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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ELAINE MARIE BLANKENSHIP, Appellant.	2 CA-CR 2011-0149 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20102210001

Honorable Jose H. Robles, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz,
and Myles A. Braccio

Phoenix
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Alex Heveri

Tucson
Attorneys for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Elaine Blankenship was convicted of aggravated driving under the influence of an intoxicant (DUI) and aggravated driving with a blood-alcohol concentration of .08 or more, both committed while her license was suspended, revoked, or restricted. The trial court suspended the imposition of sentence, placed Blankenship on concurrent, five-year terms of probation, and committed her to the Arizona Department of Corrections for a four-month term pursuant to A.R.S. § 28-1383(D)(1), to be served consecutively to a sentence imposed in another case. On appeal, Blankenship contends the court erred by denying her motion to suppress the results of her blood draw, precluding the testimony of a defense witness, and failing to ensure that her leg restraints would not be visible to the jury. We affirm for the reasons stated below.

Factual Background and Procedural History

¶2 We view the facts in the light most favorable to sustaining the convictions. *State v. Fornof*, 218 Ariz. 74, ¶ 2, 179 P.3d 954, 955 (App. 2008). On June 15, 2010, Pima County Sheriff's Deputy Joseph Kennedy responded to a call from a convenience-store clerk who was concerned that an intoxicated female customer was about to drive away in a vehicle. Upon arriving at the store, Kennedy observed Blankenship sitting in the driver's seat of a vehicle matching the description given by the clerk. The engine was running and the vehicle was straddling two parking spaces.

¶3 Kennedy approached the vehicle, and when he motioned for Blankenship to roll down the window, she began "yelling . . . like she was looking for someone." Blankenship claimed she was calling for her friend, S.M. Another deputy tried to locate S.M. in the area but could not find her. After Blankenship failed field-sobriety tests, she

was arrested for DUI. Kennedy then transported her to the Pima County Jail where another deputy conducted a blood draw.

¶4 A grand jury subsequently indicted Blankenship for the two counts described above. At trial, Blankenship admitted she had been drinking alcohol but claimed S.M. had driven to the store. Blankenship testified that when Kennedy arrived, she was "looking around" for S.M., who had gone to meet someone by the dumpster behind the store when Blankenship went inside to purchase some liquor. A jury found Blankenship guilty of both offenses, and the trial court sentenced her as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21, 13-4031, and 13-4033.

Discussion

Motion to Suppress

¶5 Blankenship argues the trial court erred by denying her motion to suppress blood-alcohol evidence obtained from the blood draw conducted after her arrest. She claims the blood draw was "performed in an incompetent, unreasonable, and unsafe manner" in violation of the Fourth Amendment to the United States Constitution.[1] In reviewing the court's decision, we consider only the evidence presented at the hearing on the motion to suppress, and we view that evidence in the light most favorable to

[1]Although Blankenship argues the blood draw also violated her rights under article 2, § 8 of the Arizona Constitution, the prohibitions under article 2, § 8 have been construed consistently with those under the Fourth Amendment, except in the home-search context. *State v. Juarez*, 203 Ariz. 441, ¶ 15, 55 P.3d 784, 788 (App. 2002); *see also State v. Johnson*, 220 Ariz. 551, ¶ 13, 207 P.3d 804, 810 (App. 2009). Thus, "we rely on Fourth Amendment jurisprudence in determining the propriety" of the trial court's decision. *State v. Teagle*, 217 Ariz. 17, n.3, 170 P.3d 266, 271 n.3 (App. 2007).

sustaining the ruling. *State v. Zamora*, 220 Ariz. 63, ¶ 7, 202 P.3d 528, 532 (App. 2009). We will not reverse a trial court's denial of a motion to suppress absent an abuse of discretion. *State v. Szpryka*, 220 Ariz. 59, ¶ 2, 202 P.3d 524, 526 (App. 2008). Although we defer to the court's factual findings, we review its legal conclusions de novo. *State v. Wyman*, 197 Ariz. 10, ¶ 5, 3 P.3d 392, 395 (App. 2000).

¶6 The Fourth Amendment's guarantee against unreasonable searches and seizures is violated when a defendant's blood is drawn in an unreasonable manner. *See State v. May*, 210 Ariz. 452, ¶¶ 5-6, 112 P.3d 39, 41 (App. 2005); *see also Schmerber v. California*, 384 U.S. 757, 771-72 (1966). In determining reasonableness, the trial court must evaluate the "means and procedures" used in the defendant's particular blood draw. *Schmerber*, 384 U.S. at 768; *see also State v. Noceo*, 223 Ariz. 222, ¶ 8, 221 P.3d 1036, 1039 (App. 2009).

¶7 The following evidence was presented at the suppression hearing. After Blankenship's arrest, Kennedy transported her to the Pima County Jail at the request of Deputy Michael Buglewicz, who agreed to meet Kennedy there to conduct a blood draw. When Buglewicz arrived at the jail, he observed Blankenship sitting in the backseat of Kennedy's patrol car "being uncooperative" and "complaining she was in a lot of pain." After positioning Blankenship in the rear passenger seat with her feet on the ground outside the vehicle, Buglewicz inspected her arms, asked about her medical conditions, and cleaned the area for the draw. He testified that he inserted the needle without incident. But as Buglewicz was switching from the first vial to the second, Kennedy accidently stepped on Blankenship's foot. Buglewicz testified that despite Blankenship's

"screaming" and "moving," he managed to keep her arm restrained and was able to complete the draw.

¶8 Blankenship first contends the location of the blood draw—performed while she was seated on the rear passenger side of a patrol car with her feet on the ground as Buglewicz held her arm—was unreasonable. This court has repeatedly rejected similar arguments. *See Noceo*, 223 Ariz. 222, ¶ 12 & n.3, 221 P.3d at 1040 & n.3 (blood draw conducted in back seat of patrol car reasonable); *May*, 210 Ariz. 452, ¶¶ 7, 9, 112 P.3d at 41-42 (blood draw conducted while defendant and deputy stood at rear of police car not performed in unreasonable manner); *State v. Clary*, 196 Ariz. 610, 614-16, 2 P.3d 1255, 1259-61 (App. 2000) (Fourth Amendment protections do not prohibit use of objectively reasonable force to overcome resistance to blood draw pursuant to search warrant). Although Buglewicz acknowledged the location of the blood draw in this case was not ideal, he stated he decided not to move Blankenship as an accommodation to her because she "was complaining of pain to her arms and legs." And, as to Blankenship's concern that she had nowhere to rest her arm, Buglewicz testified that he held the arm from which he was drawing blood to keep it steady. On this record, the trial court did not err in concluding that the location of the blood draw was not unreasonable.

¶9 Blankenship next claims "Buglewicz's disregard for basic safety led to Kennedy accidently stepping on [her] foot during the draw." And she asserts "[h]er reaction to the pain caused her to move and push the needle sideways and deeper into her vein. She experienced excruciating pain and the next day she had a serious contusion from the draw." Buglewicz testified the accident occurred after the draw had already

begun—as he was filling the second vial. Blankenship's expert testified that this type of accident "is an occurrence that obviously happens, [and the phlebotomist] just need[s] to know how to handle it when it does happen." Although the expert stated the appropriate procedure would have been to remove the needle and stop the blood draw, Buglewicz testified he was able to complete the procedure without complication. He stated that he held on to Blankenship's arm with one hand while he kept the needle in the vein with the other. According to Buglewicz, the needle went in a little further but no more so than would be acceptable for a usual blood draw and that the vein did not collapse. Buglewicz acknowledged that drawing blood causes some individuals to bruise and testified he observed bruising on Blankenship's right arm from a recent, unrelated blood draw. The trial court reasonably could have concluded, based on Buglewicz's testimony, that the mishap did not render completion of the blood draw unreasonable.

¶10 Finally, Blankenship contends the manner of the draw was unreasonable because of her medical conditions.[2] The deputies and Blankenship gave conflicting testimony about which medical conditions Blankenship mentioned before the draw. Buglewicz stated Blankenship told him she had low or no white blood cell count and was taking blood thinners. Blankenship's expert did not rule out a blood draw from someone with those conditions, as long as proper precautions were taken. Although the expert opined that proper precautions were not taken here, Buglewicz testified he had medical

[2]Blankenship also asserts Buglewicz "testified that he disregards all medical risks when drawing a person's blood." This simply mischaracterizes the deputy's testimony. Buglewicz actually testified that he would draw anyone's blood, but he would take certain precautions depending on the person's medical conditions.

equipment on hand to deal with infection and excessive bleeding. We cannot say the trial court erred in concluding the procedure was reasonable, notwithstanding Blankenship's medical conditions.

Witness Preclusion

¶11 Blankenship next argues the trial court erred in precluding her from calling her husband, F.C., as a witness at trial. She contends the court "mechanistic[ally] appli[ed]" Rule 15.6, Ariz. R. Crim. P., relating to untimely disclosed witnesses, and failed to consider less drastic alternatives to preclusion. We review for an abuse of discretion the court's ruling on admissibility of evidence, *State v. Tucker*, 215 Ariz. 298, ¶ 46, 160 P.3d 177, 192 (2007), and imposition of sanctions for a Rule 15 violation, *State v. Armstrong*, 208 Ariz. 345, ¶ 40, 93 P.3d 1061, 1070 (2004). Although a trial court has wide discretion in discovery matters, it abuses its discretion when it misapplies the law. *State v. Fields*, 196 Ariz. 580, ¶ 4, 2 P.3d 670, 672 (App. 1999). The court's decision will not be reversed on appeal absent an error of law and resulting prejudice. *State v. Delgado*, 174 Ariz. 252, 256, 848 P.2d 337, 341 (App. 1993).

¶12 On the first day of trial, Blankenship filed a motion to permit F.C. to testify or, alternatively, to continue the trial. According to Blankenship, F.C. would testify that on the evening of June 15, 2010, S.M. was visiting Blankenship at their home, and when the two left for the store, he gave the car keys to S.M. because his wife had been drinking. Despite having interviewed F.C. months prior, Blankenship's attorney claimed F.C. revealed these facts to him for the first time the day before trial. Blankenship argued the state would suffer no prejudice from the late disclosure because F.C.'s testimony

would be brief and the prosecutor could interview F.C. before he testified. The trial court denied the motion.

¶13 Defendants generally must disclose the names and addresses of all witnesses they intend to call at trial not later than "40 days after arraignment or within 10 days after the prosecutor's disclosure pursuant to Rule 15.1(b), whichever occurs first." Ariz. R. Crim. P. 15.2(c), (d). But as a final deadline, disclosure of witnesses "shall be completed at least seven days prior to trial." Ariz. R. Crim. P. 15.6(c). To present evidence or witnesses not disclosed at least seven days before trial, a party must obtain leave from the trial court. Ariz. R. Crim. P. 15.6(d). In the absence of a finding by the court that the undisclosed material or information sought to be used could not have been discovered or disclosed in compliance with the rules, "the court may either deny leave or grant a reasonable extension to complete the disclosure and leave to use the material or information." *Id.* A party who does not meet the requisite burden is not subject to "automatic preclusion of the evidence whose admission is being sought." Ariz. R. Crim. P. 15.6 committee cmt. Rather, "the court retains discretion to impose at least one of the Rule 15.7 sanctions," including preclusion. *Id.*; *see also State v. Scott*, 24 Ariz. App. 203, 205, 537 P.2d 40, 42 (1975) (trial court has discretion to determine appropriate relief for Rule 15 violation).

¶14 Here, the trial court denied Blankenship's motion to allow F.C. to testify because "the evidence could have been discovered or disclosed earlier" since F.C. is Blankenship's husband. The court concluded Rule 15.6(d) is procedural and does not require "prejudice or anything of that nature." The court apparently did not believe it had

discretion to impose a sanction other than preclusion after finding the evidence could have been discovered sooner. Because that belief was incorrect, we conclude the court abused its discretion by automatically precluding F.C.'s testimony without considering alternate sanctions under Rule 15.7. *See* Ariz. R. Crim. P. 15.6 committee cmt.; *see also State v. Garza*, 192 Ariz. 171, ¶ 18, 962 P.2d 898, 903 (1998) ("When a judge has discretion and fails to recognize his obligation to use that discretion . . . , we must conclude he abused or failed to exercise that discretion.").

¶15 However, we conclude the error was harmless and not prejudicial because we are satisfied beyond a reasonable doubt that it did not contribute to or affect the verdict. *See State v. Fulminante*, 193 Ariz. 485, ¶ 49, 975 P.2d 75, 90 (1999). At trial, Blankenship admitted she was intoxicated and her license was suspended. Deputy Kennedy testified that Blankenship was seated in the driver's seat of a vehicle with its engine running. Despite Blankenship's defense that S.M. had driven her to the store, Kennedy testified that only after he motioned for her to roll down the car window did she start "yelling . . . like she was looking for someone." Kennedy also observed "a lot of items on the passenger seat of the vehicle," which made it unlikely that Blankenship had been sitting there as a passenger as she had claimed. And S.M. never was located. Moreover, F.C.'s testimony was to be limited to the fact that he had handed S.M. the car keys inside the house—he did not see who actually drove the vehicle. *See Delgado*, 174 Ariz. at 260, 848 P.2d at 345 (to establish prejudice, defendant must show evidence was material to defense).

Leg Restraints

¶16 Blankenship argues the trial court's "failure to accommodate [her] request to not be singled out as the only witness who [did not] walk [before the jury] to the witness stand because she was shackled violated her constitutional rights to a fair trial and to be presumed innocent." Generally, "[m]atters of courtroom security are left to the discretion of the trial court." *State v. Davolt*, 207 Ariz. 191, ¶ 84, 84 P.3d 456, 476 (2004). We will uphold the trial court's decision on such matters when it is supported by the record. *State v. Dixon*, 226 Ariz. 545, ¶ 22, 250 P.3d 1174, 1180 (2011).

¶17 On the second day of trial, Blankenship requested that the state's first witness take the stand before the jury entered the courtroom so that she would not be the only witness who did not walk to the stand in front of the jury. The court denied her request. Prior to testifying, Blankenship took the stand while the jury was not present and her attorney instructed her not to stand when the jurors entered or left the courtroom so they would not see her leg restraints. After a subsequent witness testified, a member of the jury who was later designated as an alternate gave the court a written question, inquiring why Blankenship's legs were hidden and the jury did not get to see her walk. After a discussion with counsel, the court decided not to respond to the question.

¶18 The Fifth and Fourteenth Amendments of the United States Constitution prohibit courts from routinely placing defendants in shackles or other physical restraints that are visible to the jury. *See Deck v. Missouri*, 544 U.S. 622, 629 (2005). Before authorizing the use of restraints, "the trial court must make a 'case specific' determination reflecting 'particular concerns, say, special security needs or escape risks,

related to the defendant on trial.'" *Dixon*, 226 Ariz. 545, ¶ 25, 250 P.3d at 1180, *quoting Deck*, 544 U.S. at 633; *see also State v. Bassett*, 215 Ariz. 600, ¶ 10, 161 P.3d 1264, 1266 (App. 2007) (rule also applies to non-visible restraints).

¶19 Blankenship did not challenge the use of leg restraints during trial and has not done so on appeal. Rather, she suggests failure to grant her request to have another witness seated when the jury was brought into the courtroom improperly led the jury to infer that she was shackled. The Ninth Circuit rejected a similar argument in *Castillo v. Stainer*, 983 F.2d 145, 149 (9th Cir. 1992). There, the court found the argument that the jury would infer the presence of restraints because the defendant did not move in front of the jury "unpersuasive." *Id.* *But see State v. Finch*, 975 P.2d 967, 1005 (Wash. 1999) (jury could infer restraints from short stride).

¶20 In any event, we find no error here. "An appellate court will not find error on the ground that the defendant was shackled unless it is shown that the jury saw the shackles." *State v. McMurtrey*, 136 Ariz. 93, 98, 664 P.2d 637, 642 (1983). Precautions were taken to ensure that the jury did not see Blankenship's restraints. Blankenship's argument that the jury knew of the restraints, given one juror's question, is purely speculative. And Blankenship did not ask the trial court to question the jurors about the matter, nor did she seek "to make an evidentiary record after trial." *State v. Apelt*, 176 Ariz. 349, 361, 861 P.2d 634, 646 (1993) (defendant could have, but did not, request post-trial voir dire of jury to identify any prejudice resulting from brief exposure to defendant in handcuffs and shackles).

¶21 Blankenship's argument that the trial court erred in denying her motion for a mistrial based on the juror's question fails for the same reason. To warrant a mistrial, Blankenship was required to demonstrate that she suffered prejudice because she was wearing leg restraints. *State v. Mills*, 196 Ariz. 269, ¶ 8, 995 P.2d 705, 707-08 (App. 1999). We review the denial of a motion for mistrial for abuse of discretion. *State v. Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d 345, 359 (2000). Here, there is nothing in the record to suggest the jury saw the restraints. Moreover, Blankenship cannot demonstrate she suffered prejudice because the juror who posed the question to the court did not participate in the deliberations. *Cf. State v. Speer*, 221 Ariz. 449, ¶ 76, 212 P.3d 787, 801 (2009) (seating alternate juror obviates any prejudice when one juror sees restraints).

Disposition

¶22 For the foregoing reasons, Blankenship's convictions and sentences are affirmed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge