IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

PAUL HUMPHREY MERWIN, JR., *Appellant*.

No. 1 CA-CR 16-0260
FILED 9-19-2017

Appeal from the Superior Court in Yavapai County
No. V1300CR201380138
The Honorable Michael R. Bluff, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Terry M. Crist
Counsel for Appellee

Kimerer & Derrick, PC, Phoenix
By Clark L. Derrick, Rhonda Elaine Neff
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Peter B. Swann delivered the decision of the Court, in which Judge Kent E. Cattani and Judge Donn Kessler (retired) joined.

S W A N N, Judge:

¶1 Paul Humphrey Merwin, Jr., appeals his conviction for negligent homicide. He argues that the superior court should have suppressed evidence of the content of his blood, and he challenges the sufficiency of the evidence at trial. For the following reasons, we affirm.

¶2 We hold that the blood evidence was admissible under A.R.S. § 28-1388(E) (commonly known as the "medical draw exception" to the warrant requirement) and the inevitable discovery doctrine. Though the state failed to prove that medical personnel drew the blood for medical purposes, it met its burden to show that the blood inevitably would have been drawn in accordance with the exception. And while the state could not demonstrate exigent circumstances to support the application of § 28-1388(E) under current law, binding case law in effect at the time of the draw held that the metabolic process could create exigency and the officer's belief in the existence of legally exigent circumstances was held in good faith.

¶3 We further hold that sufficient evidence supported Merwin's conviction. We therefore affirm Merwin's conviction and his sentence.

FACTS AND PROCEDURAL HISTORY

¶4 Merwin was indicted for two counts of driving under the influence ("DUI") and manslaughter after he caused a single-vehicle collision that killed his passenger.

¶5 Before trial, Merwin moved to suppress the blood sample that law enforcement obtained from him on the day of the collision. The state responded that the sample was taken in accordance with A.R.S. § 28-1388(E). At an evidentiary hearing on the suppression motion, the parties presented evidence of the following facts.

¶6 On March 4, 2012, at approximately 6:00 p.m., police officer Tommy Nester responded to the scene of the collision. Officer Nester found

Merwin in the driver's seat of the vehicle, and a female was slumped over in the passenger's seat. As Officer Nester escorted Merwin to a police vehicle as a safety measure, he noticed a "slight odor of alcoholic beverage coming from [Merwin's] person." Officer Nester asked Merwin whether he had been drinking alcohol and Merwin said no. The officer did not conduct field sobriety tests.

¶7 Officer Nester left Merwin and began directing traffic. He also spoke to several witnesses. The witnesses reported that Merwin was driving down a hill when he suddenly left his lane as though to pass another vehicle, but there was no vehicle to pass. He then crossed a double yellow line and drove into a culvert. Officer Nester noted the absence of skid marks; he also noted that the damage to Merwin's vehicle showed, in his estimation as an accident reconstructionist, an impact speed of less than 35 miles per hour.

¶8 Meanwhile, Merwin received medical treatment at the scene. A firefighter paramedic evaluated Merwin and found him to be responsive, alert, and oriented. Merwin told the firefighter that a cigarette had made him dizzy as he drove, and he denied any drug or alcohol use. The firefighter noted no signs of intoxication.

¶9 Merwin initially refused to be transported for medical care, but he later changed his mind. He was transported by ambulance, without lights or sirens, to a medical center as Officer Nester followed in his vehicle. An ambulance paramedic evaluated Merwin and found him to be responsive, alert, and oriented, with no signs of alcohol consumption.

¶10 Merwin arrived at the medical center, and he verbally consented to a "Conditions of Admission Agreement." He began receiving care from a nurse at the medical center at 7:49 p.m. The nurse did not record any signs of alcohol consumption.

¶11 Officer Nester made contact with Merwin in the emergency room. At 7:55 p.m., certified nursing assistant Matthew McCarthy drew a sample of Merwin's blood and certified the draw on a "Consent Form" that Officer Nester provided. Officer Nester crossed out the "consent" portion of the form and wrote "FATAL CRASH DRAW."

¶12 Officer Nester initially testified that he "requested blood" and "asked McCarthy if he would take the blood," but he later testified that "they were drawing his blood so I drew his blood," and "[b]asically McCarthy told me they were already drawing his blood for medical reasons and did I need a blood draw and I said yes." Officer Nester's written report

stated that Merwin's blood was already being drawn for medical purposes by the time the officer contacted him.

¶13 The medical-center records showed that Merwin's treating physician requested a blood sample, and the request was logged at 8:05 p.m., ten minutes after McCarthy completed the draw. McCarthy testified at one point that Officer Nester "[o]bviously [ ] must have" requested the draw, but he later stated that the physician "more than likely . . . probably [had] given us a verbal order." McCarthy and the treating nurse also testified that medical protocols can provide grounds for blood draws. But both acknowledged that they had no independent recollection of the draw at issue.

¶14 McCarthy asserted that in view of the physician's order, the medical center "would have drawn blood anyways." He added, however, that the medical center would have offered Merwin separate blood-draw consent and refusal forms, and that he did not see any such forms in the medical records.

¶15 The superior court ruled that the blood draw did not satisfy A.R.S. § 28-1388(E) because, while Officer Nester had probable cause to believe that Merwin had violated the DUI statutes, the state had failed to carry its burden to prove that the blood draw was conducted for a medical reason. The court then *sua sponte* examined and rejected the inevitable discovery exception to the exclusionary rule, concluding that "[i]t was clear from the evidence that [Merwin]'s blood was eventually going to be taken for medical purposes," but "the Court is unaware of any case authority that would allow th[e inevitable discovery] theory to apply under the circumstances of this case." The court therefore granted Merwin's motion to suppress the blood sample.

¶16 The state moved for reconsideration, arguing under A.R.S. § 28-1390, Officer Nester was allowed to obtain a copy of Merwin's blood alcohol concentration because "the inevitable discovery doctrine does apply." The court granted the motion for reconsideration, concluding that "[Merwin]'s blood was going to be drawn for medical purposes regardless of what Officer Nester may have said to . . . McCarthy" and "[f]rom this medical draw, Officer Nester was then entitled to a sample under A.R.S. § 28-1388(E)."

¶17 The state voluntarily dismissed Merwin's DUI charges on the eve of trial, and proceeded on the manslaughter charge only.

¶18 At trial, the state presented testimony from witnesses to the collision. The witnesses testified that immediately before the collision, Merwin was driving noticeably slow and was swerving. His vehicle then drifted into the opposing lane of traffic and abruptly impacted the concrete embankment. One of the witnesses added that she had seen Merwin making jerky movements immediately before the drift. When the witnesses approached the vehicle, they found that both Merwin and his passenger were unconscious and that the passenger's breathing was labored. Merwin regained consciousness within minutes, but the passenger soon died.

¶19 A medical examiner autopsied the passenger's body and concluded that she died from blunt force trauma to the chest and abdomen, and that a ruptured abdominal artherosclerotic aneurysm was a contributory factor. The medical examiner opined that, based on the timing, the aneurysm probably ruptured during the collision. He further opined that the passenger would have died even without the aneurysm.

¶20 The parties stipulated that Merwin's blood sample showed a blood alcohol concentration ("BAC") of 0.057%, and the presence of two nanograms per milliliter of THC. The state presented evidence that a BAC of 0.05% impairs reaction time, coordination, and the ability to do divided-attention tasks, and that THC, the active ingredient in marijuana, impairs speed perception, distance perception, and reaction time. The state further presented evidence that a BAC of 0.05% in combination with drug ingestion causes even greater impairment and makes a vehicular collision even more likely.

¶21 The jury convicted Merwin of the lesser-included offense of negligent homicide, and found that it was a dangerous offense. The court entered judgment on the verdict, and sentenced Merwin to a presumptive six-year prison term. Merwin timely appeals.

DISCUSSION

¶22 Merwin challenges the court's determination that the blood evidence was admissible. He also challenges the sufficiency of the evidence to support his conviction.

I. THE BLOOD EVIDENCE WAS ADMISSIBLE.

¶23 We first address the admission of the blood evidence. We review the denial of a motion to suppress based on the evidence presented at the suppression hearing. *State v. Newell*, 212 Ariz. 389, 396, ¶ 22 (2006). We review the superior court's factual findings for abuse of discretion, but

we review its legal conclusions de novo. *State v. Davolt*, 207 Ariz. 191, 202, ¶ 21 (2004).

¶24 Section 28-1388(E) sets forth the medical draw exception:

> Notwithstanding any other law, if a law enforcement officer has probable cause to believe that a person has violated § 28-1381 [which describes the crime of DUI] and a sample of blood . . . 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.

The state bears the burden to prove that the medical draw exception applies. *State v. Spencer*, 235 Ariz. 496, 499, ¶ 12 (App. 2014); Ariz. R. Crim. P. 16.2(b). The state must show the existence of four factors: "(1) probable cause existed to believe that the suspect was driving under the influence, (2) exigent circumstances made it impractical for law enforcement to obtain a warrant, (3) the blood was drawn by medical personnel for a medical reason, and (4) the provision of medical services did not violate the suspect's right to direct his or her own medical treatment." *State v. Nissley*, 241 Ariz. 327, 333, ¶ 24 (2017).

¶25 The state contends that it met its burden under § 28-1388(E), and that the superior court's reliance on the alternative theory of "inevitable discovery" therefore was unnecessary. Considering each factor in turn, we conclude that the state failed to satisfy its burden under the statute. We hold, however, that the evidence was admissible under the inevitable discovery doctrine.

A. The State Met Its Burden to Prove Probable Cause for DUI.

¶26 We begin with the probable-cause factor. "Probable cause is something less than the proof needed to convict and something more than suspicions." *State v. Aleman*, 210 Ariz. 232, 237, ¶ 15 (App. 2005) (citation omitted). "[P]robable cause does not require certain knowledge, it requires only facts sufficient to warrant a [person] of reasonable caution in the belief that certain items may be . . . useful as evidence of a crime." *State v. Ahumada*, 225 Ariz. 544, 549, ¶ 18 (App. 2010) (citation and internal quotation marks omitted). The standard is a "practical and common-sense" one that "depends on the totality of the circumstances." *State v. Sisco*, 239 Ariz. 532, 535, ¶ 8 (2016) (citation omitted). In the DUI context, relevant factors include the odor of alcohol coming from the defendant's person, and

unexplained erratic driving. *Aleman*, 210 Ariz. at 239, ¶¶ 15–16, 18; *see also State v. Quinn*, 218 Ariz. 66, 69–70, ¶ 10 (App. 2008) (in dicta).

¶27 Here, Officer Nester detected a slight odor of alcohol emanating from Merwin's person, and he learned from witnesses that Merwin caused the collision when he inexplicably swerved over the double yellow line. He also noted the absence of skid marks, as well as the presence of damage indicating a relatively slow impact speed. Based on the totality of the circumstances, Officer Nester had probable cause to believe that Merwin had committed DUI.[1]

B. The State Failed to Meet Its Burden to Prove Exigent Circumstances Under Current Law, But it Acted in Good Faith Under Then-Governing Case Law.

¶28 We next turn to the exigent-circumstances factor. Merwin did not contest exigency in the superior-court proceedings. Accordingly, we review this factor for fundamental error only. *Newell*, 212 Ariz. at 398, ¶ 34**.**

¶29 The parties do not dispute that the only "exigency" was the natural metabolic dissipation of the alcohol in Merwin's bloodstream. *Schmerber v. California*, 384 U.S. 757 (1966), established that while the metabolic process is a relevant consideration, additional facts are necessary to support a government-directed blood draw based on exigency. *Id.* at 770–71; *see also Missouri v. McNeely*, 133 S.Ct. 1552, 1558–61 (2013) (clarifying *Schmerber*'s holding); *State v. Havatone*, 241 Ariz. 506, 512, ¶¶ 25–28 (2017) (explaining *Schmerber* and *McNeely*). But in *State v. Cocio*, 147 Ariz. 277 (1985), a case involving the medical draw exception (which at that time was codified at A.R.S. § 28-692(M)), the Arizona Supreme Court construed *Schmerber* as having held that the body's natural ability to metabolize alcohol creates, by itself, an exigent circumstance. *Id.* at 285–86. *Cocio* therefore held that "because of the destructibility of the evidence, exigent circumstances existed. The highly evanescent nature of alcohol in the defendant's blood stream guaranteed that the alcohol would dissipate over a relatively short period of time." *Id.* at 286.

¶30 The Arizona Supreme Court has since disavowed *Cocio*'s exigency holding. *Nissley*, 241 Ariz. at 330, ¶ 11; *Havatone*, 241 Ariz. at 513,

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[1] In his reply brief on appeal, Merwin relies on trial testimony to argue that Officer Nester lacked probable cause. We do not consider trial evidence in our review of a pretrial suppression ruling. *Newell*, 212 Ariz. at 396, ¶ 22.

¶ 30. But at the time that Merwin's blood was drawn, *Cocio* provided the standard for exigency in blood draws conducted for medical reasons. *See Havatone*, 241 Ariz. at 513, ¶ 30 (recognizing unique medical-draw exigency standard established by *Cocio*); *State v. Reyes*, 238 Ariz. 575, 578–79, ¶ 19 (App. 2015) (holding, based on *Cocio* and subsequent cases: "As of 2012, when Reyes's blood was drawn, Arizona courts had uniformly held that dissipation of alcohol in blood was in itself a sufficient exigent circumstance for purposes of the medical exception."). "Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." *Davis v. United States*, 564 U.S. 229, 241 (2011). In view of the then-governing standard prescribed by *Cocio*, the state reasonably obtained Merwin's blood based on the evanescent nature of alcohol in his bloodstream.

C. The State Failed to Meet Its Burden to Prove That the Draw Was Conducted for a Medical Reason, But the Evidence Established That a Medical Draw Was Inevitable.

¶31 We next examine whether Merwin's blood was drawn for a medical reason, consistent with the medical services to which he had consented. The superior court determined that the blood was *not* drawn for a medical purpose, and we perceive no abuse of discretion in that finding. The evidence was equivocal with respect to whether McCarthy drew Merwin's blood in response to a physician's order or medical protocol, or whether he instead drew it in response to Officer Nester's request. Officer Nester testified at one point that he "requested blood" and "asked McCarthy if he would take the blood," and the written records show that Officer Nester received the blood sample ten minutes *before* Merwin's treating physician ordered that a sample be taken for medical purposes. We do not reweigh the evidence.

¶32 We conclude, however, that a lawful medical draw was inevitable. The inevitable discovery exception to the discovery rule provides that "[i]llegally obtained physical evidence may be admitted if the State can demonstrate by a preponderance of the evidence that such evidence inevitably would have been discovered by lawful means." *State v. Davolt*, 207 Ariz. 191, 204, ¶ 35 (2004). The rationale for the exception is that "[w]hile . . . evidence which is obtained in violation of a constitutional right should be excluded to deter unlawful police conduct, it serves no purpose to put the government in a worse position than it would have been in had no police misconduct occurred." *State v. Rojers*, 216 Ariz. 555, 559, ¶ 19 (App. 2007). "The exception does not turn on whether the evidence would have been discovered had [law enforcement] acted lawfully in the

first place. Rather, the exception applies if the evidence would have been lawfully discovered despite the unlawful behavior and independent of it." *Brown v. McClennen*, 239 Ariz. 521, 524-25, ¶ 14 (2016).

¶33 Merwin contends that the state waived the inevitable discovery exception by raising it for the first time in the motion for reconsideration, and that even if the exception was not waived, it was preserved for appellate review solely on the grounds urged in the superior-court proceedings. The state contends that the superior court found that the exception applied based on A.R.S. § 28-1388(E), and it therefore limits its arguments on appeal to § 28-1388(E). We address both potential statutory bases for the inevitable discovery exception. *See, e.g.*, *State v. Boteo-Flores*, 230 Ariz. 551, 553, ¶ 7 (App. 2012) (holding that we may address waived arguments to uphold a trial court's ruling, and that waiver is a procedural concept that we may, in our discretion, not apply).

¶34 We conclude that A.R.S. § 28-1390 does not provide grounds for the inevitable discovery of Merwin's blood. Subsection (A) of that statute provides:

> Notwithstanding any other law, if a law enforcement officer reasonably believes that a person may have violated § 28-1381 [which describes the crime of DUI] . . . , the law enforcement officer may request emergency department personnel of a health care institution as defined in § 36-401 to provide to the law enforcement officer a copy of any written or electronic report of the person's blood alcohol concentration.

Notably, the statute does not authorize law enforcement to obtain blood itself—it applies only to "written or electronic report[s] of . . . blood alcohol concentration." *Id.* For that reason alone, the statute did not provide an avenue for inevitable discovery of Merwin's blood. In addition, the medical records presented at the suppression hearing did not include the type of report contemplated by § 28-1390.

¶35 But while § 28-1390 does not provide grounds for inevitable discovery, § 28-1388(E) does. Merwin contends that the mere fact that his treating physician ordered a blood draw does not mean that he would have consented to that procedure. But the medical center's records show that Merwin verbally accepted a "Conditions of Admission Agreement" whereby he consented to "receiving all medical and surgical treatment as ordered by the responsible physicians: including physician services, nursing services, technical services, laboratory procedures and tests . . . and

other hospital services rendered under the general or special instructions of [his] physicians."

¶36 Merwin relies on McCarthy's testimony that medical-center protocol required a separate consent form for a medical blood draw. But even in the absence of such a formal protocol, Merwin had the ability to revoke or limit his consent to treatment at any time, and there is no evidence that he ever sought to do so. And there is also no showing that he relied on any privately-created protocol. We find no support for the proposition that a defendant may avoid application of the inevitable discovery doctrine to a medical blood draw by simply claiming, after the fact, that he might have withdrawn his general consent to treatment when approached for a blood sample as part of that treatment. The superior court correctly concluded that the medical center would inevitably have drawn Merwin's blood for medical purposes, within the scope of his consent to treatment.[2]

¶37 The superior court correctly ruled the blood evidence admissible as the product of an inevitable medical draw under A.R.S. § 28-1388(E).

II. SUFFICIENT EVIDENCE SUPPORTED MERWIN'S CONVICTION.

¶38 We next address the sufficiency of the evidence to support Merwin's conviction for negligent homicide. We review the sufficiency of the evidence de novo. *State v. West*, 226 Ariz. 559, 562, ¶ 15 (2011). We view the evidence in the light most favorable to upholding the verdict, and we resolve all conflicts in the evidence against the defendant. *See State v. Girdler*, 138 Ariz. 482, 488 (1983). We do not reweigh the evidence or determine the credibility of witnesses. *State v. Williams*, 209 Ariz. 228, 231, ¶ 6 (App. 2004).

¶39 We will reverse only if "there is a complete absence of probative facts to support the conviction." *State v. Scott*, 113 Ariz. 423, 424–25 (1976). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316 (1987). Sufficient evidence may be either direct or circumstantial, and may support differing reasonable inferences. *State v. Anaya*, 165 Ariz. 535, 543 (App. 1990).

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[2] We note that defense counsel conceded in closing argument at the suppression hearing that the draw would have occurred.

¶40 Under A.R.S. § 13-1102(A), "[a] person commits negligent homicide if with criminal negligence the person causes the death of another person, including an unborn child."

¶41 Merwin first contends that the state presented insufficient evidence to show that he acted with criminal negligence. Under A.R.S. § 13-105(10)(d),

> "[c]riminal negligence" means, with respect to a result or to a circumstance described by a statute defining an offense, that a person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

Voluntary intoxication does not provide a defense to criminal negligence. *State v. Venegas*, 137 Ariz. 171, 174 (App. 1983). To the contrary, intoxication may be considered as an important factor in the *mens rea* analysis. *State v. Burgess*, 82 Ariz. 200, 203 (1957); *State v. Woodall*, 155 Ariz. 1, 3 (App. 1987).

¶42 Merwin contends that no witnesses testified that he showed signs of impairment, and that the jury's verdict was "based upon a hypothetical possibility." But the evidence demonstrated that the collision was caused by Merwin's erratic driving, and that he had alcohol and drugs in his system at the time. The evidence further established that Merwin's BAC was sufficient to cause impairment, and that drug ingestion amplifies alcohol-based impairment. Merwin contends that other evidence showed "other possible causes for the accident" other than his negligence. But the mere fact that the jury might have reached a different conclusion does not create an insufficiency of the evidence. The jury's determination that the collision was caused by Merwin's criminal negligence was supported by the evidence.

¶43 Merwin next contends that the state presented insufficient evidence to show that he caused the passenger's death. He argues that the state failed to meet its burden to show that the passenger's ruptured aneurysm was not an independent intervening cause of her death. Merwin emphasizes that the medical examiner opined that the rupture "probably"—as opposed to certainly—occurred as a result of the collision. But the state's burden to prove guilt beyond a reasonable doubt "does not require proof that overcomes every doubt." *State v. Portillo*, 182 Ariz. 592, 596 (1995); *see also Anaya*, 165 Ariz. at 543 (sufficient evidence may support

differing reasonable inferences). The medical examiner's testimony was sufficient to support the jury's determination that the collision caused the passenger's death.

CONCLUSION

¶44 For the reasons set forth above, we affirm Merwin's conviction and sentence.

AMY M. WOOD • Clerk of the Court
FILED: AA