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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THE STATE OF ARIZONA, Appellee, v. JAMES MATTHEWSON, Appellant.	2 CA-CR 2008-0176 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200701012

Honorable Boyd T. Johnson, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Joseph L. Parkhurst — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

P E L A N D E R, Chief Judge.

¶1 Following a jury trial, James Matthewson was convicted of driving under the influence of alcohol, driving with an alcohol concentration of .08 or more, and negligent homicide. The trial court sentenced him to a mitigated term of five years' imprisonment for the homicide, suspended the imposition of sentence on the remaining offenses, and imposed a three-year term of supervised probation to begin after Matthewson's release from incarceration. On appeal, Matthewson contends the trial court improperly admitted evidence of the results of blood tests taken after the highway collision from which these charges arose. Specifically, he contends the state's failure to establish foundation that the Arizona Department of Public Safety officer who had drawn Matthewson's blood was a qualified individual under A.R.S. § 28-1388 rendered the blood draw unconstitutional.

¶2 Because Matthewson did not object to the evidence below, we review for fundamental error only. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to [the] defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Id*., *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id*. ¶ 20. However, the defendant "must first prove error," *id*. ¶ 23, and Matthewson has not.

¶3 Matthewson's argument under § 28-1388(A) is meritless. The statute provides: "If blood is drawn under [A.R.S.] § 28-1321, only a physician, a registered nurse or another qualified person may withdraw blood for the purpose of determining the alcohol concentration or drug content in the blood." As Matthewson acknowledges, however, § 28-1388(A) expressly provides that "[t]he qualifications of the individual withdrawing the blood . . . are not foundational prerequisites for the admissibility of a blood alcohol content determination made pursuant to this subsection." This court has previously concluded that "[t]he logical interpretation of the statute is that the legislature intended evidence to be presented that someone trained in blood withdrawal—a physician, nurse, or other qualified person—actually drew the blood, but does not require evidence of the individual's professional qualifications or credentials." *State v. Nihiser*, 191 Ariz. 199, 202, 953 P.2d 1252, 1255 (App. 1997).

¶4 In *State ex rel. Pennartz v. Olcavage*, 200 Ariz. 582, ¶ 21, 30 P.3d 649, 655 (App. 2001), Division One of this court determined that "a phlebotomist, by definition, is a person who, through training or experience, is competent to draw blood." *See also State v. May*, 210 Ariz. 452, ¶ 10, 112 P.3d 39, 42 (App. 2005) (deputy phlebotomist a "qualified person" under § 28-1388(A)). In this case, the officer who drew Matthewson's blood testified without contradiction that he was "an Arizona Department of Public Safety law enforcement phlebotomist." The trial court did not err by admitting the blood test results without further evidence of the officer's qualifications.

¶5 Matthewson's argument that lack of this foundation at trial rendered the blood draw itself unconstitutional is also unpersuasive. Matthewson does not argue that § 28-1388 is unconstitutional, nor does he contend the officer phlebotomist who drew his blood was not, in fact, qualified or drew his blood in an constitutionally unreasonable manner—only that the state laid insufficient foundation regarding the officer's qualifications under § 28-1388. As explained above, we disagree. The trial court committed no error, fundamental or otherwise, by admitting the blood test results. Accordingly, Matthewson's convictions, his sentence, and the trial court's imposition of probation are affirmed.

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JOHN PELANDER, Chief Judge

CONCURRING:

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J. WILLIAM BRAMMER,JR., Judge

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PHILIP G. ESPINOSA, Judge