IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

LEROY LAVERNE SIMONTON, *Appellant*.

No. 1 CA-CR12-0584
FILED 12-26-2013

Appeal from the Superior Court in Maricopa County
No. CR2011-008013-001
The Honorable M. Scott McCoy, Judge

AFFIRMED

COUNSEL

Maricopa County Public Defender, Phoenix
By Jeffrey L. Force
Counsel for Appellant

Arizona Attorney General, Phoenix
By Jana Zinman
Counsel for Appellee

MEMORANDUM DECISION

Judge Patricia A. Orozco delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Margaret H. Downie joined.

O R O Z C O, Judge:

¶1 Defendant, Leroy Laverne Simonton, timely appeals from his convictions for Count one, possession of dangerous drugs (methamphetamine), a Class four felony; Count two, use of dangerous drugs (methamphetamine), a Class four felony; Count three, possession of drug paraphernalia, a Class six felony; Count four, driving or actual physical control while under the influence of any drug, a Class one misdemeanor; and Count five, driving or actual physical control while under the influence of any drug defined in Arizona Revised Statute (A.R.S.) section 13-3401 or its metabolite was in his body, a Class one misdemeanor. He argues: (1) that double jeopardy barred his convictions for use of dangerous drugs and driving under the influence of dangerous drugs; and (2) that the trial court abused its discretion by denying admission of a tape recorded interview of a witness who was allegedly unavailable to testify at trial.

¶2 This court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and A.R.S. sections 12-120.21(A)(1)(1992), 13-4031 and 13-4033 (2010). For reasons set forth below, we affirm.

FACTS[1] AND PROCEDURAL HISTORY

¶3 Mid-afternoon on May 20, 2011, Phoenix Police Department Officers Day and Swenson responded to a collision between a passenger vehicle and a minivan at the intersection of West Bell Road and 19th Avenue in Phoenix. Defendant identified himself to the officers as the driver of the minivan.

[1] We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against defendant. *State v. Vendever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

¶4 Officer Day became suspicious when she noticed that Defendant was "fidgety" and kept repeating himself; had a reddish face, constricted pupils, and slurred speech; and would stop speaking and stare off into the distance. She administered field sobriety tests (FSTs), four of which Defendant failed. Defendant's behavior and performance on the FSTs led Day to believe that Defendant was under the influence of a stimulant, not a depressant such as alcohol, and she arrested him for "suspicion of driving under the influence."

¶5 Before the minivan was towed, Defendant asked Swenson if Swenson could remove "his grandmother's jewelry" from the van, which Defendant indicated was located between the driver and passenger seats. When Swenson obliged, in addition to some costume jewelry, Swenson found several "designer baggies" full of a white crystalline substance that was later determined to be methamphetamine. Defendant denied knowing what the white substance was and subsequently requested that Swenson leave everything, including the jewelry, in the van.

¶6 Phoenix Police Detective Layden, a drug recognition expert, drew blood from Defendant and also obtained a urine sample. Layden also noted signs of impairment in Defendant that led him to believe that Defendant had "ingested a central nervous system stimulant" such as methamphetamine. Forensic analysis established that the blood and urine samples each contained both methamphetamine and amphetamine.

¶7 The State charged Defendant with Count one, possession of dangerous drugs (methamphetamine); Count two, use of dangerous drugs (methamphetamine); Count three, possession of drug paraphernalia (baggies); Count four, driving or actual physical control while under the influence of intoxicating liquor or drugs; and Count five, driving or actual physical control with a drug metabolite in his body. At trial, Defendant testified that a friend, Kenny Johnson, was actually driving the van but that Johnson "walked off" before the police arrived. He maintained that he tried to tell Day, but that she would not listen. However, he also testified that he had never actually mentioned Johnson's name to the police. Defendant denied ever using methamphetamine and denied any knowledge of the drugs that were found inside the van. He ascribed the blood and urine analysis results to the fact that he had been taking Sudafed or other "allergy medicine" because he had been suffering from "a real bad cold" for a "couple [of] weeks." The jury found the Defendant guilty of all of the offenses as charged, and on August 28, 2012, the trial court suspended imposition of sentences and placed Defendant on concurrent terms of two years supervised probation on each count.

DISCUSSION

Double Jeopardy Violation

¶8 Defendant was convicted of Count two knowingly using methamphetamine on May 20, 2011, and Count five driving or being in actual physical control of a vehicle on that same date while there was any drug defined in A.R.S. § 13-3401 or its metabolite in his body. He argues that the use of methamphetamine is a "lesser included" offense of driving while under the influence of methamphetamine and thus, because both convictions are based on his use of methamphetamine, his convictions on the two offenses violate the prohibitions against double jeopardy. He asks us to vacate the conviction on Count two. We decline that request.

¶9 First, as Defendant acknowledges, he failed to raise this issue before the trial court. He therefore forfeits appellate relief on this issue unless he can prove that fundamental error existed and that the error caused him prejudice. *State v. Henderson*, 210 Ariz. 561, 567, ¶¶19-20, 115 P.3d 601, 607 (2005). The onus rests squarely with Defendant to do both. *Id*. at 567, ¶ 19, 115 P.3d at 607. However, even before we engage in fundamental error review, "we must first find that the trial court committed some error." *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991). We find no error, let alone, fundamental error.

¶10 "The Double Jeopardy Clause prohibits the imposition of multiple punishments for the same offense." *State v. Eagle*, 196 Ariz. 188, 190, ¶ 6, 994 P.2d 395, 397 (2000). In *Blockburger,* the Supreme Court held that two offenses constitute the same offense for double jeopardy purpose unless "each statute requires proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *See also, State v. Siddle*, 202 Ariz. 512, 516, ¶ 10, 47 P.3d 1150, 1154 (App. 2002) (citation omitted) ("statutory provisions constitute the same offense if they are comprised of the same elements").

¶11 The *Blockburger* test is essentially the same test for deciding whether an offense is the lesser included of another. One offense is the "lesser included" of another offense if the "greater offense cannot be committed without [also] necessarily committing the lesser offense." *State v. Wall*, 212 Ariz. 1, 3, ¶ 14, 126 P.3d 148, 150 (2006). Thus, the lesser offense must be "composed solely of some but not all of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one." *State v. Geeslin*, 223 Ariz. 553, 554, ¶ 7, 225 P.3d 1129, 1130 (2010). The focus is on the statutory

elements of the two charged offenses, not the factual proof that is offered to support the conviction. *State v. Cook*, 185 Ariz. 358, 361, 916 P.2d 1074, 1077 (App. 1995). If each statute contains an element not found in the other, "then the offenses are not the same and the double jeopardy bar does not apply." *Id*.

¶12 In Count two Defendant was convicted of use of a dangerous drug, which required the State to prove that he (1) knowingly (2) used (3) methamphetamine, a dangerous drug. A.R.S. § 13-3407.A.1. (Supp. 2012). In Count five, Defendant was convicted of driving while under the influence of, in this case, drugs, which required the State to prove that he (1) drove or was "in actual physical control of a vehicle" (2) while there was "*any* drug defined in A.R.S. § 13-3401[2] or its metabolite in his body." A.R.S. § 28-1381.A.3. (2011). Each of these offenses requires the State to prove distinctly separate statutory elements. Count two requires the State to prove that Defendant "knowingly" ingested or used methamphetamine to be found guilty of that crime; Count five does not contain a "knowingly" element in order for the State to prove that he drove while under the influence of the drug. Similarly, Count five requires the State to prove the element that Defendant was driving or in actual physical control of a vehicle in order to be found guilty of DUI, but contains no concomitant requirement that the State prove that he "knowingly" ingested the drug. The mere fact that the "factual proof" offered to support each offense may overlap does not change the fact the statutes each contain elements not found in the other. *Cook*, 185 Ariz. at 361, 916 P.2d at 1077. Therefore, the offenses in Count two and five are not "the same" or a lesser included and double jeopardy does not apply. *Id*.

¶13 Because we conclude that Defendant committed and was convicted of two separate offenses in Count two and Count five, we find that Defendant has not met the burden of proving that any error, fundamental or otherwise, occurred. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

Failure to Admit Taped Interview of Kenny Johnson

¶14 After the State rested, Defense counsel informed the trial court that she planned to call Defendant's former defense counsel and a

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[2] A.R.S. § 31-3401.6.(b)(xvii) (Supp. 2012) lists methamphetamine as a dangerous drug.

defense investigator as witnesses in Defendant's case-in-chief. She also advised the court that she intended to play a recording of a taped interview that Kenny Johnson had with Defendant's prior defense counsel during which Johnson admitted that he was the driver of the minivan at the time of the accident. Despite the defense's efforts, Johnson could not be found and subpoenaed to come to court to testify. Counsel argued that, although Johnson's taped statements were hearsay, they were nonetheless admissible because Johnson was "unavailable" and because his statements fell under Ariz. R. Evid. 804(b)(3), the "statement against interest" exception to the hearsay rule. The State argued that Johnson's statements were inadmissible because (1) the State had not been given the opportunity to cross-examine Johnson and (2) Johnson's statement that he was the driver was not a "statement against interest" because the passenger vehicle was the cause of the accident and Johnson never admitted either that he was "high" or impaired at the time of driving or any knowledge of the drugs in the van.

¶15 After hearing argument and listening to the tape of the interview, the trial court ruled that the taped statements were "inadmissible hearsay" because they were not against Johnson's "personal or pecuniary interest." On appeal, Defendant claims that the taped statements were admissible under Rule 804(b)(3) as "statements against interest" and that the trial court abused its discretion in excluding them.

¶16 A trial court "has considerable discretion in determining the relevance and admissibility of evidence," and this court "will not disturb its ruling absent a clear abuse of discretion." *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990). An abuse of discretion occurs only when "unfair prejudice resulted . . . or the court incorrectly applied the law." *Higgins v. Assman Elecs., Inc.*, 217 Ariz. 289, 298, ¶ 34, 173 P.3d 453, 462 (App. 2007). While a defendant has the right to attempt to show that another person committed the crime for which he is charged, "it remains in the trial court's discretion to exclude the evidence if it offers only a possible ground of suspicion against another." *State v. Prion*, 203 Ariz. 157, 161, ¶ 21, 52 P.3d 189, 193 (2002). Furthermore, a defendant's right to present his defense is "limited to the presentation of matters admissible under ordinary evidentiary rules" and any probative value must not be outweighed by the dangers of unfair prejudice, confusion or misleading of the jury. *State v. Hardy*, 230 Ariz. 281, 291, ¶ 49, 283 P.3d 12, 22 (2012).

¶17 We will uphold the trial court's decision on admissibility if there is "'any reasonable evidence in the record to sustain it.'" *State v. Butler*, 230 Ariz. 465, 472, ¶ 28, 286 P.3d 1074, 1081 (App. 2012) (quoting *State v.*

Morris, 215 Ariz. 324, 341, ¶ 77, 160 P.3d 203, 220 (2007)). We find no abuse of discretion in the trial court's decision.

¶18 "Hearsay" is an out-of-court statement made by a declarant "offer[ed] in evidence to prove the truth of the matter asserted." Ariz. R. Evid. 801(c). Hearsay is generally inadmissible unless it falls under one of the applicable exceptions. Ariz. R. Evid. 802. Rule 804 provides one such exception for a "statement against interest," which it defines as a statement that "a reasonable person in the declarant's position would have made only if the person believed it to be true, because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to . . . expose the declarant to civil or criminal penalty." Ariz. R. Evid. 804(b)(3). The rule further provides that a statement "tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

¶19 The trial court correctly determined that Johnson's admission that he was driving the van was not a statement against interest given the circumstances of this case. The Defendant was charged with DUI while under the influence of drugs. Johnson never admitted that he was under the influence of drugs or otherwise impaired while driving the van or that he used or knew anything about the drugs found inside the van. Therefore, the mere statement that he was driving the van, a lawful act, did not expose him to any criminal liability. Nor did the fact that the van was involved in an accident while he was driving expose him to any liability, either civil or criminal, because all of the evidence at trial established that the driver of the passenger vehicle was cited for failure to yield the right of way and, thus, responsible for the accident.

¶20 Defense counsel acknowledged that the car accident in and of itself was not evidence of a crime, but also argued that Johnson's statements were against interest because Johnson could have been held liable for leaving the scene of the accident. However, the admissions were made four months after the incident when presumably Johnson knew that Defendant was not being held accountable for the accident itself but was charged with the DUI, which Johnson did not admit. Therefore, his statement that he was the driver did not expose him to criminal liability for the actual offenses charged.

¶21 Furthermore, contrary to Defendant's arguments, other than Defendant's testimony at trial, few corroborating circumstances indicated the "trustworthiness" of Johnson's statements. Ariz. R. Evid. 804(b)(3).

Defendant acknowledges that he and Johnson had known each other for "about a year" before the incident, but denies that this played any part in Johnson's decision to contact his defense counsel or admit to driving. Officer Day testified that when she first saw Defendant he had the keys to the van in his hands and that he identified himself to her as its driver and never mentioned another person or driver on the day of his arrest. Swenson also testified that Defendant never mentioned another driver to him. Swenson further testified that the interior of the van, including the passenger seat, was so "cluttered" with Defendant's belongings that it would have been "difficult" for anyone to have been sitting in the passenger seat if someone else drove. This evidence and the fact that Johnson's admission occurred months after the charges were filed clearly undermine the "trustworthiness" of his admission. For these reasons, we cannot say that the trial court abused its broad discretion in finding that the statements were not admissible pursuant to Rule 804(b)(3). *Amaya-Ruiz*, 166 Ariz. at 167, 800 P.2d at 1275; *Butler*, 230 Ariz. at 472, ¶ 28, 286 P.3d at 1081.

CONCLUSION

¶22 For the foregoing reasons, we affirm Defendant's convictions and sentences.

Ruth A. Willingham · Clerk of the Court
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