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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OF ARIZONA, Appellee, v. LUZ TRINIDAD FIERRO-ANGULO, Appellant.	2 CA-CR 2010-0369 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR200801661

Honorable Steven Sheldon, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson
Tucson
Attorneys for Appellee

Kessler Law Offices
By Eric W. Kessler
Mesa
Attorney for Appellant

K E L L Y, Judge.

¶1 Appellant Luz Fierro-Angulo was convicted after a jury trial of two counts of negligent homicide and one count of aggravated assault. On appeal she maintains the trial court erred in admitting the testimony of an emergency room physician who had

treated her the night of the accident. She argues admission of his testimony violated the physician-patient privilege, he was not competent to testify, and his testimony did not lay proper foundation for admitting evidence about test results from a blood sample taken from her at the hospital. She also contends her Sixth Amendment rights were violated because she did not have the opportunity to cross-examine the person who prepared the blood-test report upon which the doctor had relied. Finding no error, we affirm.

Background

¶2 "On appeal, we view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the jury's verdicts." *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). Fierro-Angulo was the driver of a pickup truck that was involved in an early morning rollover accident in November 2006. Two people died as a result of the accident and a third person was injured.

¶3 A sheriff's deputy investigating the accident "smell[ed] the [odor] of spirituous liquor, intoxicating beverage" on Fierro-Angulo when he attempted to talk to her. Fierro-Angulo was taken to a hospital for treatment for her injuries. While she was there, Dr. Corey Detlefs drew a sample of her blood for medical purposes.

¶4 Pinal County Sheriff's Deputy Douglas Peoble, a member of the county's critical accident response team, also responded to the accident scene. He testified he had observed "debris that you would expect from a rollover collision . . . [and] beer cans and an ice chest." Peoble subsequently interviewed Fierro-Angulo at her home, and she admitted "she had been driving the truck the entire night" and had drunk alcohol before driving. According to Peoble, another officer requested a sample of Fierro-Angulo's

blood from the hospital. The sample was picked up several days after the accident and tested for intoxicating substances by the Arizona Department of Public Safety ("DPS").

¶5 Fierro-Angulo was charged with two counts of manslaughter by "[r]ecklessly causing the death of another" pursuant to A.R.S. § 13-1103, and one count of aggravated assault pursuant to A.R.S. § 13-1204. She was convicted of aggravated assault and two counts of negligent homicide—a lesser-included offense of manslaughter. The trial court sentenced Fierro-Angulo to presumptive, concurrent prison terms on all counts, totaling 7.5 years. This appeal followed.

Discussion

¶6 Before trial, Fierro-Angulo moved to preclude results of alcohol concentration tests performed on her blood sample, arguing the state had insufficient "foundational evidence to support . . . admissibility," or for the alternative reason that it had been "unlawfully acquired by the State." Thereafter, the state filed a motion to obtain Fierro-Angulo's "medical records and a court order for the doctor to submit to an interview regarding the limited information as to whether the blood was drawn for medical purposes or [at] law enforcement request, the name of the person that [sic] drew the blood and what time the blood was drawn." The state argued Fierro-Angulo's motion "placed the circumstances relating to the blood draw at issue."

¶7 The trial court granted the state's motion, finding that because Fierro-Angulo's motion to preclude/suppress evidence "challeng[ed] the facts surrounding the blood draw," she had implicitly waived "any privilege otherwise accorded to . . . the circumstances." The court ordered the hospital to release information related to the blood

draw and the hospital identified Detlefs as the person who "drew the defendant's blood." At a hearing on the motion to preclude/suppress, the court ruled Detlefs was "not to talk about [Fierro-Angulo's] medical treatment but to talk about the collection of the blood sample and whether it was for medical treatment or for law enforcement purposes, as [the defense] asserted." Detlefs testified he drew blood from Fierro-Angulo's right femoral artery at 9:22 a.m. on November 5 for medical purposes, he was not asked by law enforcement to do so, and he was qualified to draw blood in this manner. The trial court then ruled "the information . . . [wa]s the equivalent of non-medical business records . . . , presentation of the information did not require invasion of the physician-patient privilege and . . . was information properly subject to a Court order on discovery."

Physician-Patient Privilege

¶8 Fierro-Angulo argues the trial court's admission of Detlefs's testimony violated the physician-patient privilege under A.R.S. § 13-4062(4). She asserts that because "[t]he draw was solely for medical purposes . . . Detlefs conducted [the] procedure as part of his evaluation and treatment of Appellant" and therefore the court erred by requiring him "to testify in order to satisfy the State's evidentiary needs" and in holding she "'implicitly' waived the privilege." We review de novo whether a privilege exists. *State v. Wilson*, 200 Ariz. 390, ¶ 4, 26 P.3d 1161, 1164 (App. 2001).

¶9 Section 13-4062(4) provides a physician or surgeon "shall not be examined as a witness . . . without consent of the . . . patient, as to any information acquired in attending the patient which was necessary to enable the physician or surgeon to prescribe or act for the patient." No physician-patient privilege existed at common law, and we

therefore strictly construe the privilege. *State v. Morales*, 170 Ariz. 360, 363, 824 P.2d 756, 759 (App. 1991). The physician-patient privilege "'is primarily intended to protect communications made by the patient to [her] physician for the purpose of treatment, so as to insure that the patient will receive the best medical treatment by encouraging full and frank disclosure of medical history and symptoms by a patient to [her] doctor.'" *State v. Miles*, 211 Ariz. 475, ¶ 16, 123 P.3d 669, 674 (App. 2005), *quoting Wilson*, 200 Ariz. 390, ¶ 5, 26 P.3d at 1164. Four elements must be established before the physician-patient privilege may be invoked. *Morales*, 170 Ariz. at 363, 824 P.2d at 759.

> First, the patient must not consent to the testimony. Second, the witness must be a physician or surgeon. Third, the information was imparted to the physician while he was attending the defendant. Finally, the information must be necessary to enable the physician to prescribe or act for the treatment of the defendant.

Id., *quoting State v. Beaty*, 158 Ariz. 232, 239, 762 P.2d 519, 526 (1988).

¶10 Fierro-Angulo has not established the third and fourth elements. The information was not "imparted to [Detlefs] while he was attending [Fierro-Angulo]"; instead, it described acts he personally had performed and standard practices at the hospital. *See id.* He testified that on November 5 he had drawn blood from a person with the trauma name of "W72," and "W72" was a unique identifier associated with Fierro-Angulo. Further, this information was not necessary to Fierro-Angulo's treatment. The mere fact that a blood draw occurred does not give the physician any information necessary to treat the patient. Nor is the trauma name assigned to a patient medically

relevant. It is equally irrelevant that the testifying physician conducted the blood draw. *Morales*, 170 Ariz. at 363, 824 P.2d at 759 (blood draw itself did not violate privilege).

¶11 Relying on *State v. Santeyan*, 136 Ariz. 108, 664 P.2d 652 (1983), Fierro-Angulo argues we must find Detlefs's testimony violated the privilege because he "conducted this procedure as part of his evaluation and treatment [of her]." Her reliance on *Santeyan*, however, is misplaced. That case involved a urinalysis performed by the hospital "[d]uring the course of . . . treatment . . . [which] indicated the presence of opiates in [the defendant's] system." *Id.* at 109, 664 P.2d at 653. Because the hospital performed the tests for the purpose of diagnosis and treatment, our supreme court found the admission of the test results violated the physician-patient privilege. *Id.* at 110, 664 P.2d at 654. Here, although the blood draw "was necessary to provide proper and effective treatment to [Fierro-Angulo]," no test results or information obtained by Detlefs (or the hospital) as a result of the blood draw were admitted, only the fact that blood had been drawn. *See Morales*, 170 Ariz. at 363, 824 P.2d at 759.

¶12 Because we conclude the physician-patient privilege is inapplicable to Detlefs's testimony, we need not address the propriety of the trial court's finding that Fierro-Angulo implicitly waived the privilege. *See State v. Tucker*, 205 Ariz. 157, ¶ 52, 68 P.3d 110, 120 (2003). The trial court did not err in admitting Detlefs's testimony over Fierro-Angulo's objection.

Foundation for Blood Evidence

¶13 Fierro-Angulo nevertheless contends admitting the results of the blood alcohol analysis was error because even if Detlefs's testimony did not violate the

privilege, it failed to provide sufficient foundation pursuant to A.R.S. § 28-1388, to admit the test results. "We review a trial court's rulings on the admission of evidence for an abuse of discretion." *State v. Dann*, 220 Ariz. 351, ¶ 66, 207 P.3d 604, 618 (2009).

¶14 Section 28-1388(E) provides in pertinent part as follows:

> [I]f a law enforcement officer has probable cause to believe that a person has violated [A.R.S.] § 28-1381 and a sample of blood, urine or other bodily substance is taken from that person for any reason, a portion of that sample sufficient for analysis shall be provided to a law enforcement officer if requested for law enforcement purposes.

Fierro-Angulo does not dispute that her blood was drawn by medical personnel for medical purposes. Nor does she argue that law enforcement lacked probable cause to believe a violation of § 28-1381 had occurred. Rather, she contends that Detlefs was incompetent to testify under Rule 602, Ariz. R. Evid., and that he could not provide the required foundation for admission of the blood test results because he did not remember drawing the blood and did not know who had prepared or signed the trauma flow chart ("chart") on which his testimony was based. We disagree.

¶15 Rule 602 provides "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." The rule "preclude[s] 'testimony concerning matters the witness did not observe or had no opportunity to observe.'" *State v. Mincey*, 130 Ariz. 389, 404, 636 P.2d 637, 652 (1981) (noting Arizona rule identical to federal counterpart), *quoting United States v. Lyon*, 567 F.2d 777, 784 (8th Cir. 1977). The evidence here established that Detlefs had observed the events about which he testified and "that [he] [had]

personal knowledge of the matter." *See* Ariz. R. Evid. 602. He testified he was on duty November 5, and he had personally performed the blood draw on Fierro-Angulo. Detlefs's recollection of the events was lacking, not his observation or opportunity to observe. *See Lyon*, 567 F.2d at 783 (witness's "lack of independent recollection d[oes] not violate Fed. R. Evid. 602").

¶16 Witness competency is a fact-intensive inquiry best left to the discretion of the trial court. *State v. Apodaca*, 166 Ariz. 274, 276, 801 P.2d 1177, 1179 (App. 1990). We will not overrule the trial court's decision as to competency "unless the record absolutely demands it." *Id.* Unless there is a problem with a witness's overall capacity to recollect the events, failure to independently remember them does not render a witness incompetent. *See State v. Roberts*, 139 Ariz. 117, 121, 677 P.2d 280, 284 (App. 1983) ("Competency has to do with a witness' *capacity* to observe, recollect and communicate the subject of the testimony."); *see also* Ariz. R. Evid. 601 ("Every person is competent to be a witness except as otherwise provided in these rules or by statute.").

¶17 Nonetheless, Fierro-Angulo argues "[c]learly Dr. Detlefs had no personal knowledge of the matter," because "[h]e relied entirely upon the written record of someone other than himself." She further contends Detlefs's testimony did not support admitting the chart as a business record under Rule 803(6), Ariz. R. Evid.[1] Rule 803(6)

[1]Fierro-Angulo also argues the chart was protected by the physician-patient privilege and Detlefs was not competent to testify about it. Because we have already addressed the privilege and Detlefs's competency in connection with his testimony, we decline to do so again in the context of the admission of the chart as a business record.

provides "[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses" is not excluded as hearsay,[2] if:

> (a) Made at or near the time of the underlying event,
>
> (b) by, or from information transmitted by, a person with first hand knowledge acquired in the course of a regularly conducted business activity,
>
> (c) made and kept entirely in the course of that regularly conducted business activity,
>
> (d) pursuant to a regular practice of that business activity; and
>
> (e) all the above are shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11)[, Ariz. R. Evid.]

Although he testified he had no "independent recollection" of treating Fierro-Angulo, Detlefs also testified he recognized his signature on the chart, the chart was "created at or near the time of treatment for [Fierro-Angulo]," the information was recorded "simultaneously" to treatment being provided either by him or by a "nurse scribe" on his direction, the chart was prepared in accordance with "standard practice" for the trauma team, and it was "kept in the normal course of business for the hospital." Nothing in the record suggests a "lack of trustworthiness" in the chart. *See* Ariz. R. Evid. 803(6). We therefore conclude Detlefs's use of the chart during his testimony was permissible under Rule 803(6) and laid appropriate foundation to admit the blood test results. The trial court did not abuse its discretion in admitting the evidence.

[2]"Hearsay is not admissible except as provided by applicable constitutional provisions, statutes, or rules." Ariz. R. Evid. 802.

Confrontation Clause

¶18 Fierro-Angulo asserts her rights under the Sixth Amendment of the United States Constitution were violated because she was unable "to confront and cross-examine the individual responsible for the preparation of the chart [relied on by Detlefs for his testimony]." We review de novo challenges to the admissibility of evidence based on the Confrontation Clause. *State v. King*, 213 Ariz. 632, ¶ 15, 146 P.3d 1274, 1278 (App. 2006). The state counters Fierro-Angulo has waived this argument because she failed to raise it below and fails to allege fundamental error on appeal.[3] *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶¶ 16-17, 185 P.3d 135, 140 (App. 2008). We agree.

¶19 Fierro-Angulo's trial counsel objected to Detlefs's testimony arguing it violated the Sixth Amendment because counsel had "never seen these records before, and . . . [did]n't have an opportunity to cross-examine." We are unable to locate any place in the record where she argued "the individual responsible for the preparation of the chart" should be called as a witness, as she does on appeal. In fact, Detlefs testified that he personally filled in parts of the chart and the rest was filled in by a nurse at his direction. Thus, her objection below was premised on Detlefs's lack of memory rather than the absence of some other witness who prepared the document.

¶20 A witness's lack of memory does not in itself violate the Confrontation Clause. *State v. Real*, 214 Ariz. 232, ¶ 7, 150 P.3d 805, 807 (App. 2007). "And an objection on one ground does not preserve the issue on another ground." *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008). A party who fails to raise an issue in

[3]Fierro-Angulo did not file a reply brief.

the trial court is limited to review for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is "'error going to the foundation of the case'" such that it deprives the defendant of a fundamental right of "such magnitude" she could not possibly have received a fair trial. *Id.*, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). The "defendant must establish both that fundamental error exists and that the error in [her] case caused [her] prejudice." *Id.* ¶ 20. Because Fierro-Angulo "does not argue the alleged error was fundamental[,]" the argument is waived. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140.

Disposition

¶21 Fierro-Angulo's convictions and sentences are affirmed.

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

CONCURRING:

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

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