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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 03-18-2010
PHILIP G. URRY, CLERK
BY: DN

STATE OF ARIZONA,) 1 CA-CR 08-0974
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
)
DONALD JAMES KRUSE,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Yavapai County

Cause Nos. V-1300-CR-0820070664

The Honorable Warren R. Darrow, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Adriana M. Rosenblum, Assistant Attorney General
Attorneys for Appellee

Emily Danies Tucson
Attorney for Appellant

J O H N S E N, Judge

¶1 Donald James Kruse appeals his convictions and sentences for four counts of aggravated assault, two counts of driving under the influence and one count each of reckless

endangerment, criminal damage, possession of a dangerous drug, possession of marijuana and possession of drug paraphernalia. For the reasons stated below, we affirm his convictions and resulting sentences.

FACTUAL AND PROCEDURAL HISTORY

¶2 At about 1 p.m. on a school day, Kruse veered left in a large pickup truck and crossed into oncoming traffic on Main Street in Cottonwood.¹ He struck head-on a smaller car driven by a teen who was driving her four girlfriends back to school after lunch.

¶3 Police officers and paramedics responded quickly to the scene. An officer approached Kruse, who was next to the truck. Kruse told him he was the driver of the truck and said he was not injured. He told the officer he had taken his morning 120 milligram dose of methadone and had smoked marijuana the week prior.

¶4 Kruse was arrested after he could not successfully complete a series of field sobriety tests. At the Cottonwood Police Department, he waived his *Miranda*² rights and submitted to a videotaped interview. Blood tests revealed the presence of

¹ We view the facts in the light most favorable to sustaining the verdicts and resolve all inferences against Kruse. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

² See *Miranda v. Arizona*, 384 U.S. 436 (1966).

marijuana, diazepam³ and methadone. According to trial testimony, the combined presence of these drugs could result in an exaggerated state of tiredness and sleepiness and could have caused Kruse to fall asleep while driving. A search of Kruse's residence found methadone, clonazepam pills, a thumb-scale, syringes, a number of marijuana cigarettes, some of them partially consumed, and items used for smoking and storing marijuana.

¶15 Four of the victims sustained serious physical injuries requiring extended stays in the hospital and multiple surgeries. Two of the four were under 15 on the date of the collision.

¶16 At trial, Kruse admitted during cross-examination he had smoked marijuana the day before the incident and had ingested two Valium pills in addition to his methadone dose the morning of the accident. He also admitted that he owned or possessed some of the drug paraphernalia, marijuana and other drugs found at his residence. The jury found Kruse guilty as charged. The court sentenced Kruse to aggravated⁴ and presumptive concurrent terms of imprisonment, the longest terms of which are fifteen years for the aggravated assaults,

³ Diazepam is sold under the trade name Valium.

⁴ The court found the victims' emotional harm and serious physical injuries to be aggravating factors.

dangerous crimes against children. Kruse timely appealed,⁵ and we have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), -4033(A)(1) (Supp. 2009).

DISCUSSION

A. Admission of Statements and Test Results.

¶7 Kruse requested a voluntariness hearing regarding statements he made at the scene of the collision and moved to preclude evidence of his field sobriety test results. After an evidentiary hearing, the court found Kruse's statements voluntary and denied the motion to suppress the test results.

¶8 Kruse contends he was unable to voluntarily speak with the officer and submit to field tests at the scene because the accident rendered him confused and unable to make intelligent decisions. Kruse also argues the statements he made at the scene were in violation of *Miranda* and the test results were unduly prejudicial under Arizona Rule of Evidence 403.

⁵ Judgment was entered October 14, 2008, and the notice of appeal was filed November 4, 2008, one day beyond the 20-day period required by Arizona Rule of Criminal Procedure 31.3. Kruse was in custody when he filed the notice. A pro per notice of appeal is deemed filed the day a prisoner delivers the notice to prison officials. *Mayer v. State*, 184 Ariz. 242, 244, 908 P.2d 56, 58 (App. 1995) (adopting holding of *Houston v. Lack*, 487 U.S. 266 (1988)). We conclude Kruse delivered the notice to prison officials within 20 days of judgment, such that the notice was timely filed. Further, although the notice only references a conviction for "aggravated DUI," we consider this appeal to be from all judgments entered and sentences imposed.

¶9 Kruse's statements are presumptively involuntary; the State has the burden of proving by a preponderance of the evidence that they were voluntary and not the product of coercion. *State v. Ross*, 180 Ariz. 598, 603, 886 P.2d 1354, 1359 (1994); *State v. Amaya-Ruiz*, 166 Ariz. 152, 164, 800 P.2d 1260, 1272 (1990). This court will not reverse the superior court's ruling absent clear error. *State v. Smith*, 193 Ariz. 452, 457, ¶ 14, 974 P.2d 431, 436 (1999). The superior court evaluates the totality of the circumstances to determine whether law enforcement improperly coerced statements from a defendant. *Id.* "When evaluating coercion, the defendant's physical and mental states are relevant to determine susceptibility to coercion, but alone are not enough to render a statement involuntary." *Id.* Rather, "[c]oercive police activity is a necessary predicate." *Id.*

¶10 In reviewing the denial of a motion to suppress, we review only the evidence submitted at the suppression hearing, and we view those facts in the manner most favorable to upholding the superior court's ruling. *State v. Box*, 205 Ariz. 492, 493, ¶ 2, 73 P.3d 623, 624 (App. 2003). The superior court determines the credibility of witnesses. *State v. Ossana*, 199 Ariz. 459, 461, ¶ 7, 18 P.3d 1258, 1260 (App. 2001). Although we defer to the court's factual determinations, we review *de*

novo its ultimate legal conclusion. *Box*, 205 Ariz. at 495, ¶ 7, 73 P.3d at 626.

¶11 The officer who questioned Kruse at the scene testified at the suppression hearing that Kruse did not appear injured, and he denied any physical injury. The officer further testified that he did not make any threats, promises or coerce Kruse in any fashion. This testimony was not contradicted.⁶ The record otherwise reflects absolutely no evidence of coercive conduct by any law enforcement representative in an attempt to induce Kruse into making statements at the scene.

¶12 The record is likewise devoid of evidence that Kruse was coerced to participate in the field sobriety tests. Absent evidence of coercive law enforcement conduct, we cannot conclude the superior court erred based solely on speculation that the collision affected Kruse in such a manner so as to render his post-accident conduct involuntary. The court likewise did not abuse its discretion in denying Kruse's motion to suppress the field sobriety test results.⁷

⁶ Kruse did not testify, nor did he provide any other evidence at the suppression hearing.

⁷ Kruse's cursory argument that his statements at the scene were made in violation of *Miranda* is without merit. According to evidence offered at the suppression hearing, Kruse was not in custody until after he performed the field tests and the officer questioned Kruse merely for purposes of determining whether a crime had been committed. See *Smith*, 193 Ariz. at 457, ¶ 18, 974 P.2d at 436 ("*Miranda's* procedural safeguards apply only to custodial interrogation."); see also *Miranda*, 384 U.S. at 477-78

B. Photographs of Victims.

¶13 Kruse next argues the superior court erred in allowing into evidence three photographs depicting the victims' medical treatment and condition after the collision. He contends that because he did not contest the victims' injuries, the photographs' minimal probative value was outweighed by their improper arousal of the jurors' emotions.

¶14 We review the admission of a photograph for abuse of discretion. *State v. Montano*, 204 Ariz. 413, 425, ¶ 55, 65 P.3d 61, 73 (2003). In our determination, we examine "the photograph's relevance, its tendency to inflame the jury, and its probative value compared to its potential to cause unfair prejudice." *State v. Morris*, 215 Ariz. 324, 339, ¶ 69, 160 P.3d 203, 218 (2007) (quoting *State v. Hampton*, 213 Ariz. 167, 173, ¶ 17, 140 P.3d 950, 956 (2006)). Relevant photographs may be admitted even if they may tend to prejudice the jury against the

("General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding."). Likewise without merit is Kruse's argument that the field sobriety test results were more prejudicial than relevant and therefore inadmissible under Arizona Rule of Evidence 403. Kruse asserts the evidence permitted the jury to unfairly conclude he was impaired and had blacked out just before the collision. However, evidence supporting those conclusions was presented to the jury by other means, including Kruse's own testimony. Kruse's field test results, moreover, were highly relevant to one of the DUI charges against him: His impairment while he was in control of the truck immediately before the collision. See *State v. Campoy*, 214 Ariz. 132, 135, ¶ 10, 149 P.3d 756, 759 (App. 2006).

defendant. *State v. Bocharski*, 200 Ariz. 50, 55, ¶ 21, 22 P.3d 43, 48 (2001). Photographs of a victim may be introduced to show, among other things, the nature and location of injuries and to corroborate, illustrate or explain testimony. *Morris*, 215 Ariz. at 339, ¶ 70, 160 P.3d at 218. Even gruesome or inflammatory photographs may be admitted so long as they are not admitted for the sole purpose of inflaming the jury. *Id.*

¶15 The court did not abuse its discretion in admitting the photographs at issue. One depicts one of the victims in a hospital bed with her head bandaged, wearing a leg brace and a neck collar. Another shows a victim with a drainage tube attached to her head wound and a nurse picking pieces of glass out of her hair. The third photograph depicts the five victims several weeks after the incident; signs of their injuries are evident in the images of the four who were most seriously injured. The photographs were relevant to illustrate and corroborate trial testimony regarding the nature and extent of the four victims' injuries and the resulting medical treatment.

¶16 The photographs' relevance is not diminished by Kruse's decision not to challenge the fact or extent of the injuries. *State v. Dickens*, 187 Ariz. 1, 18, 926 P.2d 468, 485 (1996) (even when a defendant does not contest certain issues, photographs may be admissible "because the 'burden to prove every element of the crime is not relieved by a defendant's

tactical decision not to contest an essential element of the offense.'" (quoting *Estelle v. McGuire*, 502 U.S. 62, 69 (1991)).

CONCLUSION

¶17 Kruse's convictions and sentences are affirmed.

/s/ _____
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/ _____
PATRICIA A. OROZCO, Presiding Judge

/s/ _____
JON W. THOMPSON, Judge