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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. SEAN PATRICK KELLEY, Appellant.	2 CA-CR 2009-0310 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20074349

Honorable Howard Hantman, Judge
Honorable John S. Leonardo, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 Appellant Sean Kelley appeals from his convictions for aggravated driving under the influence of an intoxicant (DUI) with a suspended, revoked, or restricted license and aggravated driving with an alcohol concentration (AC) of .08 or more with a suspended, revoked, or restricted license. He maintains that the trial court should have granted his motion to suppress the evidence police obtained after he was stopped, that it should have "compelled" the attendance of a witness he had subpoenaed, that it improperly instructed the jury, and that it abused its discretion in precluding certain evidence. Finding no error, we affirm.

Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdicts. *See State v. Tucker*, 205 Ariz. 157, n.1, 68 P.3d 110, 113 n.1 (2003). In November 2007, a Pima County Sheriff's deputy noticed a vehicle headed southbound on Euclid Avenue "traveling pretty rapidly as it was entering the intersection." The vehicle turned east onto Speedway Boulevard, making "a wide sweeping turn across three lanes of traffic and . . . into the bike lane." It then "made a sharp turn" back into the far right lane. The officer activated his lights to initiate a traffic stop and followed the "weaving" vehicle into the parking lot of a nearby restaurant.

¶3 Upon approaching the vehicle, the deputy noticed Kelley, the driver, had red and watery eyes, a "blank stare," and a flushed face. Kelley's speech was slow and he mumbled. Kelley admitted to having had "a few beers" "just now" and, when he got out of the car, he staggered and "[h]is balance was very poor."

¶4 The deputy conducted a horizontal gaze nystagmus (HGN) test and observed six out of six possible cues on the test, suggesting Kelley was impaired. Kelley

also performed poorly on field sobriety tests. A preliminary breath test established the presence of alcohol. The deputy arrested Kelley and obtained a sample of Kelley's blood for testing. The result of that test showed Kelley's AC was .226.

¶5 The state charged Kelley with aggravated DUI and aggravated driving with an AC of .08 or more. The jury found Kelley guilty and the trial court imposed presumptive, concurrent sentences totaling 4.5 years' imprisonment. Kelley appealed his convictions and sentences.

¶6 The state argues Kelley's appeal should be dismissed for lack of jurisdiction under A.R.S. § 13-4033(C). That statute eliminates a nonpleading defendant's right to a direct appeal when "the defendant's absence prevents sentencing from occurring within ninety days after conviction and the defendant fails to prove by clear and convincing evidence at the time of sentencing that the absence was involuntary." § 13-4033(C). Kelley did not attend his trial and was not sentenced until approximately a year later. Thus, the state contends Kelley's absence caused his sentencing to occur more than ninety days after his conviction and he has failed to establish his absence was involuntary.

¶7 The state acknowledges that in *State v. Soto*, 223 Ariz. 407, ¶ 14, 224 P.3d 223, 228 (App. 2010), this court found § 13-4033(C) is constitutional only in those cases where the state can "establish[] that a defendant's voluntary failure to appear timely for a sentencing hearing demonstrates a knowing, voluntary, and intelligent waiver of his constitutional right to appeal." Such a showing can be made when a defendant is advised personally that "his failure to appear at sentencing would result in a waiver of his appeal

rights." *Id.* ¶¶ 14, 18-19. Kelley was not so advised. The state has not, therefore, established his absence was voluntary and we have jurisdiction of this appeal.

Discussion

I. Reasonable suspicion

¶8 Kelley first contends the trial court abused its discretion by denying his motion to suppress the evidence obtained after he was stopped. Specifically, he maintains the deputy who stopped him had lacked reasonable suspicion to initiate a traffic stop in conformity with federal constitutional standards. In reviewing a denial of a motion to suppress, we consider only the evidence presented at the suppression hearing. *State v. Estrada*, 209 Ariz. 287, ¶ 2, 100 P.3d 452, 453 (App. 2004). "We review the court's decision 'for abuse of discretion if it involves a discretionary issue, but review constitutional issues and purely legal issues de novo.'" *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007), *quoting State v. Booker*, 212 Ariz. 502, ¶ 10, 135 P.3d 57, 59 (App. 2006). "[T]he question of whether [a law enforcement officer] had reasonable suspicion to conduct an investigatory stop is a mixed question of law and fact that we review de novo." *In re Ilono H.*, 210 Ariz. 473, ¶ 3, 113 P.3d 696, 697 (App. 2005).

¶9 At the suppression hearing, the deputy testified he had seen Kelley make a wide turn onto Speedway Boulevard and not into the "left lane immediately available," as required by A.R.S. § 28-751(2).[1] Kelley had instead "turned across all three eastbound

[1]Section 28-751(2) requires that a driver making a left turn "shall approach the turn in the extreme left-hand lane lawfully available to traffic moving in the direction of travel of the vehicle. If practicable the driver shall make the left turn from the left of the

lanes and dr[iven] into the bike lane." He had then "abrupt[ly]" "weaved back into the number three lane," thereby failing to "drive . . . as nearly as practicable entirely within a single lane" and moving his vehicle "from that lane" without "first ascertain[ing] that the movement c[ould] be made with safety." A.R.S. § 28-729(1). The deputy testified that after he had turned on his overhead lights, Kelley activated his turn signal and turned into the parking lot of "a restaurant just east of the intersection," where he was ultimately arrested. Kelley offered evidence that contradicted the deputy's description of his turn at the intersection. A woman who had been Kelley's passenger testified that she and Kelley had been traveling westbound on Speedway and had made a "u-turn" at the intersection of Speedway and Euclid in order to reach the restaurant.

¶10 A law enforcement officer may conduct a limited investigatory stop of a vehicle if the officer has articulable, reasonable suspicion that either the driver or a passenger is involved in criminal activity. *See Terry v. Ohio*, 392 U.S. 1, 30 (1968); *State v. Swanson*, 172 Ariz. 579, 582, 838 P.2d 1340, 1343 (App. 1992). To determine whether an officer has the requisite basis to conduct a traffic stop, we evaluate the totality of the circumstances from the standpoint of "an objectively reasonable police officer." *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

¶11 Kelley maintains the deputy lacked reasonable suspicion to stop him because he had made only a "minor error," much like the defendant in *State v. Livingston*, 206 Ariz. 145, ¶¶ 8, 12, 75 P.3d 1103, 1105-06 (App. 2003). He argues that his failure to turn into the first left-hand lane "is easily explained by [the passenger's] testimony that

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center of the intersection and shall make the turn to the left lane immediately available for the driver's direction of traffic."

they had made a U-turn" and that, even if the trial court accepted the deputy's testimony, "[a] turn into the outermost lane was necessary to get to the restaurant."

¶12 In *Livingston*, this court affirmed the trial court's determination that the driver in that case had not violated § 28-729(1), which requires drivers to "drive a vehicle as nearly as practicable entirely within a single lane," by momentarily traversing the shoulder line of the road on one occasion. In so doing, we accepted the trial court's implicit determination that Livingston had stayed within the lane as nearly as practicable, given that the road in that case was a curved, dangerous rural highway and, apart from straying several inches over the shoulder line, Livingston had otherwise driven safely at all times. *Livingston*, 206 Ariz. 145, ¶¶ 8, 12, 75 P.3d at 1105-06. We noted in particular that she had not abruptly corrected her vehicle after crossing the line, *id.* ¶ 5, suggesting the slight deviation resulted from the layout or conditions of the road rather than her carelessness or impairment.

¶13 Here, however, there was no evidence that the road conditions justified the wide turn Kelley had made across the three eastbound lanes or explained his abrupt deviation into and out of the bicycle lane. Additionally, the trial court was entitled to find the deputy's account of the turn more credible than the passenger's, as it implicitly did in finding the officer had a reasonable suspicion to make the stop. *See State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996) ("We . . . give deference to the trial court's factual findings, including findings regarding the [deputy's] credibility."). Although Kelley maintains the restaurant was too close to the intersection to allow him to properly make his turn, the only evidence about the location of the restaurant was that it was at the corner of Speedway and Euclid. There was no evidence about its exact

proximity to the intersection or whether a driver could properly execute a left turn before reaching it. In any event, as the state points out, Kelley did not signal that he was turning into the restaurant parking lot until after the officer had initiated the stop, suggesting to the officer that Kelley had intended to continue down Speedway. *See Livingston*, 206 Ariz. 145, n.1, 75 P.3d at 1106 ("In evaluating the reasonableness of a stop, the trial court must evaluate the totality of the circumstances.").

¶14 These are precisely the "seemingly small factual distinctions [that] can affect a court's conclusions as to the reasonableness of a stop." *Id.* The trial court had ample factual support from which to conclude the deputy had reasonable suspicion that Kelley had violated § 28-751(2) and § 28-729(1) and, consequently, to stop Kelley's vehicle.

II. Absent trial witness

¶15 Kelley next maintains the trial court should have compelled the presence of his passenger, whom he had subpoenaed for trial but who failed to appear. When the passenger failed to appear, Kelley asked the court to "do something," arguing that her testimony was "very important" to his case because she would have contradicted the deputy's description of Kelley's driving. The prosecutor offered to stipulate that the passenger would testify as she had at the suppression hearing, but Kelley argued a stipulation was insufficient. He maintained jurors had to "judge her credibility with the officer as to who is true and who they believe," and that because she was under subpoena, he was entitled to call her.

¶16 The trial court stated that the trial would "go[] forward whether [the witness] [wa]s under subpoena or not." Because it concluded there were no remedies that

would produce the witness on that day, and because there was no "indication or assurance" she would appear even if the trial were delayed, the court gave Kelley the option of stipulating as to her anticipated testimony or "reading into evidence what appears in the transcript" of the suppression hearing. Kelley accepted a stipulation as "better than nothing," and it was read into the record.

¶17 Kelley now maintains the trial court improperly "failed to enforce" his right to present witnesses under article II, § 24 of the Arizona Constitution and the Sixth Amendment to the United States Constitution. As the state points out, however, Kelley "did not specify below what action he wanted to take to compel his witness to appear." Likewise, although the court apparently construed his request as one for a continuance, Kelley did not actually move for a continuance. And although he argued he was "entitled to call" the witness, he did not specify the constitutional basis for such a right or cite any authority establishing that the court was required to take action. Thus, because Kelley "did not make the argument he now raises on appeal . . . he has forfeited this argument absent prejudicial, fundamental error." *State v. Zinsmeyer*, 222 Ariz. 612, ¶ 27, 218 P.3d 1069, 1080 (App. 2009) (fundamental error review when defendant made motion for new trial, but failed to raise grounds argued on appeal).

¶18 Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). To prevail on fundamental error review, Kelley must establish that such error occurred and that the error caused him prejudice. *See id.* ¶ 20. Even assuming

the trial court erred by failing to issue a bench warrant or to grant a continuance, however, Kelley has failed to sustain his burden of establishing he was prejudiced.

¶19 "No showing has been made that the witness could have been located and produced within a reasonable time had a continuance been granted." *State v. Cook*, 172 Ariz. 122, 125, 834 P.2d 1267, 1270 (App. 1992) (no prejudice where defendant did not show witness could have been located and her testimony was insufficient to cast doubt on testimony by other witnesses). Furthermore, "overwhelming evidence supports the conclusion" that Kelley committed the charged offenses. *State v. Fimbres*, 222 Ariz. 293, ¶ 43, 213 P.3d 1020, 1031 (App. 2009), *citing State v. Gallegos*, 178 Ariz. 1, 11, 870 P.2d 1097, 1107 (1994) (no prejudice when "[o]verwhelming evidence in the record" of defendant's guilt). As noted above, the deputy noticed Kelley had a flushed face, red and watery eyes, slurred and slow speech, and had been staggering. Kelley also admitted to the deputy that he had "just now" consumed a few beers. Kelley exhibited six out of six cues of impairment during the HGN test and performed poorly on field sobriety tests. Additionally, the state's criminalist testified that "all people are impaired to some degree for the task of driving" at .08 AC, and Kelley's AC was .226, a level substantially higher than that at which a person becomes impaired for driving. Kelley has not established that the jury would have reached a different result even if the passenger's testimony had contradicted the officer's description of Kelley's driving. *Cf. State v. Ruggiero*, 211 Ariz. 262, ¶ 27, 120 P.3d 690, 696 (App. 2005) (to establish prejudice in sentencing context, defendant must show reasonable jury would have reached different conclusion than trial judge as to presence of aggravator).

III. Jury instruction

¶20 Kelley next argues the trial court impermissibly commented on the evidence when it instructed the jury about weighing the testimony of witnesses. The court instructed the jury as follows:

> Inconsistencies or discrepancies in the testimony of a witness or between the testimonies of differing witnesses should be considered by you and may or may not cause you to discredit such testimony. Two or more persons witnessing an incident may see or hear it differently, and an innocent misrecollection like failure of memory is not an uncommon experience. In weighing inconsistencies or discrepancies, you should consider whether they concern matters of importance or an unimportant detail, and whether the discrepancy or the inconsistency results from innocent error or willful falsehood.

¶21 Kelley maintains this instruction provided the jury with "the trial court's opinion about how evidence should be weighed," violating article VI, § 27 of the Arizona Constitution, which prohibits judicial comments on the evidence. He argues the instruction interfered with the jury's independent evaluation of the testimony by telling the jurors "what . . . the[y] . . . 'should' consider and what is and is not important in determining the credibility and weight of conflicting testimony."

¶22 Because Kelley failed to object below, he has forfeited the right to seek relief for all but fundamental, prejudicial error. *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. As noted above, fundamental error goes to the foundation of the case, denies the defendant a right essential to his or her defense, and is of such magnitude that the defendant could not have received a fair trial. *State v. Roque*, 213 Ariz. 193, ¶ 65, 141 P.3d 368, 388 (2006).

¶23 The Arizona Constitution forbids judges from commenting on the evidence at trial. Ariz. Const. art. VI, § 27; *Roque*, 213 Ariz. 193, ¶ 66, 141 P.3d at 388. A trial court violates this provision when it expresses an opinion regarding what the evidence proves or "'interfere[s] with the jury's independent evaluation of the evidence.'" *Roque*, 213 Ariz. 193, ¶ 66, 141 P.3d at 388, *quoting State v. Rodriguez*, 192 Ariz. 58, ¶ 29, 961 P.2d 1006, 1011 (1998). Here, the instruction did not express the court's opinion about what the evidence proved. *See id.* (trial court violates Arizona Constitution by expressing opinion as to what evidence proves). The instruction therefore could not reasonably be found to have "'interfere[d] with the jury's independent evaluation of th[e] evidence.'" *Id*., *quoting Rodriguez*, 192 Ariz. 58, ¶ 29, 961 P.2d at 1011. Kelley has not established any error occurred here, much less error that can be characterized as fundamental. Consequently, we need not address his arguments that he was prejudiced by the instruction.

IV. State's expert witness

¶24 Finally, Kelley argues that the trial court erred in precluding the college academic record of the state's expert witness, an Arizona Department of Public Safety (DPS) criminalist, who had failed some chemistry courses.[2] In its motion, the state sought to preclude Kelley from introducing evidence about her college grades, arguing

[2]The state contends Kelley failed to make a sufficient offer of proof regarding the number of courses or the dates when the criminalist took them. *See* Ariz. R. Evid. 103(a)(2) ("Error may not be predicated upon a ruling which . . . excludes evidence unless . . . the substance of the evidence was made known to the court by offer or was apparent from the context . . . ."). Because we conclude the trial court did not err in precluding this evidence, we do not address whether Kelley adequately complied with that rule.

they were irrelevant and had been improperly released by the college. After a hearing, the court granted the state's motion, noting that her qualification as an expert and her certification in forensic alcohol analysis were the "only thing[s] . . . relevant to the trial, not her past academic record."

¶25 "Decisions on the admission and exclusion of evidence are 'left to the sound discretion of the trial court,' and will be reversed on appeal only when they constitute a clear, prejudicial abuse of discretion." *State v. Ayala*, 178 Ariz. 385, 387, 873 P.2d 1307, 1309 (App. 1994), *quoting State v. Murray*, 162 Ariz. 211, 214, 782 P.2d 329, 332 (App. 1989) (citation omitted). Although criminal defendants have a fundamental constitutional right to present a defense and confront witnesses, the right is limited by ordinary evidentiary rules and does not extend to presenting evidence that is irrelevant or unduly prejudicial. *State v. Dickens*, 187 Ariz. 1, 14, 926 P.2d 468, 481 (1996); *State v. Oliver*, 158 Ariz. 22, 30, 760 P.2d 1071, 1079 (1988).

¶26 Evidence offered to impeach a witness must be relevant and admissible. *See State v. Allen*, 140 Ariz. 412, 414, 682 P.2d 417, 419 (1984). Pursuant to Rule 401, Ariz. R. Evid., evidence is relevant when it has a tendency to prove or disprove a material fact at issue. *See Allen*, 140 Ariz. at 414, 682 P.2d at 419. And it is admissible if, inter alia, its probative value is not "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, [or] waste of time." Ariz. R. Evid. 403.

¶27 "The threshold for relevance is a low one . . . ." *Roque*, 213 Ariz. 193, ¶ 109, 141 P.3d at 396. Furthermore,

> when an expert offers his opinion he exposes himself to a different type of inquiry on cross examination than would be permitted of the ordinary factual witness. He invites investigation into the extent of his knowledge and the reasons for his opinion . . . [and] may be subjected to the most rigid cross examination concerning his qualifications and the sources of his opinion.

State ex rel. Herman v. Saldamando, 12 Ariz. App. 474, 475, 472 P.2d 85, 86 (1970).

¶28 Here, Kelley does not dispute that the criminalist had passed all of the courses necessary to earn her chemistry degree. Furthermore, she testified that she previously had been qualified as an expert in forensic alcohol analysis and the effects of alcohol on humans and had attended forensic alcohol training courses with DPS and out of state. She also testified she had a permit to conduct forensic alcohol analysis and passed an annual proficiency test in order to maintain this permit. Thus, the fact she had failed some courses in college was of marginal relevance in light of her demonstrated proficiency on the job.

¶29 Moreover, even assuming the evidence was relevant, the trial court could properly have excluded it under Rule 403. The goal of this rule, noted above, is to avoid the danger that, "'in attempting to dispute or explain away the evidence thus offered, new issues will arise . . . and the multiplicity of minor issues will be such that the jury will lose sight of the main issue.'" *State v. Gibson*, 202 Ariz. 321, ¶ 17, 44 P.3d 1001, 1004 (2002), *quoting* Joseph M. Livermore et al., *Arizona Law of Evidence* § 403, at 86 (4th ed. 2000). When the probative value of the proffered evidence is minimal, there is a greater probability that factors of confusion or waste of time will substantially outweigh its value. *See id.* Here, evidence of the criminalist's failing grades would have led to

inquiries about particular courses and their applicability to her current work. The court therefore did not err in excluding evidence of her academic performance in college. *See State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982) ("The court may prevent cross-examination into collateral matters of a personal nature having minor probative value and tending to bring up [further] collateral matters . . . which would require unnecessary use of court time."). Because we find no error, we need not address Kelley's arguments as to how he was prejudiced by the trial court's ruling.

Disposition

¶30 Kelley's convictions and sentences are affirmed.

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

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

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