IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

THOMAS PATRICK SIPE,
Appellant.

No. 2 CA-CR 2017-0100
Filed January 18, 2018

Appeal from the Superior Court in Pima County
No. CR20152106001
The Honorable Danelle B. Liwski, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Dean Brault, Pima County Legal Defender
Jeffrey Kautenburger, Assistant Legal Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Chief Judge Eckerstrom concurred.

B R E A R C L I F F E, Judge:

¶1 Thomas Sipe appeals from his convictions for aggravated driving under the influence of an intoxicant (DUI) and aggravated driving with an alcohol concentration of .08 or more, both while his license was suspended, revoked, or restricted. He argues that the trial court should have suppressed the results of a breath test because law enforcement obtained his breath sample without a warrant and without valid consent. Additionally, he argues that the court erred by precluding Sipe's testimony about certain statements made by a Motor Vehicle Division (MVD) employee. We affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2 (App. 2006). In May 2015, Sipe was arrested after showing signs of impairment following a vehicle collision. At the police substation, a Pima County Sheriff Deputy read the admin per se and implied consent affidavit ("the admonition") to Sipe, and he then consented to provide breath samples. These samples, when tested, showed that his alcohol concentration was .285 and .286. The deputy did not get a warrant for the breath test.

¶3 Sipe was indicted on the above counts. Before trial, he moved to suppress all of the evidence stemming from the warrantless breath test, arguing that the language in the admonition coerced his consent and that the state failed to invoke the good-faith exception to the exclusionary rule. The trial court ordered the parties to brief the issue in light of our supreme court's recent opinion in *State v. Valenzuela* (*Valenzuela II*), 239 Ariz. 299 (2016). The trial court ultimately denied Sipe's motion.

¶4 Following Sipe's conviction on both counts, the trial court sentenced him to concurrent three-year prison terms. This appeal followed. We have jurisdiction under A.R.S. §§ 13-4031 and 13-4033.

Warrantless Breath Test

¶5 Sipe claims that the trial court erred when it denied his motion to suppress the breath sample evidence. The court denied the motion to suppress after applying the good-faith exception to the exclusionary rule. We review the denial of a motion to suppress for abuse of discretion. *Valenzuela II*, 239 Ariz. 299, ¶ 9. We review any application of the law *de novo*. *State v. Newell*, 212 Ariz. 389, ¶ 52 (2006). We will affirm the trial court's ruling if it was legally correct for any reason. *State v. Perez*, 141 Ariz. 459, 464 (1984).

¶6 Sipe argues that police seized his breath sample without a warrant and that his consent was coerced by the language of the admonition read to him before he consented. The breath sample evidence, he asserts, should therefore be barred by the exclusionary rule. He further argues that the good-faith exception to the exclusionary rule found in *Valenzuela II*, 239 Ariz. 299, ¶¶ 31-35, does not apply. The state cites to *Birchfield v. North Dakota*, ___ U.S. ___, 136 S. Ct. 2160 (2016), and *State v. Navarro*, 241 Ariz. 19 (App. 2016), review denied (Apr. 18, 2017), in arguing that a warrant was not required for the seizing of the breath samples because they were seized incident to Sipe's lawful arrest. Because neither a warrant nor consent was required under that exception, the state argues, the seizure here was valid, the denial of the motion to suppress was correct, and there is no need to even analyze whether or not the good-faith exception to the exclusionary rule applies. The state is correct.

¶7 Both *Birchfield* and *Navarro* were issued after the trial court issued its order denying the motion to suppress. In *Birchfield*, the United States Supreme Court held that "the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving." 136 S. Ct. at 2184. In *Navarro*, this court recognized that Arizona courts have similarly permitted warrantless breath tests incident to lawful arrests. 241 Ariz. 19, ¶ 4. The breath samples here were taken incident to Sipe's lawful arrest as permitted by *Birchfield* and *Navarro*. Consequently, there was no violation of Sipe's constitutional rights.

¶8 The exclusionary rule is a remedy for an unlawful search and seizure. *Valenzuela II*, 239 Ariz. 299, ¶ 10. "The exclusionary rule, which allows suppression of evidence obtained in violation of the Fourth Amendment, is a prudential doctrine invoked to deter future violations." *Id*. ¶ 31. The good-faith exception is an exception to the exclusionary rule. *Id*. Because the search and seizure here was lawful, the exclusionary rule does not apply, and there is no reason to analyze application of the good-

faith exception to it. *Navarro*, 241 Ariz. 19, ¶¶ 6-7. The trial court's denial of the motion to suppress was correct.

Testimony

¶9 Sipe argues that the trial court erred by preventing him from testifying to certain statements made to him by an MVD employee in 2013. "We review the trial court's evidentiary rulings for an abuse of discretion." *State v. Wright*, 239 Ariz. 284, ¶ 8 (App. 2016). If Sipe is making a constitutional argument that the evidence is necessary to his defense, we review that claim *de novo*. *See State v. Connor*, 215 Ariz. 553, ¶ 6 (App. 2007). We will affirm the trial court's ruling if it was legally correct for any reason. *Perez*, 141 Ariz. 459, 464. Although Sipe argues that he should have been allowed to testify as to certain statements made to him by an MVD employee, because Sipe made no offer of proof of the MVD employee's actual statements, Sipe has not preserved his argument for review, *see* Ariz. R. Evid. 103(a)(2), *see also State v. Hernandez*, 232 Ariz. 313, ¶ 37 (2013) ("The lack of an offer of proof forecloses [appellant's] argument on appeal.").

¶10 "When an objection to the introduction of evidence has been sustained, an offer of proof showing the evidence's relevance and admissibility is ordinarily required to assert error on appeal." *State v. Towery*, 186 Ariz. 168, 179 (1996). "At a minimum, an offer of proof stating with reasonable specificity what the evidence would have shown is required." *Id*. "Something more than speculation" about possible testimony "is required to show prejudice." *Towery*, 186 Ariz. at 179. The requirement is subject to two exceptions: (1) where the purpose and substance of the expected testimony is obvious, *see State v. Treadaway*, 116 Ariz. 163, 168 (1977), and (2) where the trial court "has ruled broadly that no evidence is admissible in support of the theory or fact which the party is seeking to establish," *State v. Kaiser*, 109 Ariz. 244, 246 (1973), *quoting Peterson v. Sundt*, 67 Ariz. 312, 318 (1948).

¶11 Here, on direct examination, Sipe testified about his 2013 visit to the MVD:

> Q Okay. What did you ask them?
>
> A Well, I was concerned because by attending the classes I had heard other people getting an interlock device, they needed to get installed. And to make sure that I did not need to get that before I got my license back, I had all

> the fees and everything I had to pay as well. I asked somebody there, and she said—

At that point, the state objected on hearsay grounds. Sipe argued, as he does on appeal, that the statements were not being offered for the truth of the matter asserted but for the effect on the listener. After the trial court sustained the hearsay objection, Sipe sought to make a record:

> I want to make a record that this is not hearsay. What the lady told him is [not] admitted for the truth of the matter asserted, which, of course, *if* she spoke to Mr. Sipe to say, she told him he didn't need to do that, it's for Mr. Sipe's state of mind after he was told that. Obviously, he should have been told about the requirement and should have known.

(Emphasis added.)

¶12 Although the intended use of the proposed testimony is argued in the briefs—to show Sipe's state of mind about the necessity of an interlock device—neither that precise purpose nor the specific substance of the expected testimony is obvious from the trial court record. *See, e.g.*, *State v. Vega*, 228 Ariz. 24, ¶ 30 (App. 2011) (offer of proof insufficient where defense counsel explained purpose of expected testimony but failed to describe what witness would say about specific incident). Nor was the offer of proof unequivocal even in its vague description of the expected testimony: "*if* she spoke to Mr. Sipe to say, she told him he didn't need to do that." (Emphasis added.)

¶13 Although we do not require precision in making an offer of proof, *see Treadaway*, we cannot evaluate whether the declarant's statement here properly went to the witness's state of mind, as claimed by Sipe, or rather was essentially relevant for the truth of the mattered asserted, as the court implicitly ruled, without more precisely knowing its content. No clear record was made of what Sipe would say the MVD employee's statements were. Because a failure to establish what the MVD employee's statements were "makes it impossible to evaluate whether the trial [court]" improperly limited Sipe's testimony, *Towery*, 186 Ariz. at 179, we have no basis to say that the trial court abused its discretion.

Disposition

¶14 For the above reasons, we affirm Sipe's convictions and sentences.