FILED BY CLERK
SEP 11 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. PATRICIA LYNNE ROHRSCHNEIDER, Appellant.	2 CA-CR 2011-0314 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20110527001

Honorable Paul E. Tang, Judge

AFFIRMED

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

Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Robb P. Holmes

Tucson
Attorneys for Appellant

H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Patricia Rohrschneider was convicted of four counts of aggravated driving under the influence of intoxicating liquor. On appeal, Rohrschneider contends the state improperly shifted the burden of proof and deprived her of the benefit of the presumption of innocence during its rebuttal closing argument. Because we find no prejudicial, fundamental error, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the jury's verdicts. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). A police officer stopped the vehicle Rohrschneider was driving because it had only one working headlight. During the stop, he noticed Rohrschneider had watery, bloodshot eyes, a flushed face, and slightly uncoordinated movements. Rohrschneider failed two field sobriety tests, placed herself at a six on an impairment scale of one to ten, and later admitted she had consumed a pint and a half of vodka. The officer arrested Rohrschneider and conducted a breathalyzer test resulting in two samples with an alcohol concentration (AC) of .372 and .370.

¶3 Rohrschneider subsequently was charged with and convicted of four counts of aggravated driving under the influence of intoxicating liquor. Rohrschneider appeals from these convictions.

Discussion

¶4 Rohrschneider argues the state's rebuttal closing argument violated her rights under the United States and Arizona constitutions and amounted to prosecutorial misconduct because it "misstated the law on presumption of innocence and shifted the

burden of proof to [Rohrschneider]." Because she did not make these objections at trial, we review only for fundamental, prejudicial error. *See State v. Hernandez*, 170 Ariz. 301, 307, 823 P.2d 1309, 1315 (App. 1991) (prosecutorial misconduct not objected to below forfeited absent fundamental error); *see also State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993) (constitutional claims not objected to below also forfeited absent fundamental error).

¶5 To show error is fundamental, the defendant must establish that: (1) an error occurred; (2) the error was fundamental; and (3) the error resulted in prejudice. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Prejudice results only when, "but for the error, a reasonable fact-finder 'could have reached a different result.'" *State v. Joyner*, 215 Ariz. 134, ¶ 31, 158 P.3d 263, 273 (App. 2007), *quoting Henderson*, 210 Ariz. 561, ¶ 27, 115 P.3d at 609. To determine the prejudicial nature of remarks made during closing arguments, we must consider the prosecutor's statements and the jury instructions in context. *Hernandez*, 170 Ariz. at 308, 823 P.2d at 1316. Rohrschneider has failed to show that any fundamental, prejudicial error occurred here given the context within which the prosecutor made the remarks and the overwhelming evidence against Rohrschneider.

¶6 At trial, the prosecutor stated during her rebuttal closing argument that there "is no longer the presumption of innocence because that presumption has been rebutted by all of the facts." She also implied that because Rohrschneider had not "explained away" the state's evidence, the jury must find Rohrschneider guilty. We need

not consider whether these remarks were improper[1] or whether any error was fundamental, because Rohrschneider has not shown that any prejudice resulted from them. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. The prosecutor's comments, even if interpreted to have been improper, were an anomaly in an otherwise consistent stream of correct statements of the law. Not only did defense counsel correctly explain the presumption and burden during both opening and closing arguments, but the court also gave equally correct preliminary and final jury instructions. Additionally, the evidence of Rohrschneider's guilt was overwhelming and she is not disputing its accuracy or sufficiency. Specifically, she failed two field sobriety tests, admitted both that she was at a six on an impairment scale of one to ten and that she had consumed a pint and a half of vodka, and a breathalyzer test resulted in two samples showing an AC of .372 and .370. No reasonable fact-finder could have reached a different result and we conclude Rohrschneider has failed to show the prosecutor's remarks prejudiced her in any way.

[1]We encourage prosecutors to avoid remarks that could be construed as an improper elimination of the presumption of innocence or a shifting of the burden of proof. We long have held that "the presumption of innocence and the state's burden of proof in criminal cases . . . require the jury to determine whether the state has satisfied its burden." *State v. Preston*, 197 Ariz. 461, ¶ 12, 4 P.3d 1004, 1009 (App. 2000); *see also Coffin v. United States*, 156 U.S. 432, 453-60 (1895) (discussing complete legal history of presumption of innocence and state's burden of proof).

Conclusion

¶7 For the foregoing reasons, we affirm Rohrschneider's convictions and sentences.

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

CONCURRING:

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

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