NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee,	2 CA-CR 2012-0213
	DEPARTMENT B
v.	<u>MEMORANDUM DECISION</u>
JOSEPH MICHAEL POWERS, Appellant.	Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR2010750001

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED IN PART; REVERSED IN PART

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz and Kathryn A. Damstra — Tucson
Attorneys for Appellee

Lori J. Lefferts, Pima County Public Defender
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E C K E R S T R O M, Judge.

¶1 In this appeal, we consider whether a defendant charged with driving under the influence (DUI) may be convicted of having a blood alcohol concentration (BAC) of .08 or more "within two hours of driving or being in actual physical control" of a vehicle pursuant to A.R.S. § 28-1381(A)(2),[1] based on blood drawn more than two hours after he was last driving, when the state fails to present any "'evidence relating the defendant's blood alcohol content back'" to the relevant two-hour time frame. *State v. Claybrook*, 193 Ariz. 588, ¶ 14, 975 P.2d 1101, 1103 (App. 1998), *quoting State ex rel. O'Neill v. Superior Court (Kankelfritz)*, 187 Ariz. 440, 441, 930 P.2d 517, 518 (App. 1996). As we have before, we answer the question in the negative. *Id.* ¶ 17.

¶2 Appellant Joseph Powers was convicted of four counts of aggravated DUI stemming from his arrest on October 9, 2010: driving while under the influence of an intoxicating liquor, *see* § 28-1381(A)(1), and driving with a BAC of .08 or more within two hours of driving, *see* § 28-1381(A)(2), both committed while his license to drive was suspended, revoked, or restricted, *see* A.R.S. § 28-1383(A)(1), and with two or more DUI convictions in the preceding eighty-four months, *see* § 28-1383(A)(2). The trial court ordered Powers to serve concurrent four-month terms in the Arizona Department of Corrections, followed by concurrent eighteen-month terms of probation.

¶3 On appeal, Powers does not challenge his convictions for counts one and three of the indictment, which alleged aggravated DUI based on his driving "under the influence of intoxicating liquor . . . if . . . impaired to the slightest degree." § 28-

[1]We cite the current versions of statutes unless their amendment after the date of Powers's offenses is material to this decision.

1381(A)(1). Relying on *Claybrook*, he contends only that the evidence was insufficient to convict him of counts two and four , which required proof that he had "an alcohol concentration of 0.08 or more within two hours of driving or being in actual physical control of the vehicle," § 28-1381(A)(2), because his blood had been drawn two hours and thirty-two minutes after he was alleged to have been driving and the state failed to present evidence of "retroactive extrapolation" to establish Powers's BAC within two hours of driving. *Claybrook*, 193 Ariz. 588, ¶ 14, 975 P.2d at 1103.

¶4 The state concedes it "failed to present scientific evidence" to relate the results of the blood analysis back to the statutory two-hour time frame.[2] Relying on *State v. Panveno*, 196 Ariz. 332, 996 P.2d 741 (App. 1999), and *State ex rel. McDougall v. Superior Court (Gurule)*, 178 Ariz. 544, 875 P.2d 203 (App. 1994), the state argues there was other, "sufficient evidence from which the jury could reasonably infer that [Powers]'s [B]AC was .08 . . . or greater within two hours of driving," including the testimony of an officer who had seen Powers consuming alcohol and exhibiting signs of intoxication before driving to a convenience store; the "six out of six possible cues of impairment" Powers exhibited during a horizontal gaze nystagmus (HGN) test administered after he left the convenience store; and evidence that two hours and thirty-two minutes after he had been driving, Powers's BAC was .236. According to the state,

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[2]The state also argues we are limited to review for fundamental error, because Powers did not raise this issue below. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). We agree. But a conviction based on insufficient evidence constitutes fundamental error. *State v. Windsor*, 224 Ariz. 103, n.2, 227 P.3d 864, 865 n.2 (App. 2010).

the court in *Claybrook* "rejected 'common sense' in favor of a bright-line rule to resolve a question of the sufficiency of the evidence, rather than considering *all* the evidence presented, thereby usurping the jury's role as the finder-of-fact."

¶5 In *Desmond v. Superior Court*, our supreme court held the results of an intoxilyzer test administered approximately an hour after the defendant's arrest were insufficient to support his conviction under a previous version of Arizona's per se DUI law that "made it a crime to drive with a BAC of 0.10 percent or more." 161 Ariz. 522, 525, 529 & 527, 779 P.2d 1261, 1264, 1268 & 1266 (1989); *see* 1988 Ariz. Sess. Laws, ch. 246, § 3 (former A.R.S. § 28-692(B)). Noting the "[m]any variables [that] may affect the results of a blood alcohol test," some dependent on the timing of its administration, the court emphasized, "[T]here can be no presumption that a driver's BAC taken at the time he is stopped is as high as his BAC taken an hour later." *Desmond*, 161 Ariz. at 527, 779 P.2d at 1266. Accordingly, the court concluded, "In order for the state . . . to make a *prima facie* case under subsection B, there must be some evidence relating the BAC back to the time of arrest . . . [most often] supplied by an expert witness," such as "a police officer or the operator of the machine if properly certified and in addition possesses superior knowledge, experience and expertise on the question." *Desmond*, 161 Ariz. at 529, 779 P.2d at 1268.

¶6 The legislature subsequently amended the per se DUI statute to prohibit "having an alcohol concentration of .10 or more within two hours of driving," and this court found *Desmond* had been abrogated to the extent that "'a valid BAC reading of .10 or more taken within two hours of driving'" was admissible and sufficient, "'without

relation-back testimony,'" to prove a violation of the amended statute. *State v. Guerra*, 191 Ariz. 511, ¶ 6, 958 P.2d 452, 454 (App. 1998), *quoting State v. Superior Court (Ryberg)*, 173 Ariz. 447, 450, 844 P.2d 614, 617 (App. 1992). But we also recognized that relation-back evidence still would be required under *Desmond* when a defendant's BAC had been determined by a breath or blood test administered more than two hours after he or she had been driving. *See id.* n.3, *citing Kankelfritz*, 187 Ariz. 440, 930 P.2d 517; *see also Claybrook*, 193 Ariz. 588, ¶ 14, 975 P.2d at 1103 (when defendant tested more than two hours after driving, "the State may still meet its burden of proving that the defendant had a BAC of 0.10 or more within the two-hour period by using 'evidence relating the defendant's blood alcohol content back'"), *quoting Kankelfritz*, 187 Ariz. at 441, 930 P.2d at 518.

¶7 We have not construed *Desmond* as requiring the state to present a specific type of relation-back evidence to meet this standard. *See State ex rel. McDougall v. Superior Court (Klemencic)*, 170 Ariz. 474, 476-77, 826 P.2d 337, 339-40 (App. 1991) (expert testimony that, based on post-arrest BAC, defendant would have needed to consume six or seven drinks five minutes prior to driving to have BAC level of .10 or below at time of stop, sufficient to relate BAC back). But *Desmond* still requires us to consider whether the state has presented "some evidence" sufficient for the jury to assess the defendant's BAC at the statutorily relevant time. *Desmond*, 161 Ariz. at 529, 779 P.2d at 1268.

¶8 The state's reliance on *Gurule* to suggest this rule invades the province of the jury is misplaced. In *Gurule*, this court rejected a defendant's contention that his

breathalyzer test results, showing a BAC of .115 and .103, were insufficient to support his conviction, which required proof of a BAC of .10 or over, due to the "margin of error" of the machine used for testing. 178 Ariz. at 546, 875 P.2d at 205. We concluded "the effect of the inherent margin of error of a breath testing device is a question of fact for the fact finder," who was entitled to consider "the test result combined with the other evidence . . . [of] intoxication" to determine whether the state had met its burden. *Id.* This result was consistent with *State v. Superior Court (Blake)*, in which our supreme court held an HGN examination provided reliable evidence that could be used to corroborate a defendant's BAC results from a blood or breath test—but which is "not admissible in any criminal case as direct independent evidence to quantify blood alcohol content." 149 Ariz. 269, 280, 718 P.2d 171, 182 (1986). *Blake* emphasized that "regardless of the quality and abundance of other evidence, a person may not be convicted of a violation of [the per se DUI statute] without chemical analysis of blood, breath or urine showing a proscribed blood alcohol content." *Id.* at 279, 718 P.2d at 181; *accord State ex rel. Hamilton v. Mesa City Court (Lopresti)*, 165 Ariz. 514, 517, 799 P.2d 855, 858 (1990) (noting "legislature has specified that blood, breath, and urine tests are the only methods for measuring, or quantifying, BAC").

¶9 In contrast to *Gurule*, in which the state had presented evidence of a BAC sample acquired during the relevant time period, there was no evidence presented at Powers's trial from which the jury could have quantified his BAC within two hours of driving. A senior criminalist with the Tucson Police Department crime laboratory testified she had determined the blood specimen submitted in Powers's case had a BAC

of .236. She also testified generally that "the higher the alcohol concentration, the more intense . . . the effects that you might see," but she did not testify about how alcohol is metabolized, or how BAC results may vary over time, or express any opinion of what Powers's BAC would have been had his blood been drawn thirty-two minutes earlier, within two hours of driving.

¶10 The state asserts that, because the analysis showed Powers had a BAC of .236 when his blood was drawn, "a mere 30 minutes earlier, his BAC was necessarily .08 . . . or greater." But there was simply no evidence from which the jury could draw that inference or reach that conclusion. Although the evidence of Powers's intoxication at the time of his arrest certainly was sufficient to support the jury's finding that he was "impaired to the slightest degree" and thus sustain his conviction pursuant to § 28-1381(A)(1), it did nothing to "quantify" his BAC within two hours of driving for the purpose of a conviction pursuant to § 28-1381(A)(2)—and could not have been used for that purpose. *Blake*, 149 Ariz. at 280, 718 P.2d at 182.

¶11 We recognize that another panel's decision in *Panveno* appears to suggest that circumstantial evidence of a defendant's impairment was sufficient to support a jury's finding of his BAC while driving, based on results from a blood test performed more than two hours later, even though the state presented no evidence relating those results back to the time of his driving. 196 Ariz. 332, ¶¶ 15, 17, 29, 996 P.2d at 743, 745. We conclude such a result is inconsistent with our supreme court's holding in *Desmond*, which we are bound to follow. *State v. Long*, 207 Ariz. 140, ¶ 23, 83 P.3d 618, 623

(App. 2004) ("This court is bound by decisions of the Arizona Supreme Court and has no authority to overturn or refuse to follow its decisions.").

¶12 For the foregoing reasons, we reverse Powers's convictions and dispositions for counts two and four of the indictment and affirm his convictions and dispositions for counts one and three.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge