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DEC 14 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>JASON MICHAEL PATROU,<br><br>Appellant. | 2 CA-CR 2008-0330<br>DEPARTMENT A<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20063586

Honorable Howard Fell, Judge Pro Tempore
Honorable Clark W. Munger, Judge

AFFIRMED

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E S P I N O S A, Presiding Judge.

**¶1** After a jury trial, Jason Patrou was convicted of aggravated driving under the influence of an intoxicant (DUI) while his license was suspended and aggravated driving with a blood alcohol concentration of .08 or more while his license was suspended. He was sentenced to concurrent, mitigated terms of three years' imprisonment. He appeals on a number of grounds. We affirm.

**Factual and Procedural Background**

**¶2** We view the facts in the light most favorable to sustaining the convictions, drawing all reasonable inferences in favor of the verdict. *See State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). In September 2006, a Pima County sheriff's deputy stopped Patrou's vehicle after he observed it speeding and running a red light. As he spoke with Patrou, he noticed Patrou had "red, watery, bloodshot eyes" and noted "an odor of intoxicants coming from within the vehicle." Patrou admitted he had been drinking at a nearby bar and agreed to perform field sobriety tests, during which he exhibited several signs of impairment. The deputy then conducted a preliminary breath test, which indicated the presence of alcohol. The deputy arrested Patrou, who thereafter consented to have his blood drawn. A different deputy drew two blood samples: one for the state's testing and one, as Patrou was informed, in case he chose to seek an independent test. The blood test ultimately revealed an alcohol concentration of .133.

## Discussion

### Inspection of Crime Laboratory

**¶3** Patrou first argues the trial court erred in denying his pretrial motion pursuant to Rule 15.1(g), Ariz. R. Crim. P., for an order allowing a defense expert to inspect the Department of Public Safety (DPS) crime laboratory (crime lab) where his blood was tested. "A trial court has broad discretion over discovery matters, and we will not disturb its rulings on those matters absent an abuse of that discretion." *State v. Fields*, 196 Ariz. 580, ¶ 4, 2 P.3d 670, 672 (App. 1999). Patrou is not entitled to an order compelling discovery under Rule 15.1(g) unless he demonstrated both a "substantial need" for the requested material or information and that he was "unable without undue hardship to obtain the substantial equivalent by other means." *Id*.

**¶4** Patrou and the state both presented expert testimony at a two-day evidentiary hearing on this issue. Patrou's expert witness pointed out that the results of a gas chromatograph test utilized by the lab indicated a foreign substance in Patrou's blood sample other than alcohol. She claimed the presence of the contaminant could indicate widespread "issues" in the laboratory and testified that, were she allowed to "audit" the crime lab, she would be able to identify practices and environmental factors that could potentially cause unreliable test results. The state's expert witness, a toxicology supervisor who oversees all DPS crime labs in Arizona, testified that, although the lab conditions were not perfect and the facility was due for an upgrade, it employed "rigorous" quality standards. She further

testified that, because the contaminant Patrou's witness identified did not register near the alcohol measure on the chromatograph, it had no effect on the reliability of Patrou's blood test results. Additionally, as noted above, the state introduced testimony that a second sample of Patrou's blood had been taken and was available for independent testing.

**¶5** Based on this evidence, the trial court could reasonably find that Patrou failed to demonstrate a substantial need for an audit of the DPS lab. Even if, as Patrou claims, he arguably showed "ongoing deficits in the quality of testing" due to the presence of "unknown contaminants" in his sample, he presented no evidence suggesting the crime lab's alcohol test results were flawed in his or any other case, although he had the opportunity to directly establish this by testing the second sample. *See* Ariz. R. Crim. P. 15.1(g) (defendant must show inability "without undue hardship to obtain the substantial equivalent by other means"); *see also State v. Connor*, 215 Ariz. 553, ¶ 24, 161 P.3d 596, 604-05 (App. 2007) (no substantial need to examine victim's medical records when same evidence could be presented through witness testimony). Moreover, the state presented testimony that the contaminant did not indicate a problem with the test's accuracy or reliability. *See State v. Bernini* (*Daughters-White II*), 568 Ariz. Adv. Rep. 35, ¶¶ 2, 3, 10-15 (Ct. App. Oct. 27, 2009) (trial court in DUI case abused discretion in finding substantial need under Rule 15.1 based on defendants' allegations of flaws in testing equipment that did not affect reliability of results); *Fields*, 196 Ariz. 580, ¶ 7, 2 P.3d at 673 (rejecting claim of substantial need to observe and videotape state crime lab based on defendant's speculation that flaws in testing procedure

might be discovered). Because Patrou had the opportunity but failed to test the additional blood sample, which could have directly revealed any error in the state's test result, the trial court's conclusion that he failed to demonstrate substantial need to inspect the crime lab to collect circumstantial evidence of the same was not an abuse of discretion. *See Fields*, 196 Ariz. 580, ¶ 9, 2 P.3d at 673 (testing second blood sample "would be the best evidence of the only material issue, the accuracy of the reported [blood alcohol concentration]").

**Introduction of Evidence of Second Blood Sample**

**¶6** Before trial, Patrou moved to preclude any mention of the second blood sample, arguing that because the state preserved this evidence without his requesting it and because he never took possession of it, the state should be precluded from implying that Patrou's failure to test the other sample demonstrated the accuracy of the state's test results.[1] Patrou cited no controlling authority, and the trial court denied the motion. It found the admissibility of the evidence did not "rise[] and fall[] on whether the defense physically picks up the second tube" and Patrou could not "void [the] issue by simply failing to take possession" of the blood sample. On appeal, Patrou contends the trial court erred in denying

[1]Although it appears Patrou filed a written motion in limine to preclude references to the second blood sample, he has failed to cite the motion, and we have not found it in the record on appeal. Accordingly, we look only to the transcripts of the argument on the motion to determine its content. *See State v. Kerr*, 142 Ariz. 426, 434, 690 P.2d 145, 153 (App. 1984) (appellant has duty to ensure record contains any document necessary to argument; court will not speculate on content not in record). Furthermore, because his written motion is not preserved in the record, it is unclear on which rule of evidence or constitutional provision he relied in seeking to preclude this evidence.

this motion, as well as his later motion for a new trial on the same ground. He argues he was prejudiced by references to the second blood sample in testimony and in the state's closing arguments because the statements invited the inference "that he would have tested it and disclosed the results if they were exculpatory and if he did not do so, then it could be assumed the results would have been inculpatory." This error, he argues, impermissibly shifted the burden of proof away from the state and warrants reversal. We disagree.

**¶7** Because the trial court is in the best position to weigh the probative value of challenged evidence against its potential for prejudice, the court has broad discretion in ruling on a motion to preclude. We will not disturb its determination absent an abuse of that discretion. *See State v. McKenna*, 222 Ariz. 396, ¶ 14, 214 P.3d 1037, 1043 (App. 2009). Similarly, we review the denial of a motion for new trial for an abuse of discretion. *See State v. Mills*, 196 Ariz. 269, ¶ 6, 995 P.2d 705, 707 (App. 1999).

**¶8** As the state points out, a prosecutor may "comment upon the defense's failure to adduce potentially exculpatory evidence to which defendant had access when defendant is attacking the accuracy of the State's evidence." *State ex rel. McDougall v. Corcoran*, 153 Ariz. 157, 160, 735 P.2d 767, 770 (1987). Although Patrou attempts to distinguish *Corcoran*, emphasizing he "never requested the [additional blood] sample" and arguing the "state had equal access to the second sample" through which it could have verified the accuracy of the first sample, these arguments fail to meaningfully distinguish *Corcoran*. Neither the defendant's request for an additional sample nor the state's access to it was

dispositive in *Corcoran*. Rather, our supreme court's holding in that case relied on "the well recognized principle that the nonproduction of evidence may give rise to the inference that it would have been adverse to the party who could have produced it." *Id*. at 160, 735 P.2d at 770. Accordingly, the trial court here did not err in allowing the prosecutor and the state's witnesses to refer to the second blood sample, and it did not abuse its discretion in denying both Patrou's motion to preclude and his motion for new trial.[2]

**Proof of Prior Conviction**

**¶9** Last, Patrou argues the state failed to present clear and convincing evidence of his prior conviction. *See State v. Cons*, 208 Ariz. 409, ¶ 15, 94 P.3d 609, 615 (App. 2004). To establish a prior conviction, the prosecutor must prove both that the conviction exists and that the defendant is the same person convicted in the prior case. *State v. Nash*, 143 Ariz. 392, 403, 694 P.2d 222, 233 (1985). "Although the preferred method of proving prior convictions . . . is submission of certified conviction documents bearing the defendant's fingerprints, courts may consider other kinds of evidence as well," including documents and

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[2]Even had *Corcoran* turned on the defendant's request or the state's access to the additional sample, the prosecutor's statements here did not amount to a comment on Patrou's failure to test the additional sample. As Patrou implicitly concedes, the prosecutor did not argue any inference should follow from his failure to test the sample. Patrou nonetheless contends the state "raised the question about why [he] did not obtain an independent test" when the prosecutor stated during closing, "[t]he other tube is for the defendant should . . . he want to test one." He also complains "the state's witnesses mentioned the existence of the second blood sample on several occasions." But these statements cannot reasonably be viewed as comments on his failure to test the sample, much less requests that the jury infer the evidence Patrou failed to produce would have been adverse to him.

testimony linking conviction records to the defendant. *State v. Robles*, 213 Ariz. 268, ¶¶ 16-17, 141 P.3d 748, 753 (App. 2006) (citation omitted).

**¶10** The state introduced the sentencing minute entry from Patrou's prior conviction as well as the testimony of his probation officer, who identified Patrou as the person she had previously supervised as a result of that conviction. Patrou concedes the state proved the existence of a prior conviction but argues, relying on *State v. Hauss*, 140 Ariz. 230, 681 P.2d 382 (1984), that the testimony of his probation officer was insufficient as a matter of law to establish he was the same person previously convicted. But *Hauss* stands only for the proposition that witness testimony alone cannot establish a prior conviction. 140 Ariz. at 232, 681 P.2d at 384. As we held in *Robles*, testimony can connect documentary evidence to a specific person; there, we upheld historical prior convictions when the trial court relied on a copy of a "record abstract" from the Arizona Department of Corrections and the testimony of a witness who connected the defendant to those convictions. 213 Ariz. 268, ¶¶ 3, 17, 141 P.3d at 750, 753. Although Patrou recites a number of factors he contends undermine the probation officer's identification, determining witness credibility was the province of the trial court. *State v. Olquin*, 216 Ariz. 250, ¶ 10, 165 P.3d 228, 230 (App. 2007). Patrou's probation officer connected the documentary evidence to Patrou by positively identifying him as the person she had supervised, and the trial court credited her testimony. We defer to its credibility determination and cannot say the court erred in finding the prior conviction proven.

**Disposition**

**¶11** For the foregoing reasons, Patrou's convictions and sentences are affirmed.

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

PETER J. ECKERSTROM, Judge