FILED BY CLERK
DEC 21 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. TERRY LEE CRUMRINE, Appellant.	)	2 CA-CR 2010-0127 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20082990

Honorable Christopher C. Browning, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra
Tucson
Attorneys for Appellee

Harriette P. Levitt
Tucson
Attorney for Appellant

K E L LY, Judge.

¶1 Terry Crumrine appeals from his convictions for two counts each of aggravating driving under the influence of an intoxicant (DUI) and aggravated driving with an alcohol concentration (AC) of .08 or more, based on his having committed those offenses while his driver's license was suspended, revoked, or cancelled and his having been convicted of two or more DUI offenses in the preceding eighty-four months. Crumrine argues his right to a fair trial was violated when a police officer "impermissibly testified concerning the ultimate issue in the case" by testifying Crumrine had failed field sobriety tests without describing the basis for those conclusions. We affirm.

¶2 On appeal, we view the facts in the light most favorable to sustaining the verdicts. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). At about 2:00 a.m. on July 26, 2008, a Tucson Police Department officer saw Crumrine driving his truck with the headlights off. The officer activated his patrol car's overhead lights, but Crumrine turned into the parking lot of a nearby apartment complex and proceeded fifty to sixty yards into the complex without stopping. Shortly after the officer activated his siren, Crumrine pulled his truck into a parking spot. Crumrine smelled of alcohol, slurred his speech, had watery eyes, and staggered and swayed as he got out of his truck. According to the officer, Crumrine failed each of three field sobriety tests administered, exhibiting six of six cues during a horizontal gaze nystagmus (HGN) test, five out of eight cues during a walk-and-turn test, and three out of four cues during a one-legged stand test. Duplicate breath tests indicated Crumrine's AC was .211 and .206.

¶3 Crumrine subsequently was charged with and convicted of the offenses described above. The trial court found Crumrine had two previous aggravated DUI

convictions and sentenced him to presumptive, concurrent prison terms of ten years for each offense. This appeal followed.

¶4 Relying solely on *Fuenning v. Superior Court*, 139 Ariz. 590, 680 P.2d 121 (1983), Crumrine argues the officer's testimony that Crumrine had exhibited several cues for impairment during the various field sobriety tests and had therefore failed those tests was improper because the officer did not describe what Crumrine had done to warrant those conclusions. Thus, Crumrine reasons, the officer improperly "offer[ed] his opinion as to the ultimate question of fact, . . . [Crumrine's] impairment." Crumrine did not raise this argument below and, therefore, has forfeited this claim absent fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

¶5 Crumrine misreads *Fuenning* in two ways. First, that case does not prohibit opinion testimony concerning an ultimate question of fact. Such testimony is explicitly permitted by Rule 704, Ariz. R. Evid., which states that opinion testimony that is "otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." In its supplemental opinion in *Fuenning*, our supreme court, in dicta, directed trial courts to exercise "caution" when admitting opinion evidence that a defendant was intoxicated or impaired because "testimony which parrots the language of the statute moves from the realm of permissible opinion which 'embraces an' issue of ultimate fact [under Rule 704] to an opinion of guilt or innocence which embraces all issues." 139 Ariz. at 605, 680 P.2d at 136 (emphasis removed).

¶6 Second, *Fuenning* does not suggest the admissibility of "an opinion of guilt or innocence" depends on whether the testifying witness has provided a factual basis for that opinion. 139 Ariz. at 605, 680 P.2d at 136. Our supreme court instead suggested such testimony is generally inadmissible under Rule 403, Ariz. R. Evid., because its prejudicial effect typically would outweigh its probative value. 139 Ariz. at 605, 680 P.2d at 136. Thus, although Crumrine correctly points out the officer neither explained which cues of impairment Crumrine had exhibited during the tests nor explained precisely what conduct had caused him to conclude Crumrine had exhibited those cues, that fact is not germane to our analysis whether the officer's testimony runs afoul of our supreme court's direction in *Fuenning*.[1]

¶7 The *Fuenning* court explained it was proper for a witness to testify that he or she was familiar with the symptoms of intoxication and that a defendant exhibited such symptoms. *Id.* at 605, 680 P.2d at 136. The officer's testimony here falls within this category. The officer testified Crumrine had exhibited sufficient cues, according to national standards, to warrant a conclusion he had failed the field sobriety tests. And the officer described the tests and various cues in detail. Although this evidence is highly probative of the question of Crumrine's guilt of driving under the influence of an intoxicant, *see State v. Campoy*, 214 Ariz. 132, ¶ 8, 149 P.3d 756, 758 (App. 2006), it is not an impermissible opinion "on how the jury should decide the case." *Compare State*

[1]To the extent Crumrine suggests the officer's testimony was inadmissible because it lacked foundation, he does not adequately develop that claim and we do not address it. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004) (failure to develop an argument results in waiver).

v. Askren, 147 Ariz. 436, 437, 710 P.2d 1091, 1092 (App. 1985) (finding proper officer's testimony that purpose of field sobriety tests was to determine whether defendant under influence of alcohol) *with State v. Herrera*, 203 Ariz. 131, ¶ 7, 51 P.3d 353, 357 (App. 2002) (finding improper officer's testimony defendant had been "'impaired to the slightest degree'"). Indeed, beyond describing the tests as "field sobriety tests," the officer did not testify that failing those tests meant Crumrine was intoxicated or impaired or otherwise offer an opinion on that question.

¶8 For the reasons stated, Crumrine has failed to demonstrate error, much less fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d at 608 ("To obtain relief under the fundamental error standard of review, [a defendant] must first prove error."). We therefore affirm Crumrine's convictions and sentences.

/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