

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000569-001 DT

04/15/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

GARY L SHUPE

v.

DANIEL FRANK RYCHLIK (001)

NEAL W BASSETT

PHX MUNICIPAL CT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 14007607.

Defendant-Appellant Daniel Frank Rychlik (Defendant) was convicted in Phoenix Municipal Court of driving under the influence. Defendant contends failure to give a certain jury instruction was fundamental error. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On April 6, 2011, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2); and driving without lights at night, A.R.S. § 28-922. At the trial, the State presented evidence Defendant was driving under the influence while impaired to the slightest degree. (R.T. of Jan. 18, 2012, at 27, 30, 31, 38, 44, 46, 48, 53, 57, 60, 82; R.T. of Jan. 19, 2012, at 98, 124, 170.) In addition, the State presented evidence Defendant was driving with an alcohol concentration of 0.088 within 2 hours of driving. (R.T. of Jan. 19, 2012, at 122.) Defendant presented testimony that he was not impaired. (R.T. of Jan. 18, 2012, at 61, 64-65, 66, 67, 68; R.T. of Jan. 19, 2012, at 99-100, 105.) In addition, Defendant presented testimony that his alcohol concentration was less than 0.08. (R.T. of Jan. 19, 2012, at 133, 138-40, 153, 157-61.)

After the presentation of testimony, both attorneys said they had no objections to the trial court's proposed jury instructions. (R.T. of Jan. 19, 2012, at 229-30.) Among the trial court's instructions was the presumption of being under the influence based on the Defendant's BAC. (*Id.* at 236-37.) The trial court also instructed the jurors to consider all the facts in the case in determining whether Defendant was under the influence. (*Id.* at 237.) It further instructed the jurors "evidence" included testimony of the witnesses, all writings, any material objects, and all other things presented, and the jurors were to consider all the evidence presented, and the reasonable inferences from the evidence, in determining whether the State has proved the truth of the charge beyond a reasonable doubt. (*Id.* at 240.)

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After deliberating, the jurors found Defendant guilty of both charges. (R.T. of Jan. 19, 2012, at 261.) The trial court later imposed sentence. (R.T. of Feb. 23, 2012, at 265–66.) On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE TRIAL COURT COMMIT FUNDAMENTAL ERROR IN FAILING TO GIVE DEFENDANT’S SUGGESTED JURY INSTRUCTION.

Defendant contends the trial court committed fundamental error by not instructing the jurors they could consider other evidence in determining whether his BAC was over 0.80. Defendant contends this is especially true because the jurors were instructed they could consider other evidence in determining whether the presumption showed Defendant was under the influence. If a defendant does not object at trial to the trial court’s not giving a jury instruction, the court will review for fundamental error only, and will grant relief only if the defendant proves fundamental, prejudicial error. *State v. Hargrave*, 225 Ariz. 1, 234 P.3d 569, ¶¶ 37–39 (2010) (defendant contended on appeal trial court erred in not instructing jurors on unlawful imprisonment as lesser-included offense of kidnapping; because defendant did not request that jury instruction at trial, court reviewed for fundamental error only; because evidence showed defendant intended to aid in commission of robbery and knew victims might be harmed, defendant failed to demonstrate fundamental error); *State v. Kuhs*, 223 Ariz. 376, 224 P.3d 192, ¶¶ 35–39 (2010) (on appeal, defendant contended trial court should have given additional instruction that trial court would give further instructions if jurors could not agree; because defendant never asked trial court to give that instruction, court reviewed for fundamental error, and found no error).

In *State v. Cooperman*, 230 Ariz. 245, 282 P.3d 446 (Ct. App. 2012), the court held the trial court has a duty to instruct the jurors on the statutory presumptions under A.R.S. § 28–1381(G) if a party introduces evidence of the defendant’s BAC in a (A)(1) charge. *Cooperman* at ¶¶ 13–18 & n.6. Further, Subsection (G) does not limit the introduction of any other competent evidence bearing on the question whether or not Defendant was under the influence of intoxicating liquor. The trial court thus properly instructed the jurors on that point, and therefore properly instructed the jurors on all aspects of the case.

Defendant contends the trial court *sua sponte* should have instructed the jurors they could consider any other competent evidence bearing on the question whether or not Defendant was above a BAC of 0.80. The trial court did instruct the jurors they must decide whether the State has proved the charges beyond a reasonable doubt based on all the evidence presented. (R.T. of Jan. 19, 2012, at 240.) Moreover, after the trial court instructed the jurors they could consider all evidence presented in determining whether the statutory presumption of being under the influence applied to Defendant, the jurors still found Defendant guilty of the (A)(1) charge, driving under the influence and being impaired. This Court therefore concludes Defendant has failed to establish any error, fundamental or otherwise, and had failed to show any prejudice.

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III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court properly instructed the jurors.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Phoenix Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Phoenix Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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