Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-000071-001 DT 04/22/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA KENNETH M FLINT

v.

DENNIS LEE BOHLKE (001) SCOTT C SILVA

REMAND DESK-LCA-CCC
SCOTTSDALE MUNICIPAL COURT

RECORD APPEAL RULING / REMAND

Lower Court Case Number M–751–TR–2001–016968.

Defendant-Appellant Dennis Lee Bohlke (Defendant) was convicted in Scottsdale Municipal Court of driving under the influence and driving with drugs or metabolite in his system. Defendant contends the trial court abused its discretion in denying his motion for a mistrial, and further contends the State did not present sufficient evidence to support his convictions. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

The State charged Defendant with driving under the influence, A.R.S. § 28–1381(A)(1), and driving with drugs or metabolite in system, A.R.S. § 28–1381(A)(3). At the trial in this matter, Officer David Stanley testified he was on duty on July 7, 2010, in the area of East Shea Boulevard and North 71st Place. (R.T. of Jul. 9, 2012, at 36, 43–44.) At about 11:41 p.m., he saw a vehicle turn right from 71st Place onto Shea Boulevard without stopping for the red light. (*Id*. at 43, 45–46.) Further, the vehicle turned into the middle (number 2) lane of the three lanes rather than turning into the right-most (number 3) lane, as was required by law. (*Id*. at 46, 49.) As he followed the vehicle, Officer Stanley saw the right-side tires of the vehicle drift over the white line and go into the number 3 lane by about 8 inches. (*Id*. at 50.) He further saw the license plate light was not working. (*Id*. at 51.) He initiated a traffic stop, and as the vehicle slowed to a stop, the right tires struck the curb. (*Id*.)

Officer Stanley contacted the driver, whom he identified as Defendant. (R.T. of Jul. 9, 2012, at 52, 55.) He smelled the odor of alcohol coming from the vehicle, and observed Defendant had slow and thick speech, a pale face, and reddened conjunctiva. (*Id*. at 54, 62.) Officer Stanley asked Defendant for his driver's license, and Defendant had difficulty removing it from his

wallet. (*Id*. at 54.) Once Defendant got out of the vehicle, he was uncoordinated and stumbling as he walked toward the sidewalk. (*Id*. at 56–57.) Officer Stanley saw the following signs of impairment: lack of convergence of the eyes, inaccurate estimation of time, and eye tremors. (*Id*. at 58–59, 63–64, 67–70.) Officer Stanley had Defendant perform some field sobriety tests and saw the following cues of impairment: walk-and-turn, 3 of 8 cues; one-leg-stand, 4 of 4 cues; finger-to-nose, 4 of 7 cues; Rhomberg modified, 4 of 6 cues. (*Id*. at 71–79.) Defendant had elevated pulse readings of 120 and 126. (*Id*. at 80–81.) The prosecutor asked Officer Stanley about his questioning of Defendant about his marijuana use, and the following exchange took place.

> Q. All right. So when you asked him about his marijuana usage, what did he tell you?
>
> A. He stated he used, and I quote, "Three days ago, maybe yesterday, maybe today."
>
> Q. And did you follow up on those responses?
>
> A. Yes. When he stated that he had used maybe today, "maybe" means they're unsure. And I'm pretty sure if you were smoking marijuana you would—
>
> MR. BLACK: Objection; speculation.
>
> AND THE COURT: Okay. Overruled. You may answer.
>
> AND THE WITNESS: You would know whether or not you used it. So the—the statement I made to him, is I asked him specifically, well, is "maybe" a no? He began to say something, but then he stopped and stated he didn't—
>
> MR. BLACK: Objection; Fifth Amendment, Your Honor, *State v. Sorrell.* This is a due process violation. Also, fundamental error. He's—the officer's talking about my client's right to remain silent.

(R.T. of Jul. 9, 2012, at 82–83.) The trial court excused the jurors, and Defendant's attorney made a motion for a mistrial. (*Id*. at 83, 88.) The trial court heard arguments from the attorneys, and after the noon recess and an afternoon recess, denied that motion. (*Id*. at 92, 102, 105–06.)

Officer Stanley described Defendant's actions in the police station, which included swaying when he walked and falling against a wall. (R.T. of Jul. 9, 2012, at 116.) He described having Defendant perform the filed sobriety tests in the police station, and with results that showed impairment. (*Id*. at 120, 129–32.) He observed Defendant had slow and thick speech, a pale face, a lack of convergence of the eyes, rebound dilation of the pupils, and a green film on his tongue. (*Id*. at 127–29, 134–35.) Defendant blood pressure was 152 over 76. (*Id*. at 133.)

Jessica Lovelace testified she was a criminalist with the Arizona Department of Public Safety. (R.T. of Jul. 9, 2012, at 212.) She tested a urine sample from Defendant, and it showed the presence of Carboxy–Tetrahydrocannabinol (Carboxy–THC). (*Id*. at 215, 219, 224, 231.) She testified Carboxy–THC was a metabolite of THC. (R.T. of Jul. 10, 2012, at 273.)

After presenting additional testimony from Officer Stanley, the State rested. (R.T. of Jul. 10, 2012, at 277, 279.) Defendant's attorney made a motion for judgment of acquittal, which the trial court denied. (*Id*. at 280, 282–83.) Defendant's attorney presented a witness and then rested. (*Id*. at 286, 308.) After hearing final arguments and instructions, and after deliberating, the jurors found Defendant guilty of both counts. (*Id*. at 312–13.) On August 30, 2012, the trial court imposed sentence. 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. ISSUES.

A. *Did the trial court abuse its discretion in denying Defendant's motion for a mistrial.*

Defendant contends the State introduced evidence of his exercise of his right to remain silent, and thus the trial court abused its discretion in denying his motion for a mistrial. The trial court has broad discretion in determining whether to grant a mistrial, and a reviewing court will reverse the trial court's ruling only if that court's conduct is palpably improper and clearly injurious. *State v. Walton,* 159 Ariz. 571, 581, 769 P.2d 1017, 1027 (1989). A declaration of a mistrial is the most dramatic remedy for trial error, and should be granted only when it appears that justice will be thwarted unless the jurors are dismissed and a new trial granted. *State v. Dann,* 220 Ariz. 351, 207 P.3d 604, ¶ 50 (2009). To determine whether the prosecutor's remarks or actions were so objectionable as to require a mistrial, the trial court must consider (1) whether misconduct exists and (2) whether a reasonable likelihood exists that the misconduct could have affected the jurors' verdict, thereby denying defendant a fair trial. *State v. Nelson,* 229 Ariz. 180, 273 P.3d 632, ¶ 38 (2012). Further, the defendant must show the offending statements were so pronounced and persistent that they permeated the entire atmosphere of the trial and so infected the trial with unfairness that they made the resulting conviction a denial of due process. *State v. Hughes,* 193 Ariz. 72, 969 P.2d 1184, ¶ 26 (1998). For five reasons, this Court concludes the trial court did not abuse its discretion in denying Defendant's motion for a mistrial.

First, at the time of the exchange between Officer Stanley and Defendant, he was not under arrest and Officer Stanley had not read him his *Miranda* rights. In *State v. Lopez,* 230 Ariz. 15, 279 P.3d 640 (Ct. App. 2012), the court held, when a defendant's silence is not the result of state action, the protections of the Fifth Amendment do not prohibit the state's comment on that defendant's pre-arrest, pre-*Miranda* silence. *Lopez* at ¶ 16. Thus, to the extent there was any testimony about what Defendant said, it was not a comment on any post-*Miranda* silence.

Second, there was no testimony that Defendant was silent. Officer Stanley testified as follows:

> You would know whether or not you used it. So the—the statement I made to him, is I asked him specifically, well, is "maybe" a no? He began to say something, but then he stopped and stated he didn't—

(R.T. of Jul. 9, 2012, at 83.) Thus, before Officer Stanley was cut off by Defendant's attorney, Officer Stanley was in the process of telling the jurors what Defendant was saying. Because Officer Stanley was telling the jurors what Defendant ***said,*** there was no testimony that Defendant was silent.

Third, this testimony never told the jurors that Defendant invoked his right to silence. In *State v. Kemp*, 185 Ariz. 52, 912 P.2d 1281 (1996), when the prosecutor asked a question that would have resulted in the witness's saying the defendant refused to answer further questions, the defendant's attorney objected and the trial court sustained the objection, thus the defendant suffered no prejudice. Similarly, in the present case, Officer Stanley would have told the jurors that Defendant invoked his right to silence: "[H]e stopped himself and said I don't want to answer any more questions." (R.T. of Jul. 9, 2012, at 84.) As in *Kemp*, Defendant's attorney objected and the trial court stopped any further testimony. Thus, all the jurors heard was Defendant "stated he didn't—." For all the jurors knew from this is that Defendant might have "stated he didn't remember."

Fourth, even if Officer Stanley had finished Defendant's statement and told the jurors Defendant "stated he didn't want to answer any more questions," that would not have been error. Arizona cases have held it is permissible to present testimony that the defendant answered some questions and not others. *State v. Maturana*, 180 Ariz. 126, 130, 882 P.2d 933, 937 (1994) (because defendant chose to answer some questions but not others, he did not invoke his right to remain silent, so it was not error for officer to testify that defendant remained silent in response to some questions); *State v. Reinhold*, 123 Ariz. 50, 53, 597 P.2d 532, 535 (1979) (because defendant answered questions asked by officer and only refused to tell officers victim's name, permissible to introduce evidence that defendant did not answer that question); *State v. Anaya*, 170 Ariz. 436, 442, 825 P.2d 961, 967 (Ct. App. 1991) (no error in admitting evidence that defendant voluntarily spoke to police, but then refused to make further statements when police refused to remove the handcuffs); *State v. Corrales*, 161 Ariz. 171, 172, 777 P.2d 234, 235 (Ct. App. 1989) (because defendant answered some questions but not others, trial court correctly denied defendant's motion for mistrial based on state's comments about this fact). Because the jurors heard testimony that Defendant answered some questions, they logically would have assumed at some point Defendant stopped talking to the police. Thus, informing the jurors that Defendant "didn't want to answer any more questions" would not have given the jurors any information that they would not have figured out on their own.

Fifth, to the extent information was conveyed to the jurors that Defendant invoked his right to remain silent, that was done by Defendant's attorney when he made his speaking objection:

> Objection; Fifth Amendment, Your Honor, *State v. Sorrell.* This is a due process violation. Also, fundamental error. He's—the officer's talking about my client's right to remain silent.

(R.T. of Jul. 9, 2012, at 83.) Defendant's attorney could have merely said "objection" and then asked to approach the bench, but did not do so. Because it was Defendant's own attorney who conveyed to the jurors the concept of the invocation of the right to remain silent, Defendant is not entitled to relief. The trial court thus did not abuse its discretion in denying Defendant's motion for a mistrial.

B. *Did the State present evidence sufficient to show Defendant was guilty of the (A)(3) charge.*

Defendant contends the State failed to introduce sufficient evidence to show he was guilty of A.R.S. § 28–1381(A)(3), which as applied to this case provides as follows:

> A. It is unlawful for a person to drive or be in actual physical control of a vehicle in this state under any of the following circumstances:
>
> . . . .
>
> 3. While there is any [marijuana] or its metabolite in the person's body.

He contends for marijuana, "its metabolite" is Hydroxy–THC and not Carboxy–THC, thus evidence he had Carboxy–THC in his system would not be sufficient to support his conviction. After the parties filed briefs in this matter, the Arizona Court of Appeals issued its opinion in *State ex rel. Montgomery v. Harris (Shilgevorkyan)*, 2013 WL 504558 (Ariz. Ct. App., Feb.12, 2013), which held for marijuana, "its metabolite" includes Carboxy–THC:

> [W]e hold that § 28–1381(A)(3)'s language prohibiting driving with a proscribed drug or "its metabolite" includes the metabolite Carboxy–THC.

Harris (Shilgevorkyan) at ¶ 14. The State therefore presented sufficient evidence to support his conviction for violating A.R.S. § 28–1381(A)(3).

C. *Did the State present evidence sufficient to show Defendant was guilty of the (A)(1) charge.*

Defendant contends the State failed to introduce sufficient evidence to show he was guilty of A.R.S. § 28–1381(A)(1), which as applied to this case provides as follows:

> A. It is unlawful for a person to drive or be in actual physical control of a vehicle in this state under any of the following circumstances:
>
> 1. While under the influence of [marijuana] if the person is impaired to the slightest degree.

Specifically, Defendant contends the State failed to present sufficient evidence that he was impaired. In addressing the issue of the sufficiency of the evidence, the Arizona Supreme Court has said the following:

> We review a sufficiency of the evidence claim by determining "whether substantial evidence supports the jury's finding, viewing the facts in the light most favorable to sustaining the jury verdict." Substantial evidence is proof that "reasonable persons could accept as adequate . . . to support a conclusion of defendant's guilt beyond a reasonable doubt." We resolve any conflicting evidence "in favor of sustaining the verdict."

State v. Bearup, 221 Ariz. 163, 211 P.3d 684, ¶ 16 (2009) (citations omitted). When considering whether a verdict is contrary to the evidence, this court does not consider whether it would reach the same conclusion as the trier-of-fact, but whether there is a complete absence of probative facts to support its conclusion. *State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

In the present case, the State presented the following evidence that Defendant was physically impaired: (1) He had difficulty retrieving his driver's license from his wallet; (2) he had slow and thick speech; (3) he was uncoordinated and stumbling once he got out of the vehicle; (4) he had lack of convergence of the eyes and eye tremors; (5) he had elevated blood pressure and pulse rate; and (6) he did poorly on the field sobriety tests. Although the statute requires only that "the person is impaired to the slightest degree" and not that the person's driving ability be "impaired to the slightest degree," the following evidence of Defendant's driving showed his physical ability or his judgment was impaired: (1) He went through a red light without stopping; (2) he turned into the wrong lane; (3) he drifted outside his lane; and (4) his tires struck the curb before he could stop. This Court concludes the State presented sufficient evidence to support his conviction for violating A.R.S. § 28–1381(A)(1).

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court did not abuse its discretion in denying Defendant motion for a mistrial, and further concludes the State presented sufficient evidence to support the convictions.

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

IT IS FURTHER ORDERED remanding this matter to the Scottsdale 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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