IN THE
# ARIZONA COURT OF APPEALS
## DIVISION ONE

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STATE OF ARIZONA, *Appellee*,

*v.*

BILLY BARLOW, *Appellant*.

No. 1 CA-CR 13-0210
FILED 11-21-2013

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Appeal from the Superior Court in Coconino County
No. CR 2011-00919
The Honorable Mark R. Moran, Judge

**REVERSED AND REMANDED**

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COUNSEL

Arizona Attorney General's Office, Phoenix
By Michael O'Toole

*Counsel for Appellee*

Coconino County Public Defender's Office, Flagstaff
By Brad Bransky

*Counsel for Appellant*

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**MEMORANDUM DECISION**

Judge Sally Schneider Duncan delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Kenton D. Jones joined.

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**D U N C A N,** Judge:

**¶1** Billy Barlow appeals from his convictions and sentences for two counts of aggravated driving under the influence ("DUI"). At trial, the superior court excluded from evidence the blood alcohol concentration ("BAC") results of the breath test administered after Barlow's DUI arrest and any mention that a test was performed. Barlow argues on appeal that although the breath test results were properly excluded, the superior court should have admitted evidence he consented to the test and instructed the jury not to consider the lack of test results in its deliberation.

**¶2** In our review of the record, we discovered that Barlow's redacted certified Motor Vehicle Department record, admitted at trial as Exhibit 5, included an Admin Per Se/Implied Consent Affidavit ("consent affidavit"). The consent affidavit indicated both Barlow's consent to the administration of the breath test and the test's results. "Although we do not search the record for fundamental error, we will not ignore it when we find it." *State v. Fernandez*, 216 Ariz. 545, 554, ¶ 32, 169 P.3d 641, 650 (App. 2007). Accordingly, we ordered supplemental briefing on the question: Did the inclusion of the unredacted Admin Per Se/Implied Consent Affidavit in Exhibit 5 moot appellant's argument or constitute reversible error? Having now reviewed the supplemental briefs filed by Barlow and the State, we reverse Barlow's convictions and sentences and remand for proceedings consistent with this decision.

**FACTS AND PROCEDURAL BACKGROUND**

**¶3** On December 16, 2011, Officer S. of the Page Police Department stopped a vehicle driven by Barlow after observing Barlow swerve to avoid striking his patrol car while making a left-hand turn. Officer S. also observed Barlow's vehicle cross over the fog line on one occasion. While speaking with Barlow, Officer S. smelled "at least a moderate odor of an alcoholic beverage" and Barlow admitted he drank a pitcher of beer with his brother. Barlow consented to the administration

of a breath test and field sobriety tests. Based on Barlow's performance on the field sobriety tests, his driving behavior, admission, and Officer S.'s observations throughout his interaction with Barlow, Officer S. arrested Barlow for DUI.

**¶4** The State charged Barlow with four counts of aggravated DUI. Count 1 was charged as driving impaired with a suspended license. Count 2 was charged as driving with a BAC of .08 or more with a suspended license. Count 3 was charged as driving impaired with two prior DUI convictions. Count 4 was charged as driving with a BAC of .08 or more with two prior DUI convictions.

**¶5** Prior to trial, the State filed a motion in limine to preclude evidence relating to the administration of the breath test because the device used to administer the test had not been maintained in accordance with Arizona Revised Statutes ("A.R.S.") section 28-1323 (2012) and Arizona Administrative Code R13-10-104. Specifically, Officer S. did not conduct calibration checks on the device within 31 days of each other and standard quality assurance procedures were not conducted within 90 days of each other. Because of this, the results were inadmissible. *See Mack v. Cruikshank*, 196 Ariz. 541, 548, ¶ 25, 2 P.3d 100, 107 (App. 1999). The State also moved to dismiss Counts 2 and 4. Barlow agreed the test results were inadmissible, but requested he be allowed to admit evidence he consented to the administration of the breath test. He also argued the court should instruct the jury not to infer guilt based on the lack of breath test evidence. The superior court, agreeing with the State that, in light of the inadmissibility of the test results, such evidence was irrelevant, excluded both the results and any mention of the breath test. Following a two day trial, the jury convicted Barlow of the remaining counts.

## DISCUSSION

### I. Inclusion of BAC Test Results

**¶6** As a general rule, "[a] defendant who fails to object at trial forfeits the right to obtain appellate relief except in those rare cases that involve [fundamental error]." *State v. Henderson*, 210 Ariz. 561, 567, 115 P.3d 601, 607 (2005) (citing *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). Because the record is clear Barlow failed to object at trial to the admission of Exhibit 5, we review solely for fundamental error.

**¶7** In order to prevail under a fundamental error standard, Barlow must "establish that '(1) error exists, (2) the error is fundamental, and (3) the error caused him prejudice.'" *State v. Bearup*, 221 Ariz. 163, 168, ¶ 21, 211 P.3d 684, 689 (2009) (quoting *State v. Smith*, 219 Ariz. 132, 136, ¶ 21, 194 P.3d 399, 403 (2008)). The State concedes that the failure to redact the consent affidavit from Exhibit 5 was error. Therefore, our discussion is limited to whether this error was fundamental and whether it prejudiced Barlow.

**¶8** Error is fundamental if it "goes to the foundation of [a defendant's] case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Henderson*, 210 Ariz. at 568, ¶ 24, 115 P.3d at 608 (citing *Hunter*, 142 Ariz. at 90, 688 P.2d at 982). The failure to redact the consent affidavit from Exhibit 5 constituted fundamental error for the following reasons.

**¶9** First, BAC results are "'virtually dispositive of guilt or innocence'" in a DUI case. *Mack*, 196 Ariz. at 545, ¶ 12, 2 P.3d at 104 (quoting *Montano v. Superior Court*, 149 Ariz. 385, 389, 719 P.2d 271, 275 (1986)). Where, as here, the jury receives test results that were ruled inadmissible, such an error goes to the very foundation of the case. Second, the inadvertent admission of the consent affidavit deprived Barlow of his due process right to defend himself against the charges. The Due Process Clause of the Fourteenth Amendment requires that criminal prosecutions "comport with prevailing notions of fundamental fairness." *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532, 81 L. Ed. 2d 413 (1984). The Supreme Court has "long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense." *Id.* Here, the consent affidavit inadvertently attached to an exhibit at trial revealed that the results of Barlow's BAC tests were .199 and .201, roughly two and one-half times the legal limit. Because the parties were unaware the error occurred, Barlow was unable to present any evidence to the jury to refute or explain those results and was deprived of "a meaningful opportunity to present a complete defense." *Id.* We conclude that the error here, inadvertent as it surely was, was of such magnitude that Barlow could not possibly have received a fair trial and thus constituted fundamental error.

**¶10** Our inquiry does not end here, however. In addition to showing that fundamental error occurred, a defendant must also show that the error caused him prejudice. *Henderson*, 210 Ariz. at 568, ¶ 26, 115 P.3d at 608. "Fundamental error review involves a fact-intensive inquiry,

and the showing required to establish prejudice therefore differs from case to case." *Id.* (citing *State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993)). Here, the nature of the error deprived Barlow of the opportunity to present a complete defense. Barlow must show that, absent the inclusion of the BAC results, a reasonable jury could have found him not guilty. *See id.* at 569, ¶ 27, 115 P.3d at 609.

**¶11** Barlow asserts in his supplemental brief that he was prejudiced by the inclusion of the consent affidavit in Exhibit 5 because it left the jury with "uncontroverted evidence of an extremely high inadmissible breath test with no cross examination, admonishment or curative instruction." We agree. DUI cases are unique in that they are "particularly susceptible of resolution by way of chemical analysis of intoxication," *Mack*, 196 Ariz. at 545, ¶ 12, 2 P.3d at 104 (quoting *Montano*, 149 Ariz. at 391, 719 P.2d at 277), and because, as noted *supra* ¶ 9, BAC test results are "'virtually dispositive of guilt or innocence.'" *Id*. at 545, ¶ 12, 2 P.3d at 104 (quoting *Montano*, 149 Ariz. at 389, 719 P.2d at 275). Where, as here, BAC evidence is ruled inadmissible and yet inadvertently reaches the jury during deliberations, we do not see how such an error can be anything but prejudicial.

**¶12** The jury was specifically instructed to consider "the exhibits introduced in court." Exhibit 5 was introduced in court. Because jurors are presumed to follow the court's instructions, *e.g. State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006), we can presume the jury considered Exhibit 5 in reaching its verdict. Further, we are not persuaded by the State's assertion that there is no reasonable probability of a different verdict absent the error. Barlow presented evidence consistent with the proposition that he was not driving impaired and was simply a bad driver with health problems. In this case, a reasonable jury could have returned a verdict other than guilty if it had believed the facts as presented by the defense. Because factual determinations and assessments of credibility are best left to the jury, *State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995), we decline to speculate as to what verdict the jury would have returned absent the inclusion of the consent affidavit.

**¶13** For the reasons given, we reverse the jury's verdict and remand to the superior court for further proceedings consistent with this decision. We address Barlow's remaining arguments so as to provide guidance to the superior court on remand.

II. Exclusion of Consent Evidence

**¶14** Barlow argues on appeal the superior court should have granted his request to admit evidence he consented to a breath test reasoning that because Arizona law requires all motorists to consent to a BAC test, "[t]he only possible inference which can be drawn from this lack of [consent] evidence is that [Barlow] refused the test - which equates to knowledge of guilt." We disagree.

**¶15** The appellate court "review[s] evidentiary rulings for abuse of discretion." *State v. Chappell*, 225 Ariz. 229, 238, ¶ 28, 236 P.3d 1176, 1185 (2010) (citing *State v. Smith*, 215 Ariz. 221, 232, ¶ 48, 159 P.3d 531, 542 (2007)). Here, the superior court excluded evidence Barlow consented to the administration of the breath test because it found that evidence irrelevant given that the results of the test were inadmissible.

**¶16** The superior court's ruling does not constitute an abuse of discretion. First, evidence is relevant if it has a tendency to make the existence of a fact in dispute more or less probable. Ariz. R. Evid. 401. The fact that Barlow consented to the administration of a breath test has no bearing on whether he was driving impaired and is therefore irrelevant. [1] Second, we disagree that the only possible inference from the lack of evidence relating to whether Barlow consented to the administration of a breath test was that Barlow was guilty of DUI. The superior court instructed the jury not to speculate about facts not in evidence. Any possibility of juror speculation in this case was offset by that instruction.

**¶17** Because we conclude the superior court did not abuse its discretion in excluding evidence Barlow consented to the breath test, we decline to instruct the superior court to allow such evidence on remand.

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[1] We note that in granting the State's motion in limine, the superior court expressed the view that if defense counsel presented evidence Barlow consented to the administration of the breath test, counsel would be opening the door to introduction of the test results by the State. Any suggestion that the results could be admitted in this case is inaccurate. The State could not demonstrate that the device used to obtain Barlow's BAC levels was in "proper operating condition" as required by A.R.S. § 28-1323(A)(5). The test results were therefore unreliable and inadmissible under any circumstances and for any purpose.

III. Jury Instruction

**¶18** Barlow also argues the superior court should have instructed the jury that the "lack of testimony regarding the [breath test] results does not infer guilt." We disagree.

**¶19** We review the superior court's denial of a proposed jury instruction for an abuse of discretion. *State v. Cox*, 217 Ariz. 353, 356, ¶ 15, 174 P.3d 265, 268 (2007). "[W]hen the substance of a proposed instruction is adequately covered by other instructions, the trial court is not required to give it." *State v. Hoskins*, 199 Ariz. 127, 145, ¶ 75, 14 P.3d 997, 1015 (2000). Further, "[w]hen a jury is properly instructed on the applicable law, the trial court is not required to provide additional instructions that do nothing more than reiterate or enlarge the instructions in defendant's language." *State v. Morales*, 198 Ariz. 372, 374, ¶ 4, 10 P.3d 630, 632 (App. 2000) (quoting *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995)).

**¶20** Here, the superior court instructed the jury it "must decide the facts only from the evidence produced in court. [It] must not speculate or guess about any fact." This instruction sufficiently addressed any concerns over jury speculation and therefore, the superior court was not required to phrase the instruction as requested by Barlow. We conclude the superior court did not abuse its discretion in rejecting the requested instruction and decline to require the superior court to provide a more specific instruction on remand.

**CONCLUSION**

**¶21** For the foregoing reasons, we reverse Barlow's convictions and sentences and remand to the superior court for proceedings consistent with this decision.


*The Honorable Sally Schneider Duncan, Judge Pro Tempore of the Court of Appeals, Division One, is authorized by the Chief Justice of the Arizona Supreme Court to participate in the disposition of this appeal pursuant to Article 6, Section 3, of the Arizona Constitution and A.R.S. §§ 12-145 to -147.