DIVISION ONE
FILED: 11/27/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 11-0332
	)	DEPARTMENT D
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
RAFAEL ISAAC NUNEZ, Appellant.	)	Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Mohave County

Cause No. S8015CR20080932

The Honorable Lee Frank Jantzen, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
and Barbara A. Bailey, Assistant Attorney General
Attorneys for Appellee

Jill L. Evans, Mohave County Appellate Defender — Kingman
Attorney for Appellant

P O R T L E Y, Judge

¶1 Defendant Rafael Isaac Nunez appeals his convictions and sentences on two counts of aggravated driving while impaired by alcohol.

FACTUAL[1] AND PROCEDURAL BACKGROUND

¶2 Nunez was seen driving erratically about 2 a.m. on a Saturday morning. After he ran a red light, a police officer, in a marked car with sirens and lights activated, tried unsuccessfully to get him to stop. Instead of stopping, Nunez waved the officer to go around him after the officer commanded him on a PA system to, "Stop your vehicle, pull over."

¶3 When Nunez got to his driveway and stopped, he was arrested. The police observed that his eyes were bloodshot and watery, he had a strong odor of alcohol, and he slurred his words. He also had an "open and bleeding wound" on his left hand and was taken to the hospital for medical treatment. There, Nunez was read the implied consent form and an officer asked him if he would submit to a blood test. Nunez refused.

¶4 Nunez was charged and tried, but he did not testify. During closing argument, he argued that he might have refused the blood test for purely innocent reasons, such as not wanting "to have a test taken or have a needle stuck in [him] to have the blood drawn." He also argued that the officer's failure to conduct field sobriety tests or to obtain a search warrant to test his blood left the State with no definitive proof that he was actually impaired by alcohol. Despite his argument, the

[1] We view the evidence in a light most favorable to sustaining the convictions. *State v. Girdler,* 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983).

jury found him guilty as charged, and he was subsequently sentenced.

DISCUSSION

¶5 Nunez now argues that the State improperly called attention to his silence after he was arrested and his failure to testify at trial. He contends that the State improperly argued that the jury could infer consciousness of guilt from his refusal to submit to a blood test, and that the State shifted the burden of proof by arguing that it was his fault that results of a blood test were not available. Because he failed to object to the State's closing argument, he has to demonstrate that any error was fundamental and that it caused him prejudice. *See State v. Henderson,* 210 Ariz. 561, 568, ¶¶ 21-22, 115 P.3d 601, 608 (2005). Error is fundamental when it goes to the foundation of a defendant's case, takes from him a right essential to his defense, and is error of such magnitude that he could not possibly have received a fair trial. *Id.* at 567, ¶ 19, 115 P.3d at 607.

I

¶6 Prosecutors have "wide latitude in their closing arguments to the jury." *State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990). To determine whether a prosecutor's remarks are improper, we consider whether the remarks called to the attention of jurors matters they would not be justified in

considering, and the probability, under the circumstances, that the jurors were influenced by the remarks. *State v. Jones,* 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000) (citation omitted).

¶7 Nunez concedes that it is well-settled that a prosecutor may argue that the jury can infer consciousness of guilt from a defendant's refusal to take a blood test. *See* Ariz. Rev. Stat. ("A.R.S.") § 28-1388(D) (West 2012) (providing that evidence of refusal to submit to blood test is admissible at criminal trial); *South Dakota v. Neville*, 459 U.S. 553, 564 (1983) (holding that refusal to take breath test is not "an act coerced by the officer, and thus is not protected by the privilege against self-incrimination"); *State v. Superior Court (Ahrens)*, 154 Ariz. 574, 578, 744 P.2d 675, 679 (1987) (holding that "refusal to take a chemical breath test is not testimonial evidence but physical evidence only and therefore admissible at a criminal trial for DUI"); *State v. Vannoy*, 177 Ariz. 206, 211, 866 P.2d 874, 879 (App. 1993) ("Evidence of such a refusal is admissible to show that the defendant was conscious of his guilt.").

¶8 It is also well-settled that a "prosecutor may properly comment upon the defendant's failure to present exculpatory evidence, so long as the comment is not phrased to call attention to the defendant's own failure to testify." *State v. Herrera,* 203 Ariz. 131, 137, ¶ 19, 51 P.3d 353, 359

(App. 2002) (holding that it was not improper for prosecutor to argue that, had a videotape of defendant's performance on field sobriety tests been favorable, defendant would have introduced it). The decision on whether the prosecutor's remarks were impermissible turns on whether they were of such character that "the jury would naturally and necessarily perceive them to be a comment on the failure of the defendant to testify." *State v. Cook*, 170 Ariz. 40, 51, 821 P.2d 731, 742 (1991).

¶9 It is also well-settled that a request to submit to the blood-alcohol test is not "interrogation within the meaning of *Miranda*," and a defendant's due process rights are not violated by admission of his refusal to take a blood test, despite the absence of a specific warning that a refusal would be used against him at trial. *See Neville*, 459 U.S. at 564, n.15, 564-66 (distinguishing *Doyle v. Ohio*, 426 U.S. 610, 619 (1976)); *see also Pennsylvania v. Muniz*, 496 U.S. 582, 602-06 (1990) (holding that *Miranda* does not require suppression of statements a defendant makes either when asked to perform field sobriety tests or when asked to submit to a breathalyzer examination).

II

¶10 Nunez first argues that the prosecutor's rebuttal argument improperly commented on his exercise of his rights to remain silent after his arrest and not to testify:

> And that being said, the defendant[] refused to take the test. If there was an issue with needles [—] *there was no testimony that the defendant stated, you know, I won't take the blood test but, you know, can we wait and do a breath test? I don't like needles or something like that.* There was just a flat out refusal to take the test.

(Emphasis added.) Despite the claim, the prosecutor's sole reference on rebuttal to the absence of any testimony that Nunez offered an explanation for his refusal to take a blood test was not calculated to direct the jurors' attention either to any invocation of his right to remain silent or to his failure to testify, and thus was not impermissible. *See Cook*, 170 Ariz. at 51, 821 P.2d at 742 (holding that prosecutor's argument that defendant never told a fellow prisoner who was advising him that he had an alibi did not direct the jury's attention either to defendant's failure to testify or to his invocation of his right to silence); *Neville*, 459 U.S. at 564-66 (due process right precluding prosecutor from commenting on exercise of right to silence after *Miranda* warnings is not implicated by request to submit to breath test in DUI prosecution).

¶11 The prosecutor's argument was in response to the defense supposition that Nunez might have refused to take the test because he "just didn't want, you know, [to] have a test taken or have a needle stuck in [him] to have the blood drawn." *See State v. Schrock,* 149 Ariz. 433, 439, 719 P.2d 1049, 1055 (1986) (holding that prosecutor's argument was not improper in part because it was "an invited reply to the opening statement of defense counsel"); *State v. Christensen,* 129 Ariz. 32, 38-40, 628 P.2d 580, 586-87 (1981) (holding that prosecutor's remarks on defendant's failure to testify "did not go beyond a pertinent reply" to defense counsel's argument, and accordingly were not reversible error); *State v. Arredondo*, 111 Ariz. 141, 143-44, 526 P.2d 163, 165-66 (1974) (holding that prosecutor's remarks, although "a comment on the failure of the defendant to take the stand," were not grounds for reversal because they "were invited and occasioned by the statements of defense counsel" and "did not go beyond a pertinent reply"); *State v. Edmisten*, 220 Ariz. 517, 525, ¶¶ 24-25, 207 P.3d 770, 778 (App. 2009) (holding that, even if prosecutor's comment was improper, defense counsel "opened the door to such argument, and the prosecutor was entitled to respond"). Accordingly, the prosecutor's rebuttal argument did not create any error, much less fundamental error.

III

¶12 Nunez also argues that the prosecutor shifted the burden of proof by repeatedly arguing that "it was Appellant's fault that the state did not have proof of blood alcohol content because he refused the test, where police failed to even attempt to obtain a warrant or breath test or conduct field sobriety tests." We disagree.

¶13 The facts presented at trial supported the argument. The arresting officer testified and explained why he was unable to administer a breath test or secure a warrant for a blood draw — because Nunez had to be taken to the hospital for medical treatment. Moreover, the State's argument was a fair response to the defense's opening statement that the arresting officer chose not to attempt to obtain a warrant and secure blood from Nunez. *See Schrock,* 149 Ariz. at 439, 719 P.2d at 1055. Finally, the prosecutor repeatedly emphasized during her closing arguments that the State had the burden of proof. Despite the claim, the argument did not expressly or impliedly shift the burden of proof. *Cf. State v. Sarullo*, 219 Ariz. 431, 437, ¶ 24, 199 P.3d 686, 692 (App. 2008) (holding that prosecutor did not shift the burden of proof to defendant by arguing that he had failed to call expert witnesses to support his theory of defense). Therefore, we find no error or prejudice.

IV

¶14 Nunez finally argues that the court fundamentally erred by failing to instruct the jury that a defendant has a right not to testify on his own behalf. We review the adequacy of jury instructions in their entirety to determine if they accurately and adequately reflect the law. *State v. Hoskins,* 199 Ariz. 127, 145, ¶ 75, 14 P.3d 997, 1015 (2000). We will not reverse "unless we can reasonably find that the instructions, when taken as a whole, would mislead the jurors." *State v. Sucharew*, 205 Ariz. 16, 26, ¶ 33, 66 P.3d 59, 69 (App. 2003) (citation omitted).

¶15 In the preliminary instructions, the court instructed the jury that a defendant is not required to testify at trial. After the completion of the trial the following day, that instruction was omitted from the closing instructions. Despite the omission, the jury was instructed that "[t]he defendant is not required to produce evidence of any kind," and "[t]he defendant's decision not to produce any evidence is not evidence of guilt." The jury was also advised that the defendant was presumed innocent and the State had the burden to prove guilt beyond a reasonable doubt based on the evidence. Under the circumstances, we find that the instructions, taken as a whole, did not mislead the jury. *See Sucharew*, 205 Ariz. at 26, ¶ 33, 66 P.3d at 69. Accordingly, we find no fundamental error.

CONCLUSION

¶16 Based on the foregoing, we affirm the convictions and sentences.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
ANDREW W. GOULD, Judge

/s/
_____
JON W. THOMPSON, Judge