IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

ANTHONY SALAMONE, *Appellant*.

No. 1 CA-CR 16-0204
FILED 7-6-2017

Appeal from the Superior Court in Maricopa County
No. CR2014-153441-001
The Honorable David V. Seyer, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Eric Knobloch
Counsel for Appellee

Law Office of David Michael Cantor PC, Phoenix
By Michael Alarid, III
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Kent E. Cattani delivered the decision of the Court, in which Judge Jon W. Thompson and Judge Paul J. McMurdie joined.

C A T T A N I, Judge:

¶1 Anthony Salamone appeals his convictions of two counts of aggravated driving under the influence ("DUI"). For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Around 11:30 p.m. one evening in late 2014, Trooper King of the Arizona Department of Public Safety ("DPS") pulled over the car Salamone was driving after observing it speeding, braking erratically, and drifting in and out of its lane. Salamone's face was flushed, he had bloodshot eyes, and he smelled strongly of alcohol. Salamone admitted that he had been drinking, and he failed three field sobriety tests. A records-check revealed that Salamone's driver's license was suspended.

¶3 Trooper King arrested Salamone and transported him to a mobile DUI command post, where Salamone refused to consent to blood-alcohol testing. King then took Salamone to a highway patrol station and, after obtaining a search warrant, another officer drew Salamone's blood at approximately 2:40 a.m., over three hours after the traffic stop. Later testing showed a blood alcohol concentration ("BAC") of 0.174 at the time of the draw, and retrograde extrapolation estimated Salamone's BAC within two hours of driving as between 0.186 and 0.210.

¶4 The State charged Salamone with two counts of aggravated DUI. *See* Ariz. Rev. Stat. ("A.R.S.") §§ 28-1381(A)(1), (2), -1383(A)(1).[1] A jury found him guilty as charged, and the court suspended imposition of sentence and placed him on concurrent terms of three years' probation. Salamone timely appealed, and we have jurisdiction under A.R.S. § 13-4033.

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[1] Absent material revisions after the relevant date, we cite a statute's current version.

DISCUSSION

I. Right to Counsel.

¶5 Salamone argues that Trooper King interfered with his right to counsel and that the superior court erred by denying his pretrial motion to dismiss on that ground. He asserts in particular that, in effect, King prevented access to an attorney by making inadequate efforts to facilitate contact with an attorney when requested. We review the court's ruling for an abuse of discretion, deferring to its factual determinations unless clearly erroneous. *See State v. Rosengren*, 199 Ariz. 112, 115–16, ¶ 9 (App. 2000); *see also State v. Penney*, 229 Ariz. 32, 34, ¶ 8 (App. 2012).

¶6 To effectuate a criminal defendant's state and federal constitutional right to assistance of counsel, Arizona Rule of Criminal Procedure 6.1(a) provides for the right to consult an attorney "as soon as feasible after [being] taken into custody." *See Kunzler v. Pima Cty. Superior Court*, 154 Ariz. 568, 569 (1987). Accordingly, the State must give a suspect in custody a reasonable opportunity to consult with counsel, and may not unreasonably restrict or interfere with the suspect's attempt to do so. *See, e.g.*, *id.*; *State v. Holland*, 147 Ariz. 453, 455 (1985); *Penney*, 229 Ariz. at 35, ¶¶ 10, 13; *State v. Sanders*, 194 Ariz. 156, 158, ¶ 8 (App. 1998); *Martinez v. Superior Court*, 181 Ariz. 467, 468 (App. 1994). Consistent with this principle, "when a suspect informs police he requires assistance in contacting a lawyer, the police must take reasonable steps to provide that assistance." *Penney*, 229 Ariz. at 36, ¶ 15.

¶7 Here, Salamone asked to speak to his attorney at the mobile DUI command post, and Trooper King made reasonable efforts to assist him in doing so. King immediately asked for a phone number to place the call, but Salamone could not remember the attorney's name or number. Salamone then wanted to call his wife (because his attorney's information was saved in his cell phone, which he had left with his wife), but King was unable to place the call because Salamone could not remember his wife's phone number either. King asked Salamone whether there was anyone else to call, but Salamone only wanted to contact his wife.

¶8 Additionally, the record supports the superior court's finding that Salamone had an opportunity to use a phone book in the mobile DUI command post. Salamone argues, based on prior testimony at an administrative hearing, that no such phone book was in fact available. At the administrative hearing, Salamone denied that he ever had access to a phone book; Trooper King testified that Salamone did not *use* a phone book

but did not specify whether there was one available. At the hearing on the motion to dismiss, however, King expressly testified that there was a phone book sitting within arm's reach to Salamone's right. The superior court was aware of the prior testimony and nevertheless credited King's subsequent testimony that a phone book was available. We defer to such credibility assessments and resolutions of conflicting facts. *See Rosengren*, 199 Ariz. at 116, ¶ 9.

¶9 Salamone further argues that Trooper King interfered with his access to counsel by placing him in a holding cell, rather than in the private phone room, at the highway patrol station. But by that time, King had already taken reasonable steps to provide the assistance Salamone requested—that is, asking for the attorney's phone number, asking for the attorney's name to look up the number, asking for Salamone's wife's number to retrieve the attorney's information, and asking for any other source to contact—and Salamone had already had an opportunity to access a phone book in the mobile command post. Accordingly, and given King's acknowledgement that he would have taken Salamone to the phone room if requested, the superior court reasonably concluded that the State had not violated Salamone's right to counsel.

II. Confrontation Clause and BAC Evidence.

¶10 Salamone's blood sample was prepared and analyzed by Ms. Guilbault-Miscovich, then a criminalist working for the DPS crime laboratory. By the time of trial, however, Ms. Guilbault-Miscovich no longer worked for DPS, and the State offered BAC testimony from a different DPS criminalist, Ms. Boone, based on her review of Ms. Guilbault-Miscovich's report. Over Salamone's objection, the State also offered into evidence the chromatograms produced by the gas chromatograph reflecting the presence and amount of ethanol in Salamone's blood.

¶11 Salamone argues the superior court erred by denying his motion to suppress the BAC test results premised on his asserted constitutional right to confront Ms. Guilbault-Miscovich, the criminalist who analyzed the blood sample. He further contends the court erred by admitting into evidence the chromatograms showing his BAC. We review the court's evidentiary rulings for an abuse of discretion, but consider de novo the Confrontation Clause claim. *State v. King*, 213 Ariz. 632, 636, ¶ 15 (App. 2006). As explained below, Salamone's arguments are unavailing.

¶12 The Sixth Amendment's Confrontation Clause guarantees each criminal defendant "the right . . . to be confronted with the witnesses

against him." U.S. Const. amend. VI. It thus prohibits admission of a testimonial out-of-court statement by a witness who does not appear at trial, unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). The U.S. Supreme Court has "refused to create a 'forensic evidence' exception to this rule," instead concluding that "[a]n analyst's certification prepared in connection with a criminal investigation or prosecution . . . is 'testimonial,' and therefore within the compass of the Confrontation Clause." *Bullcoming v. New Mexico*, 564 U.S. 647, 658–59 (2011) (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319–24 (2009)).

¶13 In *Bullcoming*, the U.S. Supreme Court held that the Confrontation Clause prohibited admission of "a forensic laboratory report containing a testimonial certification, made in order to prove a fact [BAC] at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification." *Id.* at 657–58. The Court reasoned that the report contained "more than a machine-generated number": the absent criminalist had further certified that the blood sample was not compromised, that he had adhered to particular safeguards while preparing the sample, and that no circumstances during testing undermined the integrity of the sample or the validity of the analysis. *Id.* at 659–60. Moreover, "surrogate testimony" by an analyst familiar with the laboratory and procedure in general—but who had not observed the absent criminalist's actions and who had not offered an independent expert opinion—"could not convey what [the absent criminalist] knew or observed about the events his certification concerned" and could not "expose any lapses or lies on the certifying analyst's part," and thus could not satisfy the confrontation requirement. *Id.* at 661–62.

¶14 *Bullcoming* did not address an in-court expert witness's independent opinion based on testimonial reports not admitted in evidence, or introduction of "only machine-generated results, such as a printout from a gas chromatograph." *Id.* at 673–74 (Sotomayor, J., concurring in part). Later case law, however, has held that expert testimony presenting an independent opinion, even though based on review of a report prepared by a non-testifying expert, does not violate the Confrontation Clause. *See Williams v. Illinois*, 567 U.S. 50, ___, 132 S. Ct. 2221, 2240–43 (2012) (plurality opinion) (testifying expert's comparison of DNA profile to a DNA profile generated by a non-testifying scientist permissible because (1) the non-testifying scientist's report served only as basis for testifying expert's opinion and was not presented for the truth of the matter asserted and (2) the non-testifying scientist's DNA profile report

was non-testimonial because "not prepared for the primary purpose of accusing a targeted individual"); *State v. Joseph*, 230 Ariz. 296, 298–99, ¶¶ 7–13 (2012) (approving admission of testifying medical expert's opinion as to cause of death based on review of an autopsy report prepared by another doctor because testifying expert "did not act as a mere 'conduit'" for the other doctor's opinions and because the substance of the autopsy report was "offered to show the basis of the testifying expert's opinion and not to prove the truth of prior reports or opinions").

¶15 This court has previously applied the Supreme Court's holding in *Bullcoming* to the type of confrontation clause issue presented by Salamone. In *State ex rel. Montgomery v. Karp*, a criminalist analyzed a DUI suspect's blood using gas chromatography, but the criminalist had left the state and the profession by the time of trial. 236 Ariz. 120, 122, ¶ 2 (App. 2014), *review denied* (May 26, 2015). The State offered testimony from a different criminalist, who had not observed or served as technical reviewer of the original criminalist's work, but instead presented her own opinion of the defendant's BAC based on her review of the original criminalist's report, notes, and documentation of the process. *Id.* at ¶ 3.

¶16 We held that the fact that the original criminalist was not available did not create a confrontation clause violation because "when an expert gives an independent opinion, the expert is the witness whom the defendant has the right to confront." *Id.* at 124, ¶ 14. We noted that the testifying expert was not a conduit for the original criminalist's opinion, but rather offered her own independent conclusions; that the State only sought to admit the testifying expert's independent opinion, not the original criminalist's statements underlying that opinion; that the gas chromatography reports "are the product of objective, computer-generated data and do not require subjective analysis"; and that the original criminalist's report was used only to explain the basis for the testifying expert's opinion, not for the truth of the matter asserted therein, and thus fell outside the ambit of the Confrontation Clause. *Id.* at 124–25, ¶¶ 15–17.

¶17 Salamone acknowledges that *Karp* would allow admission of Ms. Boone's independent conclusions regarding his BAC, but argues that *Karp* was wrongly decided and contrary to the U.S. Supreme Court's holding in *Bullcoming*. He asserts that *Karp* overlooks that the Court in *Bullcoming* was concerned with aspects of the criminalist's report beyond simply the gas chromatograph's "machine-generated number," certifying appropriate sample handling, preparation, and processing. *See Bullcoming*, 564 U.S. at 659–60 ("These representations [regarding sample preparation and processing], relating to past events and human actions not revealed in

raw, machine-produced data, are meet for cross-examination."). But those types of additional certifications from a non-testifying analyst's report were *not* presented in *Karp*, or in this case. Here, the State did not present any out-of-court statements from Ms. Guilbault-Miscovich, for instance, certifying proper preparation and processing of the blood sample. And Salamone had the opportunity to—and did in fact—attack the reliability of the gas chromatography and Ms. Boone's resulting BAC opinion given the lack of direct evidence regarding Ms. Guilbault-Miscovich's sample preparation in this case. Because the State did not offer Ms. Guilbault-Miscovich's out-of-court certifications, no confrontation issue arises, and we decline Salamone's invitation to revisit *Karp*.

¶18 Salamone further argues that Ms. Boone's testimony was, in effect, simply a conduit to introduce Ms. Guilbault-Miscovich's BAC opinion because "the chromatograms generate and print the reported BAC right on them." For a similar reason, he argues that the superior court erred even under *Karp* by admitting in evidence the chromatograms produced from his blood sample. But the chromatograms do not include any certification (or any statement at all) by Ms. Guilbault-Miscovich; as Ms. Boone described, the graphs and numbers included on the chromatograms are generated by the instrument itself, not by the criminalist. Although the chromatograms are certainly *evidence* against Salamone, as exclusively-machine-generated data they are not out-of-court *statements* by any person, and thus are not subject to confrontation or hearsay analysis. *See Bullcoming*, 564 U.S. at 673–74 (Sotomayor, J., concurring in part); *United States v. Washington*, 498 F.3d 225, 229–31 (4th Cir. 2007); *State v. Buckland*, 96 A.3d 1163, 1169–72 (Conn. 2014); *see also* Ariz. R. Evid. 801(a) (defining "statement" as "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion").

¶19 Accordingly, the superior court did not err by allowing Ms. Boone to offer her independent opinion of Salamone's BAC or allowing admission of the chromatograms into evidence.

III. Requests for Mistrial.

¶20 Salamone argues the superior court erred by denying two requests for a mistrial, one premised on a State's witness's improper testimony and the other on the prosecutor's allegedly improper statement in rebuttal closing argument. We review denial of a mistrial for an abuse of discretion, recognizing that the superior court is in the best position to assess the impact of any improper testimony or argument, including whether the asserted errors called the jurors' attention to improper

considerations and whether the jurors were in fact influenced by the errors. *State v. Jones*, 197 Ariz. 290, 304–05, ¶¶ 32, 37 (2000).

¶21 Before trial, Salamone moved to preclude testimony from Trooper King as to the ultimate issue of whether and to what degree Salamone was impaired. The parties later agreed that King could testify to Salamone's behavior and performance on field sobriety tests being signs, symptoms, or indicators of impairment, "just as long as he doesn't form an opinion or conclusion that the defendant was impaired." At trial, the State asked King if he "ma[d]e an arrest decision" and "what was that decision?" King responded that his arrest decision "was that Mr. Salamone was impaired to [the] slightest degree."

¶22 Salamone objected and moved for a mistrial. The court agreed that Trooper King's testimony was improper but denied a mistrial, instead striking King's opinion statement that Salamone was impaired to the slightest degree, instructing the jury to disregard it, and even polling the jury to ensure each juror could disregard the stricken testimony; the court again instructed the jury to that effect in the final jury instructions.

¶23 As the superior court recognized, a witness's opinion testimony of this sort—effectively reaching the ultimate issue of guilt in a DUI case—is generally improper. *See Fuenning v. Superior Court*, 139 Ariz. 590, 605 (1983); *see also State v. Herrera*, 203 Ariz. 131, 135, ¶ 7 (App. 2002). Although Salamone now argues that Trooper King's statement about an element of the offense "is a bell that cannot be un-rung with a curative instruction," the court's resolution striking the improper testimony and giving a detailed jury instruction—as well as polling the jury to ensure that each juror affirmed his or her ability to disregard the stricken testimony—is precisely the remedy approved in *Herrera* under similar circumstances. 203 Ariz. at 135, ¶ 8. Given this prompt and comprehensive remedy, and in light of the court's unique perspective on the impact of the improper testimony, the court did not abuse its discretion by crafting an alternative remedy and denying Salamone's request for a mistrial. *See id.*

¶24 Salamone also requested a mistrial based on an allegedly improper statement in the prosecutor's rebuttal closing argument. During the defense closing argument, Salamone's attorney attacked the evidence that Salamone knew or should have known his driver's license was suspended by suggesting that, because Salamone did not go to the MVD to have his license reinstated even though he was eligible to do so more than four years before the current offense, the jury could draw a reasonable inference that Salamone (1) did not know he needed to take further action

to reinstate his license and thus (2) did not know his license was suspended at the time of the offense. In rebuttal, the prosecutor responded by stating: "[Salamone] could have reinstated in 90 days, but he didn't. Why not? We don't know why not. There's one person who could answer that question."

¶25 Salamone sought a mistrial on the basis that the prosecutor's statement was an impermissible comment on his failure to testify, *see State v. Schrock*, 149 Ariz. 433, 438 (1986), and the prosecutor seemed to confirm that the statement was intended to point out that only Salamone could answer that question, "but you didn't hear from him." The superior court nevertheless concluded that a mistrial was not warranted both because the prosecutor's comment could be interpreted more broadly (that is, simply that there was no evidence one way or the other regarding why Salamone did not apply for reinstatement) and that the brief, less-than-10-second statement did not so infect the proceedings as to deprive Salamone of a fair trial.

¶26 Even assuming the prosecutor's statement impermissibly focused on Salamone's failure to testify, the superior court did not abuse its discretion by denying a mistrial on that basis. As the court noted, the comment was a single, isolated sentence at the end of a five-day trial. *See State v. Morris*, 215 Ariz. 324, 335, ¶ 46 (2007) (noting that to warrant reversal, prosecutorial misconduct must be so pronounced and persistent that it permeates the entire atmosphere of the trial, and "so infected the trial with unfairness as to make the resulting conviction a denial of due process"); *see also State v. Trostle*, 191 Ariz. 4, 16 (1997) (prosecutor's comment on defendant's failure to testify in response to defense counsel's argument was improper, but was harmless beyond a reasonable doubt). And although Salamone argues the jury's guilty verdicts show that the comment caused him prejudice, the superior court reasonably concluded that the brief statement did not constitute such pervasive or pernicious misconduct as would undermine Salamone's right to a fair trial.

CONCLUSION

¶27 Salamone's convictions and sentences are affirmed.