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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THE STATE OF ARIZONA, Appellee, v. PAUL ALAN KOSCIELSKI, Appellant.	2 CA-CR 2007-0364 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20064135

Honorable Howard Hantman, Judge

AFFIRMED

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P E L A N D E R, Chief Judge.

¶1 In this appeal from his convictions for aggravated driving under the influence of an intoxicant (DUI), aggravated driving with an alcohol concentration (AC) of .08 or more within two hours of driving, and two counts of endangerment, appellant Paul Koscielski argues the trial court fundamentally erred in instructing the jury on the statutory presumptions of impairment. Finding no error, we affirm.

Background

¶2 We view the evidence and all reasonable inferences therefrom in the light most favorable to upholding the convictions. *State v. Poshka*, 210 Ariz. 218, ¶ 2, 109 P.3d 113, 114 (App. 2005). In April 2006, Koscielski failed to stop for a red light while driving his motorcycle with a passenger on the back. He collided in the intersection with a vehicle making a left turn. Koscielski was taken to the hospital, where an investigating police officer noticed the odor of intoxicants and observed that Koscielski had a flushed face and watery, bloodshot eyes. Subsequent testing of a blood sample drawn within one hour of the collision showed Koscielski's blood had an AC of .135.

Discussion

¶3 Koscielski argues the trial court fundamentally erred when it instructed the jury, pursuant to A.R.S. § 28-1381(G)(3), as follows: "If there was [within two hours of driving] 0.08 or more alcohol concentration in the defendant's blood, it may be presumed that the defendant was under the influence of intoxicating liquor." He maintains that instruction was based on an unreasonable statutory presumption, impermissibly "relieved the state of its burden to prove beyond a reasonable doubt that [he] was impaired," and violated his "state

and federal constitutional due process rights." On those grounds, Koscielski urges us to vacate his aggravated DUI conviction. Because Koscielski did not object to the instruction below, we review only for fundamental error. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) ("Fundamental error review . . . applies when a defendant fails to object to alleged trial error.").

¶4 Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Id.*, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20. "To obtain relief under the fundamental error standard of review, [a defendant] must first prove error." *Id.* ¶ 23. Koscielski has failed to prove any error, fundamental or otherwise, occurred here.

¶5 In *State v. Klausner*, 194 Ariz. 169, 978 P.2d 654 (App. 1998),[1] Division One of this court addressed and rejected the same argument Koscielski raises. But Koscielski contends *Klausner*'s "reasoning is flawed" and urges us to depart from its holding. We will not do so, however, "'unless we are convinced that [the holding is] based upon clearly erroneous principles, or conditions have changed so as to render [it] inapplicable.'"

[1]There is only one substantive difference between the statute analyzed in *Klausner* and § 28-1381(G) as it read in 2006, the date of Koscielski's offense: the AC level that gives rise to a presumption of intoxication has been changed from .10 to .08. *See* 2001 Ariz. Sess. Laws, ch. 95, § 5; 2005 Ariz. Sess. Laws, ch. 307, § 4. The instructions here correctly included the .08 AC level.

Danielson v. Evans, 201 Ariz. 401, ¶ 28, 36 P.3d 749, 757 (App. 2001), *quoting Castillo v. Indus. Comm'n*, 21 Ariz. App. 465, 471, 520 P.2d 1142, 1148 (1974) (second alteration in *Danielson*); *see also Nat'l Indem. Co. v. St. Paul Ins. Cos.*, 150 Ariz. 492, 493, 724 P.2d 578, 579 (App. 1985) ("only the most cogent of reasons will justify a divergence between the two" divisions of court of appeals), *vacated in part on other grounds*, 150 Ariz. 458, 724 P.2d 544 (1986).

¶6 According to Koscielski, *Klausner* conflicts with *Desmond v. Superior Court*, 161 Ariz. 522, 779 P.2d 1261 (1989). In *Desmond*, our supreme court held that the state must present relation-back evidence to establish a defendant's impairment at the time of driving based on the defendant's AC after driving. *Id*. at 527-28, 779 P.2d at 1266-67. But our legislature amended the presumption provision (former A.R.S. § 28-692(E)(3)), now set forth in § 28-1381(G)(3), in response to the holding in *Desmond*.[2] *See Klausner*, 194 Ariz.

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[2]Section 28-1381(G) provides in part:

> In a trial, action or proceeding for a violation of this section or § 28-1383 . . . , the defendant's alcohol concentration within two hours of the time of driving or being in actual physical control as shown by analysis of the defendant's blood, breath or other bodily substance gives rise to the following presumptions:
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> . . . .
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> 3. If there was at that time 0.08 or more alcohol concentration in the defendant's blood, breath or other bodily substance, it may be presumed that the defendant was under the influence of intoxicating liquor.

169, ¶ 16, 978 P.2d at 658 (discussing former version of § 28-1381(G)(3)). And this court has stated that *Desmond* is no longer applicable in view of the amendments to the DUI statutes. *State v. Gallow*, 185 Ariz. 219, 221, 914 P.2d 1311, 1313 (App. 1995); *see also State v. Guerra*, 191 Ariz. 511, ¶ 12, 958 P.2d 452, 456 (App. 1998) (legislature intended amendment to respond to *Desmond* and facilitate conviction of defendant charged with DUI; "reasonable to presume" that person whose AC within two hours of driving was above legal limit "was under the influence of intoxicating liquor at the time of driving").

¶7 The permissive, rebuttable-presumption instruction in question merely allowed the jury to infer Koscielski had been under the influence of alcohol based on his AC. The state still had to prove he had been at least slightly impaired. *See* § 28-1381(A)(1); *see also Guerra*, 191 Ariz. 511, ¶ 12, 958 P.2d at 456; *Gallow*, 185 Ariz. at 221, 914 P.2d at 1313. Consequently, the state ultimately retained its burden of proof. The trial court also instructed the jury that the permissive presumption "shall not be construed as limiting the introduction of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of intoxicating liquor." The two instructions together accurately stated the law. *See State v. Rutledge*, 197 Ariz. 389, ¶ 15, 4 P.3d 444, 448 (App. 2000) (jury instructions read in their entirety must state law accurately).

¶8 "Conclusive or irrebuttable presumptions unconstitutionally relieve the State of its burden of proof." *Norton v. Superior Court*, 171 Ariz. 155, 158, 829 P.2d 345, 348 (App. 1992). But a permissive presumption—one that allows a jury to presume a fact from a predicate fact—"is constitutional if there is a rational connection between the predicate and

presumed facts." *State v. Spoon*, 137 Ariz. 105, 110, 669 P.2d 83, 88 (1983). "The fact that the presumptions will bear a stronger relationship to the fact to be proved in some cases than in others does not mean that the jury should not be instructed on the presumptions." *Klausner*, 194 Ariz. 169, ¶ 18, 978 P.2d at 658.

¶9 In sum, we find no cogent reason to depart from *Klausner*'s holding that § 28-1381(G)(3) does not violate due process because its presumption is permissive and because, contrary to Koscielski's assertion that the statutory presumption is unreasonable, a rational connection exists between the fact presumed and the fact to be proved. *See id*. ¶¶ 11-12, 16-18; *cf. Poshka*, 210 Ariz. 218, ¶ 13, 109 P.3d at 117 ("The 'logical connection' between the statute and its underlying purpose that [appellant] asserts is absent here is, quite distinctly, a discrete period of time—two hours—within which it can be said that one's ability to safely operate a vehicle has been compromised by a defined level of alcohol consumption, and an implicit recognition that it is never possible to test a driver's []AC until after he or she has stopped driving."). Because *Klausner* is not clearly erroneous and conditions have not changed, *see Danielson*, 201 Ariz. 401, ¶ 28, 36 P.3d at 757, the trial court did not fundamentally err in instructing the jury on the presumption of impairment while driving based on Koscielski's AC.

¶10 Finally, even if fundamental error had occurred here, Koscielski "has not carried [his] burden of demonstrating prejudice from the jury instruction." *State v. Bartolini*, 214 Ariz. 561, ¶ 16, 155 P.3d 1085, 1089 (App. 2007). The state's expert testified without contradiction that all people with an AC of .08 or higher are considered impaired. "The

presumption instruction merely told the jury the same information," and, "[o]n this record, we would find insufficient prejudice to warrant reversal even if we found fundamental error." *Id.*[3]

Disposition

¶11 Koscielski's convictions and sentences are affirmed.

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JOHN PELANDER, Chief Judge

CONCURRING:

_____
JOSEPH W. HOWARD, Presiding Judge

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PHILIP G. ESPINOSA, Judge

[3]As this decision reflects, controlling and longstanding caselaw renders meritless Koscielski's argument and his reliance on *Desmond*. We also note that appellant's counsel has made the same or very similar arguments unsuccessfully in several prior cases. *See State v. Gastelum*, No. 2 CA-CR 2006-0328, ¶¶ 7-12 (memorandum decision filed Mar. 17, 2008); *State v. Sanchez*, No. 2 CA-CR 2005-0416, ¶¶ 6-9 (memorandum decision filed Oct. 30, 2006); *State v. Coppess*, No. 2 CA-CR 2003-0355, ¶¶ 23-25 (memorandum decision filed Feb. 28, 2006). We discourage him from doing so in the future.