FILED BY CLERK
JUL 26 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. BRIAN WILLIAM MANUEL, Appellant.	2 CA-CR 2010-0303 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20083625

Honorable Christopher C. Browning, Judge

AFFIRMED

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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Brian Manuel was convicted of two counts of aggravated driving under the influence of intoxicating liquor (DUI) and two counts of aggravated driving with an alcohol concentration (AC) of .08 or greater. The trial court sentenced him to concurrent prison terms of eight years. On appeal, Manuel contends he was denied "due process, a fair trial, and his right to present a defense" because the Pima County Office of Court Appointed Counsel (OCAC) refused to provide public funds sufficient for him to retain a particular expert. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding Manuel's convictions and draw all reasonable inferences in favor of supporting the jury's verdicts. *See State v. Pierce*, 223 Ariz. 570, n.2, 225 P.3d 1146, 1146 n.2 (App. 2010). In September 2008, Tucson Police Officer Mark Evanoff was patrolling a residential area that was having a "prowler problem." He saw a blue sport utility vehicle (SUV) driving very slowly past the house he had been watching and decided to follow it. After he noticed the SUV's rear left brake light was out, he attempted to make a traffic stop by activating his overhead emergency lights, but the driver, Manuel, did not immediately pull over. Manuel eventually stopped but only after Evanoff shined his spotlight on the SUV, sounded his siren and "air-horn," and pulled alongside Manuel and yelled at him to stop.

¶3 When Evanoff approached and spoke with Manuel, he observed his speech was slow and slurred, his eyes were watery and bloodshot, and he had a strong odor of alcohol. Evanoff saw two forty-ounce bottles of beer on the floor of the SUV next to the

front passenger seat; one of the bottles was half-empty and the other was unopened. Manuel performed poorly on field sobriety tests administered by another officer, including a horizontal gaze nystagmus test for which he exhibited four out of six possible cues of impairment. After being advised of his rights under *Miranda*,[1] Manuel agreed to answer the officer's questions and admitted he had consumed one beer. Manuel then was arrested for DUI, and a third officer administered two breathalyzer tests that revealed blood alcohol levels of .183 and .176.

¶4 Manuel was charged with one count of DUI with a suspended or revoked driver's license, one count of aggravated driving with an AC of .08 or more with a suspended or revoked driver's license, one count of aggravated DUI with two or more prior DUI convictions, and one count of aggravated driving with an AC of .08 or more with two or more prior DUI convictions. He was convicted of all charges and sentenced as described above. This appeal followed.

Discussion

¶5 As his sole issue on appeal, Manuel, an indigent defendant, contends OCAC's refusal to allocate sufficient funds for him to retain a qualified expert "violated his state and federal constitutional rights to due process, a fair trial, and his right to present a defense." He asserts we should review this issue for structural error.

¶6 "Alleged trial court error in criminal cases may be subject to one of three standards of review: structural error, harmless error, or fundamental error." *State v. Valverde*, 220 Ariz. 582, ¶ 9, 208 P.3d 233, 235 (2009). Structural error "'deprive[s]

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

defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.'" *State v. Ring*, 204 Ariz. 534, ¶ 45, 65 P.3d 915, 933 (2003), *quoting Neder v. United States*, 527 U.S. 1, 8-9 (1999). When structural error occurs, reversal is automatic even when no objection has been made below because prejudice is presumed. *Valverde*, 220 Ariz. 582, ¶ 10, 208 P.3d at 236. But most errors, even constitutional errors, are not structural. *Ring*, 204 Ariz. 534, ¶ 45, 65 P.3d at 933.

¶7 "The denial of expert witness assistance to a criminal defendant can violate the Due Process Clause of the Fourteenth Amendment." *Jones v. Sterling*, 210 Ariz. 308, ¶ 27, 110 P.3d 1271, 1277 (2005). But "the appointment of an expert witness [is required] only when 'such assistance is *reasonably necessary* to present a defense adequately at trial or sentencing.'" *Id.* ¶ 29, *quoting* Ariz. R. Crim. P. 15.9(a); *see also* A.R.S. § 13-4013(B). "The unique facts of each case will determine what is 'reasonably necessary' for an indigent to adequately present a defense." *State v. Bocharski*, 200 Ariz. 50, ¶ 61, 22 P.3d 43, 55 (2001). And, because the mere denial of a request for appointment of an expert witness, much less an expert of the defendant's choosing, does not necessarily render a criminal trial an unreliable vehicle for determining guilt or innocence, the structural error standard of review does not apply. *Cf. State v. O'Dell*, 202 Ariz. 453, ¶ 13, 46 P.3d 1074, 1079 (App. 2002) (showing of prejudice required to establish due process violation).

¶8 Here, Manuel did not challenge OCAC's funding decision in the trial court. And because Manuel did not raise the issue below, we review only for fundamental error.

See State v. Henderson, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). "Fundamental error is limited to 'those rare cases that involve 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.'" *Valverde*, 220 Ariz. 582, ¶ 12, 208 P.3d at 236, *quoting Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. Under this standard of review, Manuel must establish "both that the error was fundamental and that the error caused him prejudice." *Id.* "Regardless of how an alleged error ultimately is characterized, however, a defendant on appeal must first establish that some error occurred." *State v. Diaz*, 223 Ariz. 358, ¶ 11, 224 P.3d 174, 176 (2010).

¶9 Manuel initially sought funding through OCAC to retain Chester Flaxmeyer as an expert to testify regarding the accuracy of the Intoxilyzer 8000, the device used to measure Manuel's blood alcohol levels. OCAC denied Manuel's request because Flaxmeyer's fee exceeded the amount OCAC could authorize, and Flaxmeyer would not agree to reduce his fee. Thus, it was OCAC that made the funding decision Manuel argues was error, not the trial court. And, as we noted above, Manuel never challenged that decision before the court. Instead, he retained another expert, Charles Laroue, through funding approved by OCAC.

¶10 Although the state filed a motion arguing Laroue lacked the qualifications to testify as an expert and should be precluded from testifying at trial, the trial court denied the motion, finding it was untimely filed. On appeal, Manuel points out that, despite its ruling, the court stated that if the state objected on foundation grounds to

Laroue's testimony at trial, the court might sustain the objection. Manuel acknowledges, however, that Laroue testified at trial and the state did not object. To the extent Manuel challenges the qualifications of his own expert, we reject that argument.

¶11 A witness may be qualified as an expert by "knowledge, skill, experience, training, or education." Ariz. R. Evid. 702. At trial, Laroue stated he had testified as an expert witness in more than two hundred cases in Arizona. Laroue was a second-year law student with a bachelor of science degree in paralegal studies. Additionally, he stated he has logged hundreds of hours of training and experience with the Intoxilyzer 8000, has become an instructor for that device through a program approved by the United States Department of Transportation, and teaches classes on "a national basis for both the Intoxilyzer 5000 and the Intoxilyzer 8000." "Whether a witness possesses sufficient qualifications to testify as an expert is a matter within the trial court's discretion and that determination will not be upset on appeal in the absence of clear abuse." *State v. Saez*, 173 Ariz. 624, 630, 845 P.2d 1119, 1125 (App. 1992). On the record before us, we find no error, let alone fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

¶12 Manuel nevertheless maintains he "was entitled to a public-funded expert with equivalent qualifications" to those of the state's expert. But he neither develops this argument nor cites any authority to support it. "[O]pening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that

claim." *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). Consequently, we do not consider his "equivalent qualifications" argument further.

Disposition

¶13 For the reasons stated above, we affirm Manuel's convictions and sentences.

/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