject Mettao's claim that the trial court erroneously admitted his alcohol-related statements into evidence. Although the officer testified at trial regarding Mettao's alcohol-related statements, the trial court explicitly excluded those statements in rendering its decision. ER at 109. In so doing, the trial court essentially granted Mettao's motion to suppress his alcohol-related statements at the conclusion of the trial.

¶ 45 Additionally, we note that defendants are "entitled to a fair trial, not a perfect one." *Camacho*, 2002 MP 6 ¶ 126 (quoting *Mancuso v. Olivarez*, 282 F.3d 728, 745 (9th Cir. 2002)). The record indicates that Mettao received a fair trial. Although the trial court admitted the results of Mettao's breathalyzer test after the Commonwealth failed to comply with Mettao's BAC-related discovery requests, we find that the impact of this error was negligible. Aside from the fact that Mettao never objected to the admissibility of the breathalyzer test at trial, we reiterate that there is ample evidence to support Mettao's conviction even without the results of the breathalyzer test. The cumulative impact of the trial court's errors did not deprive Mettao of a fair trial. We therefore decline to reverse Mettao's conviction.

#### IV

¶ 46 For the foregoing reasons, we hold that the trial judge was not required to hold a separate hearing regarding the voluntariness of Mettao's alcohol-related statements apart from the bench trial. Additionally, because Mettao did not object at trial to the admissibility of his confession or the results of his breathalyzer and field sobriety tests, he did not preserve his objection for appellate review. We further hold that Mettao was convicted of the offense with which he was charged, and the Commonwealth's amended charges did not adversely affect Mettao's substantial rights. Accordingly, the trial court's decision is AFFIRMED.

Concurring:  
Manglona, J., Torres, J.P.T.