IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

SEAN CONLEY YOUNG,
Appellant.

No. 2 CA-CR 2015-0073
Filed March 1, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20123045001
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Eliza C. Ybarra, Assistant Attorney General, Phoenix
Counsel for Appellee

Steven R. Sonenberg, Pima County Public Defender
By Michael J. Miller, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Eckerstrom concurred.

M I L L E R, Judge:

¶1 A jury found Sean Young guilty of aggravated driving under the influence while his license was suspended or revoked, and aggravated driving under the influence with an alcohol concentration of .08 or more while his license was suspended or revoked. The trial court sentenced him to concurrent ten-year terms of imprisonment. He argues the court erred by instructing the jury that records of periodic maintenance of the breath testing device used in the investigation constituted prima facie evidence that the device was working properly. This court's recent precedent directly rejects his contention; we therefore affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the verdicts." *State v. Nottingham*, 231 Ariz. 21, ¶ 2, 289 P.3d 949, 951 (App. 2012). When Tucson Police officers stopped Young just after he had begun to drive, they observed that he had an odor of alcohol and bloodshot, watery eyes, his face was flushed, and he had a noticeable sway while standing. Young admitted drinking three shots of whiskey over an hour before driving, but denied he was intoxicated. He agreed to submit to a breath test, along with field sobriety tests. In two separate readings taken six minutes apart, the breath testing machine reported his blood alcohol concentration at .085 and .082.

¶3 At trial, the state introduced evidence that the particular breath testing machine used in the investigation had passed various monthly quality assurance and calibration tests before and after the night Young was arrested. Per the state's request, the court gave the following jury instruction: "Records of periodic maintenance that

show that the breath testing device was in proper operating condition are admissible in any proceeding as prima facie evidence that the device was in proper operating condition at the time of the test." Young was convicted and sentenced as described above and now appeals. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4033(A)(1).

Analysis

¶4 Young argues the trial court erred by giving the jury instruction regarding breathalyzer maintenance. We review the court's decision to give a jury instruction for an abuse of discretion, but review de novo whether the instruction correctly states the law. *See State v. Dann*, 220 Ariz. 351, ¶ 51, 207 P.3d 604, 616-17 (2009).

¶5 Young argues the instruction was error for three reasons, and acknowledges that because he did not object for any of these reasons below, he must demonstrate that the jury instruction constituted fundamental error which caused him prejudice. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). First, he contends A.R.S. § 28-1323(A), upon which the jury instruction is based, deals with admissibility, not evidentiary presumptions, and so the instruction's "prima facie" language was error. Second, he argues the instruction unconstitutionally shifted the burden of proof to the defendant on an element of the offense. Finally, he maintains the instruction amounted to an improper judicial comment on the evidence, in violation of Ariz. Const. art. VI, § 27.

¶6 In our recent opinion in *State v. Peraza*, No. 2 CA-CR 2015-0022, ¶¶ 25-38, 2016 WL 360339 (Ariz. Ct. App. Jan. 28, 2016), the appellant raised the same three arguments Young now advances, and we rejected each of them.[1] The contested jury instruction in *Peraza* read, "records which show that the quantitative breath testing

[1]That being said, we do not fault counsel for raising the arguments in the present case, because we issued our opinion in *Peraza* after briefing in this matter was complete.

device was in proper operating condition at a time before and after the test . . . are prima facie evidence that the device was in the proper condition at the time of the test." *Id.* ¶ 26. First, citing *State v. O'Haire*, 149 Ariz. 518, 521, 720 P.2d 119, 122 (App. 1986), we concluded the instruction correctly stated the law as found in § 28-1323(A)(5), adding, "Based on the statute's plain language, [§ 28-1323(A)] allows admission of the [device maintenance] evidence as prima facie evidence the equipment was functioning properly." *Peraza*, 2016 WL 360339, ¶¶ 26-27. Second, we determined the instruction "did not relieve the state of the burden of persuasion on any element of the offense" in violation of the Due Process Clause, but "only informed the jury that [it] should construe evidence of successful ongoing maintenance as prima facie evidence that the machine was working properly." *Id.* ¶¶ 28-35. Finally, we decided that as a correct statement of law, the instruction was not an improper comment on the evidence that violated Ariz. Const. art. VI, § 27. *Peraza*, 2016 WL 360339, ¶ 36.

¶7 *Peraza* forecloses all of Young's assignments of error, and "[n]o useful purpose would be served by this court rehashing" *Peraza*'s reasoning at greater length herein. *State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). We therefore affirm Young's convictions and sentences.