DIVISION ONE
FILED: 5/21/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0251
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
JAMES MICHAEL REECE,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Navajo County

Cause No. S-0900-CR2007-0514

The Honorable Carolyn C. Holliday, Judge (Retired)

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals/Capital Litigation Division
And Melissa M. Swearingen, Assistant Attorney General
Attorneys for Appellee

Emery K. La Barge — Snowflake
Attorney for Appellant

O R O Z C O, Judge

¶1 James Michael Reece (Defendant) appeals his convictions and sentences for aggravated driving with drugs in the body, possession of a narcotic drug, and possession of drug

paraphernalia. He contends the trial court erred by (1) denying his motion to suppress evidence, and (2) instructing the jury on Arizona's implied consent law. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

¶2 On October 17, 2006, Arizona Department of Public Safety (DPS) Officer P. was patrolling State Route 260 when he observed a truck passing another vehicle. Officer P. used a radar gun to determine that the truck was traveling at seventy-seven miles per hour in a fifty-five mile per hour zone.

¶3 Officer P. initiated a traffic stop and approached the truck to speak with Defendant, the driver. Officer P. testified that while speaking with Defendant, he smelled a "moderate" odor of burnt marijuana and noticed that Defendant's speech and movements were "slow." When asked if any marijuana had been burned inside the vehicle, Defendant said no.

¶4 After determining that Defendant's driver's license had been suspended, Officer P. arrested Defendant. Officer P. then conducted an inventory search of Defendant's truck. During the search, he found a bottle that had an odor of marijuana and

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[1] We view the evidence presented at trial in the light most favorable to sustaining the convictions. *State v. Cropper*, 205 Ariz. 181, 182, ¶ 2, 68 P.3d 407, 408 (2003).

contained residue[2] and burnt pieces of paper and a bottle that contained seventy-two tablets of oxycodone that had been prescribed to Defendant's mother, who had passed away a year earlier.

¶5 Officer P. transported Defendant to the DPS office. Upon arrival, another officer, Officer A., conducted a drug recognition evaluation (DRE) on Defendant. Officer P. then read through an admin per se/implied consent affidavit[3] with Defendant and requested that Defendant submit to a blood draw. Because Defendant refused Officer P.'s request, Officer P. faxed a search warrant affidavit to the Snowflake Justice Court and obtained a telephonic search warrant that allowed him to conduct a blood draw. After Officer P. served Defendant with the warrant, Defendant allowed Officer P. to draw his blood. Defendant's blood was sent to the DPS Crime Lab to be tested. The testing revealed that Defendant's blood contained Carboxy-Tetrahydrocannabinol (Carboxy-THC), a metabolite of the active ingredient in marijuana.

¶6 The State charged Defendant with aggravated driving while under the influence (DUI) of intoxicating liquor,

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[2] The residue in the bottle was subsequently tested and determined to be marijuana.

[3] The admin per se/implied consent affidavit explains that if a person suspected of driving under the influence refuses to submit to a blood test, his or her license will be suspended for one year, regardless of the test results.

aggravated driving with drugs in the body, and possession of a narcotic drug, each a class four felony, and possession of drug paraphernalia, a class six felony. Before trial, Defendant moved to suppress the results of the blood draw, alleging that the warrant obtained by Officer P. had an insufficient basis for its issuance because Officer P.'s search warrant affidavit contained only conclusory statements. The trial court held a suppression hearing and denied Defendant's motion, finding there was a substantial basis upon which to issue the warrant.

¶7 The case proceeded to trial, and a jury found Defendant guilty on the charges of aggravated driving with drugs in the body, possession of a narcotic drug, and possession of drug paraphernalia.[4] Because Defendant had three historical prior convictions, the trial court sentenced Defendant to eight years in prison on both the aggravated driving with drugs in the body and possession of a narcotic drug counts and three years in prison on the possession of drug paraphernalia count, with all counts to be served concurrently.

¶8 Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1

[4] The State moved to dismiss the aggravated DUI of intoxicating liquor charge before trial, and the trial court granted the motion.

(2003), 13-4031 (2010), and -4033.A.1 (2010).

DISCUSSION

A. Defective Warrant

¶9 Defendant contends the trial court erred by denying his motion to suppress the results of his blood draw. He alleges that the warrant was defective because Officer P.'s affidavit that was used to secure the warrant contained conclusory statements and was not based on firsthand knowledge, but rather on the observations of another officer.

¶10 In reviewing the trial court's decision on a motion to suppress, we view the facts and evidence in the light most favorable to sustaining the trial court's decision, and we will not disturb the trial court's ruling absent clear and manifest error. *State v. Hamilton*, 173 Ariz. 196, 197-98, 840 P.2d 1061, 1062-63 (App. 1992). A search warrant will not be issued unless there is "probable cause, supported by affidavit, naming or describing the person and particularly describing the property to be seized and the place to be searched." A.R.S. § 13-3913 (2010).[5] "The affidavit . . . must set forth the facts tending to establish the grounds of the application, or probable cause for believing the grounds exist." A.R.S. § 13-3914.B (2010).

¶11 The search warrant affiant must have personal

[5] We cite the current version of applicable statutes when no revisions material to this decision have occurred.

knowledge as to facts alleged "rather than the ceremonial attestation that the affiant knows or believes those facts to be true." *State v. Moody*, 114 Ariz. 365, 366, 560 P.2d 1272, 1273 (App. 1977). If a search warrant affidavit was the only evidence presented to the issuing magistrate, we must confine our probable cause review to the affidavit alone. *State v. Jung*, 19 Ariz. App. 257, 258-59, 506 P.2d 648, 649-50 (1973).

¶12 The search warrant affidavit completed by Officer P. contained statements that there were "[m]ultiple indicators of drug impairment and symptoms," the "DRE evaluation showed multiple signs of impairment," and oxycodone and marijuana residue were found in Defendant's truck. Officer P. also avowed that Defendant had a low body temperature, an elevated blood pressure, red eyes, and a flushed face, was cold in a heated room, was swaying, and spoke slowly.

¶13 Defendant challenges the fact that Officer P. included conclusory statements that Defendant was cold, spoke slowly, and had a low body temperature and an elevated blood pressure in the affidavit. However, this information was excised from the affidavit by the trial court during the suppression hearing. The court determined that the information from the DRE was insufficient to have caused the warrant because no information was included in Officer P.'s affidavit regarding who conducted the DRE or whether the person who conducted it was certified.

After excising that information, it stated that "we are left, essentially, with someone speeding who has a suspended license, who has red eyes and a flushed face and is swaying, and in whose car is found Oxy[C]ontin and marijuana residue." Based on that information, it concluded that there was probable cause to issue a warrant.

¶14 Defendant contends, however, that the trial court also should not have considered Officer P.'s statement that marijuana and oxycodone were found in the truck because Officer P. failed to test those substances before completing the affidavit. We disagree. *See State v. Poland*, 132 Ariz. 269, 279, 645 P.2d 784, 794 (1982) (holding that an affiant's failure to obtain test results on what affiant alleged to be a blood sample in a search warrant affidavit was not a reckless disregard for the truth, even though the sample was later determined not to be blood). We find that the factual circumstances enumerated in Officer P.'s search warrant affidavit and considered by the trial court during the suppression hearing were sufficient to establish probable cause and to permit a neutral and detached magistrate to issue a search warrant to draw Defendant's blood.

B. Implied Consent Instruction

¶15 Defendant also asserts that the trial court erred in instructing the jury on implied consent. We review the trial court's decision to give a jury instruction for an abuse of

discretion. *State v. Johnson*, 205 Ariz. 413, 417, ¶ 10, 72 P.3d 343, 347 (App. 2003). However, we review de novo whether the jury instructions adequately state the law. *State v. McCray*, 218 Ariz. 252, 258, ¶ 25, 183 P.3d 503, 509 (2008).

¶16 Defendant is only challenging the implied consent jury instruction given by the trial court, which stated that

> [a]ny person who operates a motor vehicle within the state gives consent to a . . . test or tests of his blood, breath, or urine for the purposes of determining the alcoholic content of his blood if arrested for driving while intoxicated.
>
> A refusal to submit to a chemical test under the Implied Consent Law occurs when the conduct of the arrested motorist is such that a reasonable person in the officer's position would be justified in believing that such motorist was capable of refusal and exhibited an unwillingness to submit to the test.
>
> . . .
>
> If you find that the defendant refused to submit to a test, you may consider such evidence together with all the other evidence.

Defendant does not contend that he was not read the admin per se/implied consent affidavit. Instead, he argues that the implied consent jury instruction should not have been given because at the time he refused to submit to a blood draw, he was only under arrest for a suspended license, not for DUI as is required under A.R.S. § 28-1321.A (2012).

¶17 Arizona Revised Statutes section 28-1321.A provides that

> [a] person who operates a motor vehicle in this state gives consent . . . to a test or tests of the person's blood, breath, urine or other bodily substance for the purpose of determining alcohol concentration or drug content if the person is arrested for [a DUI offense] while the person was driving or in actual physical control of a motor vehicle while under the influence of intoxicating liquor or drugs.

In overruling Defendant's objection to the implied consent instruction, the trial court stated that Defendant "was under arrest to the extent that the investigation was continuing about the DUI." We agree with the trial court's determination.

¶18 Although Defendant may have initially been arrested for driving with a suspended license, there is ample evidence in the record that Defendant was also under arrest for suspicion of DUI when Officer P. requested that Defendant submit to a blood draw. First, Officer P. testified that he smelled an odor of burnt marijuana during the traffic stop and questioned Defendant about whether there was marijuana in the vehicle. During a subsequent inventory search of Defendant's vehicle, Officer P. found a bottle with an odor of marijuana, burnt pieces of paper, and marijuana residue and another bottle that contained seventy-two tablets of oxycodone. Also, before Officer P. read the admin per se/implied consent affidavit to Defendant and

requested that Defendant submit to a blood draw, he questioned Defendant about the items he found during the inventory search and Officer A. conducted a DRE on Defendant. Based on the results of Officer A.'s DRE, Officer P. believed that Defendant was under the influence of cannabis and a narcotic analgesic and that he was required to read Defendant the admin per se/implied consent affidavit before he could take Defendant's blood.

¶19 We therefore find that the trial court correctly determined that Defendant was under arrest for DUI when Officer P. requested that Defendant submit to a blood draw; therefore, it did not err in instructing the jury on Arizona's implied consent law.

¶20 Moreover, even assuming arguendo that Defendant was not under arrest for DUI and the trial court erred by giving the implied consent instruction, we believe that the error was harmless. "The test for determining harmless error is whether there was reasonable probability . . . that a verdict might have been different had the error not been committed." *State v. Williams*, 133 Ariz. 220, 225, 650 P.2d 1202, 1207 (1982) (citation and internal quotation marks omitted).

¶21 Citing *State v. Bedoni*, 161 Ariz. 480, 779 P.2d 355 (App. 1989), Defendant states that he was harmed because the jury could consider his refusal as evidence that he was under the influence of an intoxicant, and he was prejudiced as a

result. In *Bedoni*, the implied consent instruction stated that "[i]f you find that the defendant refused to submit to such a test you may consider the fact of refusal as evidence that the defendant was under the influence of an intoxicant." *Id.* at 485, 779 P.2d at 360. In this case, however, the trial court did not instruct the jury that Defendant's refusal to submit to the blood draw meant he was under the influence of an intoxicant as in *Bedoni*, but merely informed the jury that it could consider evidence of Defendant's refusal to submit to the blood draw with all of the other evidence presented at trial.

¶22 Furthermore, although Defendant asserts that the implied consent instruction could cause the jury to consider his refusal of the blood draw as evidence that he was under the influence of an intoxicant, this evidence was superfluous and could not have affected the verdict. *See State v. Bass*, 198 Ariz. 571, 581, ¶ 40, 12 P.3d 796, 806 (2000). In order to convict Defendant of aggravated driving with drugs in the body, the State was required to prove that Defendant (1) was driving (2) had a suspended license, and (3) had marijuana or its metabolite in his body. *See* A.R.S. §§ 28-1381.A.3 (2010), -1383.A.1 (Supp. 2012). Neither of the first two factors is at issue, and the third factor was proven by the results of Defendant's blood draw. The State's criminalist from the DPS Crime Lab testified that Defendant's blood contained Carboxy-

THC, a metabolite of the active ingredient in marijuana. This evidence satisfied the third and final factor needed to convict Defendant of aggravated driving with drugs in the body, and it rendered unnecessary any inference that could be drawn from the implied consent instruction. *See Montano v. Superior Court*, 149 Ariz. 385, 389, 719 P.2d 271, 275 (1986) (stating that in DUI cases, test results are "virtually dispositive of guilt or innocence").

¶23 We are convinced beyond a reasonable doubt that the jury would have convicted Defendant on the aggravated driving with drugs in the body charge even without the implied consent instruction; therefore, we fail to see how the implied consent instruction affected the jury's verdict in this case. *See Williams*, 133 Ariz. at 225, 650 P.2d at 1207 (stating that an error is harmless if the verdict would have been the same regardless of whether the error was committed).

CONCLUSION

¶24 We affirm Defendant's convictions and sentences.

/S/
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PATRICIA A. OROZCO, Presiding Judge

CONCURRING:
/S/
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PETER B. SWANN, Judge

/S/
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LAWRENCE F. WINTHROP, Chief Judge