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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. ROBERTO VARGAS, Appellant.	)	2 CA-CR 2009-0126 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20074696

Honorable Hector E. Campoy, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann
Tucson
Attorneys for Appellee

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E S P I N O S A, Judge.

¶1 After a jury trial, Roberto Vargas was convicted of driving while under the influence of an intoxicant (DUI), endangerment, negligent homicide, and leaving the

scene of an accident resulting in death or serious physical injury. The trial court sentenced him to time served on the DUI charge and to several concurrent, presumptive terms of imprisonment, the longest of which was six years, to be followed by three years' probation. On appeal, Vargas argues the court erred by allowing the state's expert to give his opinion at trial about Vargas's blood alcohol concentration (BAC) and by failing sua sponte to exclude a fact to which Vargas had stipulated. For the following reasons, we affirm.

Factual Background and Procedural History

¶2 "On appeal, we view the facts in the light most favorable to upholding the verdict and resolve all inferences against the defendant." *State v. Klokic*, 219 Ariz. 241, n.1, 196 P.3d 844, 845 n.1 (App. 2008). On an evening in November 2007, Vargas and a group of acquaintances drank numerous pitchers of beer while watching a football game at a bar. Afterwards, on the way to his home, Vargas and three others stopped at a restaurant to order takeout food; while they were waiting, Vargas drank two more beers. They made one more stop at a gas station where they purchased more beer. Once they reached Vargas's home, the men continued to drink beer. During this time, Vargas's behavior was "uninhibited" and he was wrestling with others in the backyard.

¶3 Around midnight, Vargas decided to go "offroading" in his Jeep and he was joined by M. and V. The three men bought some more beer at a gas station and rode off into the desert. Soon thereafter, the Jeep overturned, killing V. and injuring M. When some passing motorists stopped to assist and called the police, Vargas ran away into the

desert. When he returned home several hours later, his roommates told him the police were looking for him. Eventually, Vargas agreed to meet with police around 11:00 a.m. By the time they obtained a sample of his blood, approximately twelve hours had elapsed since the accident, and testing showed Vargas's BAC was .000.

¶4 At trial, the BAC result was admitted pursuant to the parties' stipulation. An expert for the state, Seth Ruskin, testified about the average rates at which alcohol is eliminated by the body and that, using these standard rates, Vargas's BAC at the time of the accident could have been anywhere between .00 and .30. Additionally, the state and defense counsel stipulated Vargas previously had attended a Mothers Against Drunk Driving (MADD) class, and the trial court read the stipulation to the jury. After Vargas was convicted and sentenced as set forth above, he brought this appeal. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Expert Testimony Concerning BAC

¶5 Vargas argues the trial court erred in admitting expert testimony concerning what his BAC could have been at the time of the accident. We review a court's admission of expert testimony for abuse of discretion. *State v. Davolt*, 207 Ariz. 191, ¶ 69, 84 P.3d 456, 475 (2004). A court can admit relevant expert testimony if it meets four criteria: the expert must be qualified, the subject must be a proper subject of expert testimony, the opinion must conform to an "appropriately scientific accepted explanatory

theory," and the evidence's prejudicial effect must not outweigh its probative value. *State v. Nordstrom*, 200 Ariz. 229, ¶ 29, 25 P.3d 717, 730 (2001).

¶6 Although Vargas concedes Ruskin was qualified to testify as an expert, he maintains the trial court should have sustained his objection and excluded the testimony because his conclusions "were nothing more than mere conjecture." He points out that Ruskin's analysis "did not account for the various factors that affect the rate at which . . . alcohol is absorbed or eliminated," including when Vargas "had begun or stopped drinking." He further contends the jury would have focused on the .30 number and maintains that, because there was "no other overwhelming evidence presented that he was intoxicated at the time of driving," "[i]f the jurors believed that [his] blood alcohol could have been as high as .30 at the time of the accident[,] this would have been a crucial factor in their decision to convict."[1]

¶7 The state responds that Ruskin's testimony was proper because the state's "theory at trial was that [Vargas] drove and crashed his vehicle while under the influence of alcohol," and "Ruskin's retroactive extrapolation testimony was necessary to explain how, consistent with the State's theory, [Vargas] could have been under the influence of alcohol at the time of driving and yet provide an alcohol-negative blood sample

[1]In his reply brief, Vargas argues for the first time that Ruskin's testimony was improper because Vargas had "only [been] charged with driving under the influence, not driving with a blood alcohol [concentration] over .08," and presents other new arguments. However, because he raised these arguments for the first time in his reply brief, we decline to consider them. *See State v. Larson*, 222 Ariz. 341, ¶ 23, 214 P.3d 429, 434 (App. 2009) (arguments raised for first time in reply brief waived). And, in any event, they do not appear to have merit.

approximately 10 hours later." The state maintains this assisted the jury in determining "how to interpret [Vargas]'s test reading and how much weight to give it." The state also argues that any prejudice was outweighed by the testimony's probative value because Ruskin "offered only general testimony regarding alcohol elimination rates," provided a range of what Vargas's BAC could have been, and "made clear that, without specific knowledge regarding a suspect's alcohol ingestion, his default assumption would be that the prior BAC [wa]s zero." Finally, the state urges that Vargas's assertion that the jurors would have focused on the .30 figure "is wholly speculative and underestimates the jurors' ability to accurately understand Ruskin's testimony, which made clear that a person's BAC 10 hours prior to giving an alcohol-negative sample can be anywhere *between* .00 and .30."

¶8 The trial court did not abuse its discretion in permitting the testimony over Vargas's objection. Because the parties stipulated to introduce Vargas's .00 BAC, Ruskin's testimony was relevant and helpful to the jury, especially with regard to its determination of whether Vargas could have been under the influence of alcohol at the time of the accident despite his negative blood test hours later. *See Nordstrom*, 200 Ariz. 229, ¶ 34, 25 P.3d at 731 (expert testimony permitted when it assists jury to understand evidence or determine facts); *Ring v. Taylor*, 141 Ariz. 56, 68-69, 685 P.2d 121, 133-34 (App. 1984) (affirming presumption-of-intoxication jury instruction based on expert testimony that appellant's BAC of .03 five hours after accident meant his BAC at time of accident would have been at least .105 using retroactive extrapolation); *see also State v.*

Panveno, 196 Ariz. 332, ¶¶ 15, 17, 996 P.2d 741, 743 (App. 2000) (retrograde analysis of defendant's BAC considered along with other evidence of impairment). This type of specialized knowledge is outside the experience of the average person, and thus was a proper subject for expert testimony. *See* Ariz. R. Evid. 702; *State v. Chapple*, 135 Ariz. 281, 292-93, 660 P.2d 1208, 1219-20 (1983). Moreover, Ruskin's opinion was presented as a hypothetical retroactive extrapolation using standardized elimination rates, and Ruskin emphasized he did not have any individual information about Vargas. *See Chapple*, 135 Ariz. at 292, 660 P.2d at 1219 (explaining general nature of testimony is factor that favors admission); *see also State v. Garcia*, 165 Ariz. 547, 551, 799 P.2d 888, 892 (App. 1990) (expert's use of hypothetical, combined with other evidence of defendant's drinking, satisfied former requirement that there be "some evidence" relating BAC at time of test to BAC at time of driving); *cf. State v. Lujan*, 192 Ariz. 448, ¶ 12, 967 P.2d 123, 127 (1998) (approving use of expert testimony on general behavioral characteristics of child sex abuse victims). Finally, as the state points out, Vargas's counsel had the opportunity to challenge Ruskin's testimony at trial on cross-examination, and he in fact used this time to question Ruskin about the issues he now raises on appeal. We therefore cannot say the trial court abused its discretion in admitting this testimony.

Stipulation Concerning MADD Class

¶9 Vargas also contends the trial court erred by failing to exclude sua sponte the stipulation that Vargas previously had attended a MADD class; specifically that

Vargas had "completed a MADD . . . Victim Impact Panel on January 9th, 2006, a two-hour course, the purpose of which is to instruct students about the dangers of drinking and driving." Vargas contends the admission of this stipulation constituted fundamental error because it "unequivocally informed the jury that [he] had a prior DUI conviction" and thus violated Rule 404(b), Ariz. R. Evid.

¶10 At the outset, the state argues this claim is "not cognizable on appeal . . . [because Vargas] invited that alleged error." Under the invited error doctrine, "[i]f the error is invited, the offending party has no recourse on appeal even under the exacting standard of fundamental error." *State v. Lucero*, 223 Ariz. 129, ¶ 17, 220 P.3d 249, 255 (App. 2009); *see also State v. Logan*, 200 Ariz. 564, ¶ 9, 30 P.3d 631, 632-33 (2001). However, "courts must look 'to the source of the error, which must be the party urging the error' to determine if invited error occurred." *Lucero*, 223 Ariz. 129, ¶ 17, 220 P.3d at 255, *quoting Logan*, 200 Ariz. 564, ¶ 11, 30 P.3d at 633. Thus, invited error is restricted to when a party "affirmatively and independently initiated the error," as opposed to "merely acquiesced in the error proposed by another." *Id.* ¶ 31. Importantly, "invited error does not occur when the defendant stipulates to the error unless it can be shown from the record that the defendant proposed the stipulation and was thus the source of the error." *Id.* ¶ 22.

¶11 Assuming there was error, the invited error doctrine applies here because the record demonstrates that Vargas's counsel was a proponent of the stipulation. Before trial, the state filed a motion seeking to introduce evidence of Vargas's prior DUI

convictions. On the first day of trial, the court noted it had "informally indicated" it would allow testimony from a "victim impact panelist" concerning training she provides about the risks of drinking and driving, despite Vargas's objection that the probative value of the testimony would be outweighed by its prejudicial effect. After this informal ruling, defense counsel stated, "I think I should inform the Court . . . that I have talked to [the prosecutor] about possibly stipulating to the MADD evidence, if you will. So we may be able to work it out that way," and noted the prosecutor had agreed not to mention the testimony in his opening statement. The parties thereafter approved the stipulation both orally and in writing, and the court read it to the jury. Accordingly, based on this record, Vargas appears to have "affirmatively and independently initiated the error" as opposed to "merely acquiesced in the error proposed by another," *Lucero*, 223 Ariz. 129, ¶ 31, 220 P.3d at 258, and apparently did so in order to avoid what he considered to be potentially more damaging evidence. *Cf. Lucero*, 223 Ariz. 129, ¶ 34, 220 P.3d at 259 (holding invited error doctrine did not apply because counsel "acquiesced in the response but neither proposed it nor argued for it"); *State v. Thues*, 203 Ariz. 339, n.2, 54 P.3d 368, 369 n.2 (App. 2002) (court would not apply invited error doctrine when unable to determine which party proposed stipulation).

¶12 Moreover, even were we to consider his claim on the merits, and assume, as Vargas insists, that the jury would have understood the stipulation to mean that Vargas had a prior DUI conviction, Vargas has not established any error. Although "[e]vidence of a defendant's prior . . . acts is not admissible 'to show that the defendant is a bad

person or has a propensity for committing crimes,'" *State v. Hargrave*, 584 Ariz. Adv. Rep. 36, ¶ 10 (June 14, 2010), *quoting State v. McCall*, 139 Ariz. 147, 152, 677 P.2d 920, 925 (1983), "[o]ther act evidence may be admitted . . . for other purposes, such as proving 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,'" *id.*, *quoting* Ariz. R. Evid. 404(b). Because Vargas did not object to this evidence at trial, we review its admission only for fundamental error, that is, if an error occurred, it "was fundamental in nature and caused prejudice." *Id.* ¶ 13; *see also State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005).

¶13 As the state points out, the stipulation demonstrated Vargas's knowledge of the dangers of drinking and driving, which was relevant to whether he had acted recklessly, an element of the charged crimes of manslaughter and endangerment. *See* A.R.S. §§ 13-1103(A)(1), 13-1201. We agree that this evidence was admissible under Rule 404(b), and that Vargas has failed to demonstrate any error. This court previously has held that evidence of a prior DUI was properly admitted under Rule 404(b) because it allowed the jury to "reasonably . . . conclude that as a result of it, appellant was made aware of the risks he posed to others in driving under the influence" and thus "was relevant to the issue of whether appellant's mental state reflected a reckless indifference to human life." *State v. Woody*, 173 Ariz. 561, 563, 845 P.2d 487, 489 (App. 1992); *see also Hargrave*, 584 Ariz. Adv. Rep. 36, ¶¶ 13-16 (in conducting fundamental error review, finding no error under Rule 404(b) in admission of defendant's affiliation with

white supremacist group because evidence was relevant to establish motive for crimes and its probative value was not substantially outweighed by potential prejudice).[2]

¶14 But even assuming Vargas had been able to establish that error occurred and it was fundamental in nature, *see Hargrave*, 584 Ariz. Adv. Rep. 36, ¶ 13, he has not demonstrated it caused him prejudice, *see Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. To show prejudice, Vargas must show that absent error, a reasonable jury could have reached a different result. *See id.* ¶ 27. At trial, a number of witnesses testified that Vargas had been drinking "a lot" throughout the evening and exhibited behaviors indicating he was intoxicated, including wrestling, speaking loudly, "monkeying around," displaying "uninhibited" behavior, and becoming "rowd[y]." After this evening of drinking, Vargas drove his Jeep to the desert at night and proceeded to drive "erratically." Then, after the accident, Vargas fled the scene knowing the police had been called and thereafter avoided contact with authorities for hours. As he concedes in his reply brief, "[t]he fact that he had avoided the police until the next day would have been sufficient for the jury to conclude that he was under the influence at the time of the accident." *See State v. Gallegos*, 178 Ariz. 1, 11, 870 P.2d 1097, 1107 (1994) (no prejudice where "[o]verwhelming evidence in the record support[ed] the jury's verdict").

[2]Vargas also contends the trial court should have instructed the jury sua sponte with "cautionary instructions required by Rule 403." But it was not required to do so absent a request from Vargas. *See State v. Miles*, 211 Ariz. 475, ¶ 31, 123 P.3d 669, 677 (App. 2005) (even though "evidence of other acts is not allowed to show that a defendant acted in conformity with them," "a trial court is not required, sua sponte, to give a limiting instruction on such evidence").

¶15 Finally, Vargas's theory of defense was not that he had not been drinking and driving that evening, but rather that his Jeep was unstable. *See, e.g.*, *State v. Coghill*, 216 Ariz. 578, ¶ 53, 169 P.3d 942, 954 (App. 2007) (finding no prejudice when basis for arguing prejudice on appeal was inconsistent with defense theory at trial). Accordingly, Vargas has failed to meet his burden of showing fundamental, reversible error.

Disposition

¶16 For the foregoing reasons, Vargas's convictions and sentences are affirmed.

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

CONCURRING:

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

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