IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

RUSSELL PAUL JOHNSON, JR., *Appellant*.

No. 1 CA-CR 16-0390
FILED 1-9-2018

Appeal from the Superior Court in Maricopa County
No. CR2015-100889-001
The Honorable Annielaurie Van Wie, Judge *Pro Tempore*

VACATED AND REMANDED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Linley Wilson
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Kevin D. Heade
Counsel for Appellant

MEMORANDUM DECISION

Acting Presiding Judge Peter B. Swann delivered the decision of the court, in which Judge Patricia A. Orozco and Judge John C. Gemmill joined.[1]

S W A N N, Judge:

¶1 Russell Paul Johnson, Jr., appeals his conviction for aggravated driving under the influence. For the following reasons, we vacate the conviction and remand to the superior court.

FACTS AND PROCEDURAL HISTORY

¶2 Just after midnight on January 7, 2015, officers with the Phoenix Police Department arrested Johnson for driving under the influence ("DUI") and conducted an inventory search of his vehicle. They found an unmarked pill bottle containing 32 Oxycodone pills. An officer then took Johnson to the police station, where he consented to a blood draw. Forensic analysis determined that Johnson's blood-alcohol level was .037 and that he had 29 nanograms per milliliter of Oxycodone in his blood. At the time of his arrest, Johnson's driving privileges were suspended.

¶3 Johnson was indicted for one count of aggravated DUI while impaired to the slightest degree A.R.S. §§ 28-1381(A)(1), -1383(A)(1)), one count of aggravated DUI while Oxycodone or its metabolite was in his body (A.R.S. §§ 13-3401(21)(dd), 28-1381(A)(1), -1383(A)(1)), and one count of possession or use of Oxycodone (A.R.S. §§ 13-3401(21)(dd), -3408(A)(1)). The possession or use count was dismissed before trial.

¶4 At trial, Johnson presented evidence that on December 17, 2014, he filled a prescription for 150 "immediate release" 15-milligram Oxycodone tablets. He also presented expert testimony that the level of Oxycodone found in his blood was within the therapeutic range. Consistent with the evidence presented, Johnson requested an affirmative-

[1] Honorable Patricia A. Orozco and Honorable John C. Gemmill, Retired Judges of the Court of Appeals, Division One, have been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

defense jury instruction under A.R.S. § 28-1381(D), which at the time provided: "A person using a drug as prescribed by a medical practitioner licensed pursuant to title 32, chapter 7, 11, 13 or 17 is not guilty of violating subsection A, paragraph 3 of this section."[2] The state objected to the inclusion of an affirmative-defense instruction, arguing:

> In order to be entitled to an affirmative defense the defense must prove by a preponderance of evidence that, one, he had a prescription; and, two, prescribed by a medical doctor qualified to prescribe prescriptions; and, three, he was taking it as prescribed.
>
> With -- even though it was hearsay, the State allowed evidence of the prescription or the Walgreen's printout, but there's been no evidence presented about the doctor or the doctor's qualifications or anyone who prescribed this; and, three, no evidence that he was taking it as prescribed. In fact, the opposite, that he'd . . . mixed it with alcohol against the manufacturer . . . warning.
>
> Based on not meeting even the statute, the addition of the affirmative defense in the closing instructions would just be confusing to the jury. And at this point the State would object to including any affirmative defense.

Johnson responded:

> Your Honor, we have brought forth enough information for it to go to the jury to determine if we have met that by a preponderance of evidence. That's for the jury to decide.
>
> And with regard to the affirmative defense, we are raising it, we have provided a prescription. He's within what's called the "therapeutic dosages," our expert has said that. There's the doctor's name, there's his number on it as the prescriber. So the records do have the information there.

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[2] The current version of A.R.S. § 28-1381(D) is similar: "A person using a drug as prescribed by a medical practitioner who is licensed pursuant to title 32 and who is authorized to prescribe the drug is not guilty of violating subsection A, paragraph 3 of this section."

> So it's a preponderance of the evidence. We've raised it. It's our position that as such, under the statute that could go to the jury.

¶5 On the state's motion, the court removed the affirmative-defense instruction from the final jury instructions because (1) the "purported prescription records," which had been admitted into evidence, were "not in any way certified"; (2) the defense failed to present evidence that the prescriptions were made by a medical practitioner "licensed pursuant to those specific titles" listed in the statute; and (3) the defense provided "no evidence whether or not [the Oxycodone] [was] being used in accordance with the actual prescription that was made."

¶6 The jury found Johnson not guilty of aggravated DUI while impaired to the slightest degree but guilty of aggravated DUI while Oxycodone or its metabolite was in his system. The court entered judgment on the verdicts and sentenced Johnson to four months in jail, with 44 days of presentence incarceration credit and 30 months of probation.

DISCUSSION

¶7 Johnson's sole argument on appeal is that the trial court allowed the state to ask a forensic scientist an improper question. "We review a trial court's admission of evidence for an abuse of discretion." *State v. Tucker*, 215 Ariz. 298, 314, ¶ 58 (2007).

¶8 The cited exchange was as follows:

> Q. Would you get in the vehicle where you knew the driver of that vehicle had 29 nanograms per milliliter of Oxycodone and an .037 alcohol concentration?
>
> A. I personally would not, no.

¶9 Johnson contends that the testimony was improperly admitted because it "was an unfair expression of her personal, and not professional opinion that Johnson was guilty." Even if the testimony was improperly admitted, any error was harmless. *See State v. VanWinkle*, 229 Ariz. 233, 237, ¶ 16 (2012) (holding that error is harmless "if the state, in light of all of the evidence, can establish beyond a reasonable doubt that the error did not contribute to or affect the verdict" (citation omitted)). The testimony only bears on count one, based on whether Johnson was operating a vehicle while impaired to the slightest degree in violation of A.R.S. § 28-1381(A)(1), for which the jury found he was not guilty. Because

he was acquitted on the impairment charge even with the allegedly improper question and answer, there is no ground upon which he would be entitled to relief on appeal. *See State v. Barger*, 167 Ariz. 563, 567 (App. 1990) (holding that alleged evidentiary error was harmless because the jury acquitted the defendant of the aggravated assault charge to which the challenged ruling pertained).

¶10 We next turn to count two — whether Johnson was driving while Oxycodone or its metabolite was in his body in violation of A.R.S. § 28-1381(A)(3). We address an issue we observed upon review — the denial of Johnson's request for a jury instruction under § 28-1381(D). After identifying that issue, we requested and received supplemental briefing from the parties on, *inter alia*, the questions of Johnson's abandonment of the issue and its substantive merits. Generally, an issue raised below but not on appeal is considered abandoned and waived. *State v. Carver*, 160 Ariz. 167, 175 (1989) ("Failure to argue a claim usually constitutes abandonment and waiver of that claim."). But this court has discretion to address a significant issue on the merits even when it was not initially argued. *See State v. Smith*, 203 Ariz. 75, 79, ¶ 12 (2002) (exercising discretion to address arguments otherwise waived); *State v. Lopez*, 217 Ariz. 433, 437–38 n.4, ¶ 17 (App. 2008) (exercising discretion to address arguments first raised in reply brief); *State v. Aleman*, 210 Ariz. 232, 240, ¶ 24 (App. 2005) ("[W]aiver is a procedural concept that courts do not rigidly employ in mechanical fashion.").

¶11 Although the denial of the requested jury instruction was not raised on appeal, an objection was made at trial, and we review for harmless error whether the trial court erred in denying Johnson's request for an affirmative-defense instruction under A.R.S. § 28-1381(D). *State v. Valverde*, 220 Ariz. 582, 585, ¶ 11 (2009) (holding that harmless-error review applies "in cases in which the defendant properly objects to non-structural error"). The inquiry upon harmless-error review "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error," and the state bears this burden of proof on appeal. *Id.* (citation omitted); *State v. Henderson*, 210 Ariz. 561, 567, ¶ 18 (2005).

¶12 An affirmative defense is "a defense that is offered and that attempts to excuse the criminal actions of the accused." A.R.S. § 13-103(B). "An affirmative defense is a matter of avoidance of culpability even if the State proves the offense beyond a reasonable doubt." *State v. Holle*, 240 Ariz. 300, 304, ¶ 22 (2016) (citation omitted). A defendant is entitled to

an instruction on "any theory of defense which is recognized by law and supported by the evidence," and "an instruction must be given if there is evidence upon which the jury could rationally sustain the defense." *State v. Strayhand*, 184 Ariz. 571, 587–88 (App. 1995). The truth of a defendant's version of facts is an issue for the jury to determine after the jury is properly instructed. *Id.* at 588.

¶13 In this case, the requested affirmative defense applies. Under A.R.S. § 28-1381(D), a defendant is not guilty of a § 28-1381(A)(3) charge if he proves "by a preponderance of the evidence that he used prescription drugs as prescribed by a licensed medical practitioner." *State v. Bayardi*, 230 Ariz. 195, 201, ¶ 23 (App. 2012); A.R.S. § 13-205(A). Here, the uncontradicted evidence shows that Johnson had 29 nanograms per milliliter of Oxycodone in his blood at the time of the traffic stop. And the court admitted into evidence, without objection, a printout of his prescriptions filled by a Walgreens pharmacy in Tempe between December 2014 and February 2015. The printout showed that on December 17, 2014, Johnson filled a prescription for 150 "15MG* IMMEDIATE REL TABS RX #: 1629982-02398." The printout also contained the initials of the pharmacist who filled the prescription and listed the name of the prescriber. In addition, a defense expert relied on the printout and opined that when compared with the state's blood-analysis report, Johnson's use was consistent with therapeutic use, and did not appear to be inconsistent with the prescription information offered into evidence.

¶14 Johnson asked the court to instruct the jury that taking Oxycodone as prescribed was a defense to the metabolite DUI offense but the court declined, finding that he failed to present sufficient evidence of the elements of the defense. We disagree. Johnson presented, and the court admitted without objection, evidence upon which the jury could rationally sustain the § 28-1381(D) affirmative defense, and he was therefore entitled to a jury instruction.

¶15 The state argues that because the defense expert could not state "exactly" how the Oxycodone was prescribed, and because Johnson had consumed alcohol in addition to the Oxycodone, he presented insufficient evidence to support the "as prescribed" defense. Although additional information about the prescriber and the details of how Johnson was to consume the Oxycodone would have been beneficial, that information was not necessary in light of the detailed prescription printout admitted into evidence without objection, which was further relied upon by a defense expert. Additionally, testimony from the state's expert that "[t]here is a general warning for most medications . . . . [and] a generic or

general warning for the combination of Oxycodone and alcohol," is of little consequence to the issue at hand. Because Johnson's theory that he consumed the Oxycodone as prescribed was reasonably supported by the evidence, the state's presentation of conflicting evidence does not invalidate his entitlement to a jury instruction on the affirmative defense. *See State v. Karr*, 221 Ariz. 319, 322, ¶ 14 (App. 2008) (holding that defendant was entitled to jury instructions on self-defense and justified use of deadly physical force, while recognizing jury's ability to "cho[o]se" whether "to believe Defendant's version of events").

¶16 The failure to give an instruction, however, is not reversible error unless it is prejudicial to the rights of a defendant. *State v. Islas*, 132 Ariz. 590, 591 (App. 1992). "The purpose of jury instructions is to inform the jury of the applicable law in understandable terms." *State v. Noriega*, 187 Ariz. 282, 284 (App. 1996). In assessing the impact of an absent instruction, we consider the attorneys' statements to the jury. *See Valverde*, 220 Ariz. at 586, ¶ 16 (holding that attorneys' statements to jury are relevant to assessing the impact of an erroneous instruction); *Karr*, 221 Ariz. at 323, ¶ 16 ("In our evaluation of the 'jury instructions, we consider the instructions in the context of and in conjunction with the closing arguments of counsel.'" (citation omitted)).

¶17 During opening statements, the prosecutor stated:

> You are also going to hear some evidence of a possible -- that he possibly had a prescription for those. What the evidence will also show is that that doesn't matter; that he was impaired by the mixture of Oxycodone and alcohol and that he wasn't taking them as prescribed.

Defense counsel also foreshadowed the affirmative defense in his opening statement when he said:

> So just because a drug is in your system--you're going to hear that as to one of the counts, there's a prescription which is a possible defense, that if he's taking in conformance with the therapeutic dosage that a doctor would give.

¶18 During closing arguments, the state argued, "[o]n count 2 [the § 28-1381(A)(3) offense,] it also doesn't matter if he had a prescription. All the information you heard about therapeutic and non therapeutic prescription, not a prescription, it doesn't matter." The state also argued, "[i]t doesn't matter on count 2 whether you think he was impaired or not. If it was in his body while he was driving, while his license was suspended,

and he knew it was suspended, he's guilty on count 2. Prescription doesn't matter." Johnson objected to the state's statement that "[p]rescription doesn't matter" for the (A)(3) charge, but the court overruled the objection.

¶19 On this record, it is evident that the state capitalized on the excluded jury instruction by repeatedly arguing that any evidence of a prescription "doesn't matter." That argument misled the jury on the law, and the instruction, which the evidence supported, was not given to counter the misleading argument. Precluding the jury from weighing the admitted evidence in the proper legal context was prejudicial. Accordingly, the state has failed to meet its burden of establishing that the erroneous preclusion of Johnson's requested jury instruction was harmless. *See Henderson*, 210 Ariz. at 567, ¶ 18 (holding that harmless-error review is applicable where a timely objection was improperly overruled and the review "places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict").

CONCLUSION

¶20 For the foregoing reasons, we vacate the conviction and remand to the superior court.

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