IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. SUSAN FINSTERER, Appellant.	2 CA-CR 2011-0312 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20103350001

Honorable Jose H. Robles, Judge Pro Tempore

AFFIRMED

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B R A M M E R, Judge.

¶1 Susan Finsterer appeals from her convictions and sentences for four counts of aggravated driving under the influence (DUI). She argues the trial court erred in refusing to dismiss the charges against her because the state had violated her due process right to obtain an independent blood test. Finsterer also contends the court erred by denying her motion for a mistrial made after a witness remarked on her invocation of the right to counsel at the time of her arrest. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding Finsterer's convictions and sentences. *See State v. Bigger*, 227 Ariz. 196, ¶ 2, 254 P.3d 1142, 1145 (App. 2011). On September 20, 2010, Officer David Ortiz stopped Finsterer because the taillights on her vehicle were not illuminated, she had made an improper left-hand turn, and her insurance policy on the vehicle had been cancelled. Ortiz smelled alcohol and noticed Finsterer "appeared confused and had a flush[ed] appearance." After she got out of the vehicle, Finsterer was swaying noticeably while walking. Ortiz administered a horizontal gaze nystagmus test and Finsterer displayed six out of six cues for alcohol impairment. He administered two additional field sobriety tests, one of which Finsterer failed. After the tests, Ortiz read Finsterer the *Miranda*[1] warnings, and she asked to speak to an attorney. Ortiz then allowed her to use his cellular telephone to contact her attorney. After arresting her and transporting her to the police station, another officer administered two breath tests, and the results showed her blood alcohol concentration (BAC) was .114 and .110 approximately two hours after she had been stopped.

¶3 Finsterer was charged with aggravated DUI while her license was suspended or revoked, aggravated DUI with a BAC of .08 or more while her license was suspended or revoked, aggravated DUI with at least two prior DUI convictions within the preceding eighty-four months, and aggravated DUI with a BAC of .08 or more with at

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

least two prior DUI convictions within the preceding eighty-four months. Before trial Finsterer moved to dismiss the charges against her alleging she had been denied a reasonable opportunity to obtain an independent blood test in violation of her due process rights. After an evidentiary hearing, the trial court denied the motion.

¶4 During trial Finsterer moved for a mistrial after Ortiz testified she had invoked her right to counsel. The trial court denied the motion but instructed the jury to disregard the officer's statement. The state later informed the court that Ortiz had revealed he made the statement intentionally. After a three-day jury trial, Finsterer was convicted as charged. The court suspended the imposition of sentence and imposed concurrent four-year-terms of probation on each count, with credit for presentence incarceration of four months to satisfy the requirements of A.R.S. § 28-1383(D). This appeal followed.

Discussion

Motion for Dismissal of Charges

¶5 Finsterer argues the trial court erred in refusing to dismiss the charges against her because her due process right to obtain an independent blood test had been violated. We review a court's ruling on a motion to dismiss charges for an abuse of discretion, *State v. Sanchez*, 192 Ariz. 454, ¶ 4, 967 P.2d 129, 131 (App. 1998), but review Finsterer's due process claim de novo, *see Mack v. Cruikshank*, 196 Ariz. 541, ¶ 6, 2 P.3d 100, 103 (App. 1999).

¶6 A defendant's right to obtain an independent blood test derives from the due process right to gather exculpatory evidence. *Van Herreweghe v. Burke*, 201 Ariz. 387, ¶¶ 6-8, 36 P.3d 65, 67-68 (App. 2001). Additionally, A.R.S. § 28-1388(C) provides:

> The person tested shall be given a reasonable opportunity to arrange for any physician, registered nurse or other qualified person of the person's own choosing to administer a test or tests in addition to any administered at the direction of a law enforcement officer. The failure or

> inability to obtain an additional test by a person does not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer.

Due process requires only that defendants must have a "'fair chance' to obtain potentially exculpatory evidence." *Sanchez*, 192 Ariz. 454, ¶ 5, 967 P.2d at 131, *quoting Montano v. Superior Court*, 149 Ariz. 385, 389, 719 P.2d 271, 275 (1986). But an unreasonable or unconstitutional interference with the right to obtain an independent blood test requires dismissal of the charges. *Id.* ¶ 9.

¶7 Ortiz stopped Finsterer's vehicle at 12:23 a.m. and arrested her at 12:50 a.m. After both Finsterer and Ortiz spoke with her attorney, Ortiz transported her to the police substation, arriving at 1:36 a.m. Another officer administered breath tests at 2:11 a.m. and 2:17 a.m. Finsterer requested an independent blood test, and Ortiz placed her in a cell so that he could complete her arrest-related paperwork. Ortiz testified completing the paperwork took longer than usual because Finsterer was "kicking and screaming inside the cell" and he was required to stop and check on her welfare. At some point between 3:20 a.m. and 3:33 a.m. as Ortiz attempted to search her before transporting her to a hospital for a blood test, Finsterer tried to bite his arm, causing further delay because additional officers became involved. Finsterer was transported to the hospital at 3:53 a.m. and then obtained a blood draw.

¶8 We disagree with Finsterer's assertion that the officers "creat[ed] unnecessary delay in transporting [her] to the hospital." The record demonstrates that she, not the officers, caused much of the delay. *See Van Herreweghe*, 201 Ariz. 387, ¶ 10, 36 P.3d at 68 ("The difficulties of obtaining an independent test do not violate a defendant's rights if those difficulties are not created by the State."). And although Finsterer relies on *Amos v. Bowen*, 143 Ariz. 324, 693 P.2d 979 (App. 1984), that case is distinguishable. There, the transporting officer caused a two-hour delay in the defendant obtaining an independent blood test by stopping on the way to the hospital to intervene in an assault. *Id.* at 327-28, 693 P.2d at 982-83. No similar "affirmative conduct" by law

enforcement personnel caused an unreasonable delay here. *See id.* at 328, 693 P.2d at 983. Thus we find no unreasonable or unconstitutional interference with Finsterer's ability to obtain an independent blood test. *See Sanchez*, 192 Ariz. 454, ¶ 9, 967 P.2d at 132.

¶9 Moreover, Finsterer did obtain an independent blood test. And an expert testified that, notwithstanding "additional technical difficulties" when analyzing a blood sample taken more than two hours after driving because it must be "related back" to the time of driving, the sample could provide a reasonable estimate of Finsterer's BAC at the time she drove by using the process of retrograde extrapolation. *See generally State v. Claybrook*, 193 Ariz. 588, ¶¶ 14-15, 975 P.2d 1101, 1103 (App. 1998) (recognizing method and noting procedure generally accepted in scientific community). Therefore, we find no due process violation in the delay before Finsterer obtained her independent blood test, and the trial court did not abuse its discretion in refusing to dismiss the charges against her. *See Sanchez*, 192 Ariz. 454, ¶ 4, 967 P.2d at 131.

Motion for Mistrial

¶10 Finsterer also argues the trial court erred by denying her motion for a mistrial after Ortiz testified she had invoked her right to counsel. We review a court's denial of a motion for a mistrial for an abuse of discretion. *State v. Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d 345, 359 (2000). Because the court "is in the best position to assess the impact of a witness's statements on the jury," we defer to its discretionary determination. *State v. Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d 231, 244 (2003). A mistrial is "'the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted.'" *Id.*, *quoting State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983).

¶11 Statements at trial regarding a defendant's invocation of the right to counsel violate the defendant's due process rights. *State v. Palenkas*, 188 Ariz. 201, 212, 933 P.2d 1269, 1280 (App. 1996). However, Finsterer has failed to explain why a mistrial

was the necessary or exclusive remedy to cure the violation here. She suggests the trial court should have granted her a mistrial because Ortiz made the statement intentionally, but offers no relevant legal support for that argument. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (briefs must contain argument and supporting authority); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on review). Rather, "[w]hen a witness unexpectedly volunteers an inadmissible statement, the action called for rests largely within the discretion of the trial court which must evaluate the situation and decide if some remedy short of mistrial will cure the error." *Adamson*, 136 Ariz. at 262, 665 P.2d at 984.

¶12 Here, we find no abuse of discretion in the trial court's decision to offer a limiting instruction instead of declaring a mistrial as it was in the best position to determine the appropriate remedy. *See Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d at 244. The court immediately instructed the jury to disregard the statement Ortiz made. *See id.* ¶ 48 (curative instruction permissible to address improper witness testimony). We presume that jurors follow the instructions they are given, *State v. McCurdy*, 216 Ariz. 567, ¶ 17, 169 P.3d 931, 938 (App. 2007), and that they did so here. Therefore, we cannot say a mistrial was the only appropriate remedy, and thus the court did not abuse its discretion in denying Finsterer's motion. *See Adamson*, 136 Ariz. at 262, 665 P.2d at 984.

Disposition

¶13 For the foregoing reasons, we affirm Finsterer's convictions and sentences.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge