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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2010-000394-001 DT 05/07/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
K. Waldner
Deputy

STATE OF ARIZONA GARY L SHUPE

v.

COURTNEY LEE ODISHAW (001) VAUGHN A CRAWFORD

PHX MUNICIPAL CT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 13534590.

Defendant-Appellant Courtney Lee Odishaw (Defendant) was convicted in Phoenix Municipal Court of driving under the influence. Defendant contends the trial court erred in the following ways: (1) Denying her Motion To Vacate Judgment based on a *Miranda* claim; (2) permitting the State to comment on the fact that her attorney had obtained a sample of her blood for testing; (3) instructing the jurors on the statutory presumption on intoxication; (4) not suppressing the results of her blood test based on her claim that the police laboratory did not follow proper procedures; and (5) did not allow post-trial discovery so she could file a post-trial motions raising certain claims. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On February 17, 2008, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); failure to drive in one lane, A.R.S. § 28–729(1); and following to closely, A.R.S. § 28–730(A). On August 26, 2008, Defendant's attorney, Lawrence Kazan, filed a Motion for Release of Blood Sample for Independent Analysis, which the trial court granted on October 10, 2008, and signed an Order ordering the Phoenix Police Department to release for independent testing a sample of blood taken from Defendant. Also on August 26, Defendant's attorney filed a Motion To Suppress re: Unlawful Stop, alleging the officer did not have reasonable suspicion to stop Defendant's vehicle.

At the hearing on Defendant's Motion To Suppress, Officer Gary Rice testified he was on duty on February 16, 2008, on 32nd Street north of Camelback Road. (Vol. 1, R.T. of Jan. 26, 2009, at 3–4.) For this portion of 32nd Street, the speed limit is 40 mph. (*Id*. at 6–7.) At 11:30 p.m., he saw two vehicles traveling north on 32nd Street, and using his radar gun deter-

mined they were going at 47 mph. (*Id*. at 8, 12.) The two vehicles were so close he thought the first vehicle was towing the second vehicle, but as they passed by, he saw the second vehicle was not being towed. (*Id*. at 9–10, 31.) Because the second vehicle was only one car length behind the first vehicle, Officer Rice believed that vehicle was traveling at an unreasonable speed for that short a distance between vehicles, so he proceeded to follow the vehicles. (*Id*. at 10–12, 34.) Because of southbound traffic, Officer Rice was not able to pull out onto 32nd Street right away, so he did not catch up to the vehicles until they were about to stop at Lincoln Drive. (*Id*. at 12–14.) The first vehicle drove into the right-turn lane, and the second started to drive into the left-turn lane, but then changed direction and moved into the right-turn lane. (*Id*. at 22–24, 36, 39–40.) As the second vehicle was making the right turn onto Lincoln Drive, Officer Rice turned on his emergency lights. (*Id*. at 25–26, 41.) That vehicle did not stop until it turned right on 36th Street and pulled into a parking lot. (*Id*. at 26–28, 42.)

Officer Rice spoke to the vehicle's driver, whom he identified as Defendant. (Vol. 1, R.T. of Jan. 26, 2009, at 42.) When the prosecutor asked Officer Rice what Defendant said, Defendant's attorney objected because the statement was made after the stop and he was moving to suppress evidence gathered after the stop, but he did not make any claim of a *Miranda* violation. (*Id*. at 43.) After the testimony and the arguments of the attorneys, the trial court found Officer Rice had reasonable suspicion to stop Defendant's vehicle. (*Id*. at 52.)

The prosecutor next asked the trial court to allow him to introduce the following evidence:

> [T]he Defendant obtained a—and a sample of the blood [for purposes] of independent chemical testing, and that because the results were not disclosed you can presume that they would have been in support of the reading in this particular case. We intend to argue that provided the Defense calls into question the validity or accuracy of the reading in question. . . .

(Vol. 1, R.T. of Jan. 26, 2009, at 52.) Defendant's attorney objected because it was "completely speculative" and "unduly prejudicial." (*Id*. at 53.) The prosecutor said he would introduce this evidence "through Officer Rhett Campbell as a rebuttal witness if the Defense does attempt to question—call into question the validity of the reading." (*Id*. at 61.) Officer Campbell would say he gave a sample of Defendant's blood to Christine Brohms of Blood Alcohol Testing pursuant to Court order. (*Id*.) The following exchange later occurred:

> MR. FISHER [the prosecutor]: Because as I pointed out earlier, we wouldn't be calling the Defendant. We wouldn't be getting this information from—from cross-examination. We'd be calling another witness to indicate that the blood sample was released upon this Court's order . . . on motion of the Defense to an alcohol testing and consulting firm retained by the Defense. It wouldn't be coming up through the Defendant at all.

THE COURT: Well, I don't think that changes anything. But let me, Mr. Kazan, do you—how do you want to comment on that last issue that we brought up about how they're intending to get it in?

MR. KAZAN: I agree, Your Honor. First of all, it puts—first of all, I don't think they can call Christine Brohms from—from—and I don't think that they have enough chain to show that that came from Ms. Odishaw. And, I mean, so what they're—what they're really doing is they're commenting on a tactical decision maybe made by me, not by Ms. Odishaw in terms of what she wants to do for her case. So, I mean, in essence, I mean, if she testifies, they could ask her all those questions and she won't know anything about it because she wasn't privy to that kind of thing. So, again, I don't think that they can do that, and the fact that it was released to a Christine Brohms doesn't link it to Ms. Odishaw at all.

(Vol. 1, R.T. of Jan. 26, 2009, at 63–64.) After the trial court and the attorneys reviewed the case authority, they had the following exchange:

MR. FISHER: [T]he State is allowed to comment on the Defendant's ability to get an independent chemical analysis.

THE COURT: Right.

MR. FISHER: What I'm trying to establish—

THE COURT: But what you're—you're trying to go a little bit farther.

MR. FISHER: And say that there is a second sample. And if they attack the validity of the reading we can say that second sample was preserved, and was taken on the date. It could still be tested today. Nobody's done it, there hasn't been any evidence of that, you haven't heard it.

THE COURT: I think that's about as far as you can go. I actually think the case law supports exactly what you said but I was thinking you wanted to go farther with that.

MR. FISHER: Perhaps I was not very articulate, Judge, I apologize.

THE COURT: Well, I mean, Mr. Kazan don't you agree that he can say that?

MR. KAZAN: I think he can say that.

THE COURT: I don't think that's—

MR. KAZAN: I don't think that he's gone too far with that.

THE COURT: No. I don't either.

MR. FISHER: I think—

MR. KAZAN: What he was trying to say—I read that he was trying to say before that they actually got the—

THE COURT: They got it, they tested—

MR. KAZAN: —Defense got it, they tested—

THE COURT: —it came back in the State's favor.

MR. KAZAN: —and the results are—

MR. FISHER: I don't know if they tested it or not. I know they are capable.

THE COURT: Well that's what I thought you were trying to go with too.

MR. FISHER: What I'm saying, Judge, is—

THE COURT: What you said before is perfect.

MR. FISHER: What I'm saying is, look we know it's out there but you didn't hear evidence of it and they could have tested it too. Often times what happens is when you present that in trial, there's a large objection to burden shifting and then it becomes a huge nightmare at trial.

THE COURT: No. What you said is fine.

MR. FISHER: Okay. That's all I wanted to get out there.

THE COURT: Okay. You can do that.

(Vol. 1, R.T. of Jan. 26, 2009, at 74–76.)

Trial began May 4, 2009. In his Opening Statement, Defendant's attorney told the jurors Defendant "had drank a glass of wine" that night in the bar area of the Ritz Carlton Hotel, and was there with her friend for "the majority of the evening until the two of them decided to leave." (Vol. 3, R.T. of May 4, 2009, at 14.) He told the jurors that, once Defendant saw her friend driving, she though he had too much to drink to be driving, so she tried to stop him. (*Id*. at 14–15.) He said that, while she was trying to stop her friend, Officer Rice saw them and stopped her. (*Id*. at 15–17.) And he said Defendant initially told Officer Rice she had not had anything to drink. (*Id*. at 17.) He said there must have been something wrong with the State's blood testing machine "because the amount of wine that Ms. Odishaw had that night, in the timeframe that she had it, would in no way, shape or form amount to the alcohol that Ms. Swanson ultimately claimed was found in Ms. Odishaw's blood." (*Id*. at 19.)

Officer Rice testified about seeing the two vehicles and stopping Defendant's vehicle. (Vol. 3, R.T. of May 4, 2009, at 22–29.) When Officer Rice asked Defendant how much she had to drink, she said she had nothing. (*Id*. at 31, 42.) Officer Rice had Defendant perform an HGN test, and he saw all six cues, which meant she had a BAC of 0.08 or above. (*Id*. at 41.) Officer Rice told Defendant the results of the test showed she had been drinking and that she had enough alcohol that she should not be driving. (*Id*. at 42.) When he asked her again how much she had to drink, she admitted she had one glass of wine. (*Id*.) Defendant's attorney made no objection to this testimony. (*Id*. at 42–43.) During cross-examination of Officer Rice, Defendant's attorney brought out testimony that Defendant said she had one glass of wine. (*Id*. at 63.)

Officer James Lawler testified he had taken a blood sample from Defendant. (Vol. 3, R.T. of May 4, 2009, at 79–80, 82.) He said he took two vials of blood from Defendant. (*Id*. at 85.) He said he draws two vials "as a matter of our policy," and they "analyze one of them and we keep the other one in storage for any later testing if necessary." (*Id*. at 88.) On cross-examination of Officer Lawler, Defendant's attorney obtained Defendant's height and weight. (*Id*. at 93.)

Defendant's attorney then presented as a witness James Blomo, who identified himself as a Commissioner with the Maricopa County Superior Court. (Vol. 3, R.T. of May 4, 2009, at 103.) Mr. Blomo said he met Defendant after she was released from custody, and that she did not appear to be under the influence of alcohol. (*Id*. at 108–10, 111–13, 114–15, 117–18.) When Defendant's attorney asked him what he would have said if someone told him Defendant had a BAC of 0.119, he said, "I would have been shocked and I would have said, no way." (*Id*. at 118.)

Gayle Swanson testified she was a forensic scientist with the Phoenix Crime Lab, and she tested a blood sample from Defendant. (Vol. 4, R.T. of May 4, 2009, at 1, 4.) She said there were two tubes of blood in the package, she tested two samples of blood from one of them, she never opened the other tube, and it went back into the refrigerator. (*Id*. at 7–8., 11) She said the results of her tests shows BAC readings of 0.119 and 0.120. (*Id*. at 15.)

On cross-examination, Defendant's attorney asked Ms. Swanson about the testing procedures and accuracy checks she used. (Vol. 4, R.T. of May 4, 2009, at 20–33.) He then asked her if she was familiar with the National Institute of Science and Technology and whether the whole blood controls she used were traceable to NIST standards. (*Id*. at 33–34.) He also asked her what BAC would she expect for a female weighing 108 pounds who had one glass of wine to drink, and Ms. Swanson said that person would have a BAC of 0.04. (*Id*. at 35–36.)

The next day, Defendant's attorney made an oral motion to strike the blood test in this case because the whole-blood controls Ms. Swanson used were not traceable to NIST standards and thus did not comply with A.R.S. § 41–2063. (Vol. 4, R.T. of May 5, 2009, at 46–47.) The trial court said that was a motion that Defendant's attorney should have made before the trial started "because I can't strike a blood test without some kind of written motion." (*Id*. at 49.) The trial court therefore denied the motion, but said Defendant's attorney could reassert the motion after his expert testified. (*Id*. at 49–50.)

Defendant's expert, Mark Stoltman, then testified. (Vol. 5, R.T. of May 5, 2009, at 1.) He discussed the whole-blood controls used by the Phoenix Police Department Crime Lab. (*Id*. at 6–12.) Defendant's attorney asked Mr. Stoltman about National Institute of Science and Technology, the NIST standards, and whether Arizona followed those standards. (*Id*. at 12–15.) Mr. Stoltman further testified what effect that would have on the testing done. (*Id*. at 15–22, 43.) When asked on cross-examination if he had any reason to doubt the accuracy of the results of 0.119 and 0.120, Mr. Stoltman said:

> I believe you already asked me that and my answer is still the same, that I can't say whether it is or is not. There's nothing that I have in the documentation that suggests the answers are wrong. Statistically, the probability is that the answer is something other than what's reported, but I can't tell you if that is necessarily the case here.

(Vol. 5, R.T. of May 5, 2009, at 52.)

After Mr. Stoltman's testimony, Defendant's attorney renewed his motion to strike the blood test results. (Vol. 6, R.T. of May 5, 2009, at 1.) After hearing from the attorneys, the trial court ruled it would not strike the blood test sample. (*Id.* at 4.) When asked if he had any issues with the jury instructions, Defendant's attorney said, "They're fine." (*Id*. at 2.)

During the prosecutor's final argument, he referred to what Defendant had said to Officer Rice and said, "that's her story." (Vol. 6, R.T. of May 5, 2009, at 9.) Defendant's attorney made no objection. (*Id*.) Defendant's attorney then gave his version of "her story":

> And Mr. Orto [the prosecutor] just got done telling you that his big evidence of impairment in this case is the driving. But, Ms. Odishaw, the night of her arrest, without any time to reflect, without any time to make up a story, explained to Officer Rice when he started tossing at her ideas that she was following another car too closely. That she had left her lane momentarily for three or four seconds while she was following that car up 32nd Street.
>
> And what was her response with—I mean, we didn't hear anything from Officer Rice indicating that she had to think about what she said. She—there was a big pause before she responded to me. She said, you know, I probably was. I was following this friend of mine because he had too much—I believe he had too much to drink to be driving.
>
> And everything you heard in terms of her driving behavior that night was completely with her explanation of why she was on the roadway in that position at that time. And if you think about it for a moment what other reason would she have to have driven in that particular fashion on that night in that location knowing as Commissioner Blomo told you yesterday, she lives just north of Camelback off of 24th Street.
>
> So if she wasn't following this person, she certainly wasn't driving north on 32nd Street from Camelback to get home, to go to Lincoln to get home. She was at 32nd Street and Camelback, if that's where she started she would have been going west on Camelback to 24th Street to go home. So what she told Officer Rice makes darn good sense and you really have no reason to believe that it was anything other than the truth.
>
> That she was following this guy. She was trying to get his attention. Well, okay. She chose to trying to get close enough to him that he would respond to her, rather than honk the horn or flash her bright lights on him. She moved her car outside of her lane to flash her headlights in his rearview mirror to get his attention, as she told Officer Rice that night.

> . . . .
>
> So really was the driving—I mean, the question you really have to answer, was the driving behavior the result because Ms. Odishaw lost her ability to control herself and control her vehicle because of alcohol, or was she intentionally driving by following them too close in the area where he saw her to get his attention, or leaving her lane for that brief moment in time, was it intentional behavior to get his attention? Because that's all Mr. Orto gave you in terms of Ms. Odishaw being impaired by alcohol.

(Vol. 6, R.T. of May 5, 2009, at 20–23.) Defendant's attorney then made an argument based on Officer Rice's testimony that Defendant's said she had only one glass of wine to drink:

> But [Mr. Stoltman] told you about the validation studies that show that you could be as low as a .04 or a .05 and still exhibit the same six cues that Officer Rice saw.
>
> So it's not meaningful in terms of corroborate—it actually corroborates what Ms. Odishaw told Officer Rice in terms of what she had to drink. Because Ms. Swanson calculated for you yesterday that that one glass of wine that she consumed would have made her about a .04, which would be right in the range of what Mr. Stoltman told you could be the—could be consistent with the effects of six cues, or the presence of six cues of horizontal gaze nystagmus.

(Vol. 6, R.T. of May 5, 2009, at 25–26.) Defendant's attorney concluded with an argument that the State's evidence was "inconsistent with what she told Officer Rice about what she had to drink that night. One drink." (*Id*. at 33.)

In rebuttal, the prosecutor responded to arguments made by Defendant's attorney:

> And there's also been some testimony about the driving here and the only information that I've given you. And the only information that you've heard about what the Defendant was doing that day was when she told Officer Rice that she was following her friend. And Officer Rice first saw the Defendant way down here. And then he caught up to the Defendant way up here. So we have no idea what she was doing between here and here. She says she was following her friend. Who knows what she was actually doing. She could have been following her friend, she could have been doing something else, who knows.
>
> . . . .
>
> She gets up to the intersection and she's still straddling the lane divider—first she wants to go left, then she gets into the right lane. Again, a strange behavior that the—that essentially three times that he sees her here, here, and here. Now maybe she had an innocent explanation to it. But to any casual observer that's strange driving behavior. She can explain about looking for a friend. You can also explain it by the alcohol that she's been drinking that particular day.

(Vol. 6, R.T. of May 5, 2009, at 41–42.) Again, Defendant's attorney made no objection.

After the trial court gave the final instructions to the jurors, Defendant's attorney again made no objection. (Vol. 6, R.T. of May 5, 2009, at 57.) The jurors found Defendant guilty of both DUI charges. (*Id*. at 57–58.) After the trial court excused the jurors, Defendant then gave testimony relating to the civil traffic charges. (*Id*. at 59–73, 78–80.) The trial court found her responsible for one offense and not responsible for the other. (*Id*. at 81.) The trial court then imposed sentence. (*Id*. at 82–85.) On May 19, 2009, Defendant filed a timely notice of appeal.

On June 4, 2009, Defendant filed a *pro se* Consolidated Motion To Vacate Judgment and for New Trial raising the following issues: (1) The State was permitted to comment on the fact that her attorney had obtained a sample of her blood for testing; (2) the prosecutor made arguments that brought to the jurors' attention that Defendant did not testify; (3) the jury instructions on the statutory presumption on intoxication shifted the burden of proof; (4) the jury instructions made the trial unfair.

On July 6, 2009, the trial court held a hearing on Defendant's pending motions. Defendant's new attorney, Vaughn Crawford, argued (1) permitting the State to comment on the fact that her attorney had obtained a sample of her blood for testing had the effect of precluding Defendant from testifying; (2) the prosecutor's argument brought to the jurors' attention Defendant did not testify; (3) the jury instructions on the statutory presumption on intoxication shifted the burden of proof. (Vol. 7, R.T. of July 6, 2009, at 2, 11, 19, 36, 39.) After hearing arguments of counsel, the trial court denied Defendant's Motion To Vacate Judgment and for New Trial. (*Id*. at 41–46.)

On August 7, 2009, Defendant's attorney filed a Motion To Vacate Judgment (Fifth Amendment), and on September 25, 2009, the trial court issued an Order denying that Motion. Also on August 7, 2009, Defendant's attorney filed a Motion To Vacate for Newly-Discovered Evidence, but on September 24, 2009, filed a notice withdrawing that Motion. On October 9, 2009, Defendant's attorney filed a Notice of Appeal from the trial court's September 25, 2009, Order. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

A. *Has Defendant waived any issue concerning Miranda.*

Defendant contends the State introduced evidence of a statement she made prior to when she received the *Miranda* warnings. Specifically, she notes Officer Rice testified he asked her how much she had to drink that night, she admitted she had one glass of wine. (Vol. 3, R.T. of May 4, 2009, at 42.) When a party's own attorney causes the evidence to be presented to the jurors, any error will be considered as invited and thus not the basis for granting relief on appeal. *State v. Anderson,* 210 Ariz. 327, 111 P.3d 369, ¶ 44 (2005) (defendant contended evidence of sexual relationship between him (age 48) and 14-year-old female co-defendant was extremely prejudicial and should have been excluded; because defendant's attorney elicited this evidence, any error was invited). In the present case, the first mention of Defendant's having a glass of wine occurred during opening statement when Defendant's attorney told the jurors Defendant

"had drank a glass of wine" that evening. (Vol. 3, R.T. of May 4, 2009, at 14.) Because Defendant's attorney introduced to the jurors the fact that Defendant had a glass of wine that evening, Defendant is precluded from obtaining relief on appeal based on that fact.

Further, absent fundamental error, failure to raise an issue at trial waives the right to raise the issue on appeal. *State v. Gendron,* 168 Ariz. 153, 154–55, 812 P.2d 626, 627–28 (1991); *State v. Gatliff*, 209 Ariz. 362, 102 P.3d 981, ¶ 9 (Ct. App. 2004). Fundamental error is limited to those rare cases that involve error going to the foundation of the defendant's case, error that takes from the defendant a right essential to the defendant's defense, and error of such magnitude that the defendant could not possibly have received a fair trial, and places the burden on the defendant to show both that error existed and that the defendant was prejudiced by the error. *State v. Soliz,* 223 Ariz. 116, 219 P.3d 1045, ¶ 11 (2009). In the present matter, Defendant's attorney never filed a pre-trial motion to suppress Defendant's statement on the basis of *Miranda*, and when Officer Rice testified that Defendant admitted she had one glass of wine, Defendant's attorney made no objection. (Vol. 3, R.T. of May 4, 2009, at 42.) From the record presented, it appears Defendant's attorney wanted the jurors to know Defendant said she had one glass of wine to drink. Not only did Defendant's attorney not object when Officer Rice gave the testimony on direct examination, Defendant's attorney on cross-examination asked Officer whether Defendant "ended up telling you that she did have a glass of wine." (*Id*. at 63.) He then used that information to have Gayle Swanson give an opinion that, if Defendant had one glass of wine to drink, she would have a BAC of 0.04. (Vol. 4, R.T. of May 4, 2009, at 35–36.) Because Defendant's attorney argued to the jurors to Defendant's benefit that she had only one glass of wine, Defendant has failed to show any prejudice from Officer Rice's testimony.

B. *Has Defendant waived any issue based on the trial court's ruling about testing of the second sample.*

Defendant contends the trial court erred in ruling the State could introduce evidence that someone representing Defendant had obtained the second sample, but had introduce no evidence about test results. On that issue, the Arizona Supreme Court has said the following:

> Even where the defendant does not take the stand, the prosecutor may properly comment on the defendant's failure to present exculpatory evidence which would substantiate defendant's story, as long as it does not constitute a comment on defendant's silence. Such comment is permitted by 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. We believe that the prosecution's questions on cross-examination and its remarks in closing arguments were simply comments designed to draw reasonable inferences based on Keen's failure to present evidence relating to the breath sample. Although we do not have a complete trial transcript, it is apparent from defense counsel's closing statement that Keen had challenged the validity of the State's blood alcohol test results. It strikes us as elemental fairness to

> allow the State to 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 (Keen), 153 Ariz. 157, 160, 735 P.2d 767, 770 (1987); *accord, State v. Lehr,* 201 Ariz. 509, 38 P.3d 1172, ¶¶ 56–57 (2002). The trial court ruled in accordance with *Keen* and *Lehr,* and Defendant's attorney concurred with that ruling. (Vol. 1, R.T. of Jan. 26, 2009, at 75.)

Defendant contends the trial court's ruling was error because it precluded her from testifying because she would be subject to cross-examination about obtaining the sample and failing to produce test results. For three reasons, Defendant is not entitled to relief on that claim.

First, Defendant's attorney never objected to the trial court's ruling on the basis that it had the effect of precluding Defendant's testimony, thus this Court's review is for fundamental error only, which places the burden on Defendant to show both error existed and she was prejudiced by the error. *Soliz,* 223 Ariz. 116, 219 P.3d 1045, at ¶ 11. Defendant has failed to show error existed because, as noted above, the trial court ruled in conformity with existing case law. And Defendant has failed to show she was prejudiced because she has not made an offer of proof showing what her testimony would have been if she had testified.

Second, Defendant has waived any error by not taking the stand and subjecting herself to cross-examination. In a similar context, if a trial court rules a defendant may be impeached with evidence of a prior conviction, if the defendant chooses not to testify and thereby is not subjected to impeachment, the defendant may not question on appeal the trial court's ruling. *State v. Smyers,* 207 Ariz. 314, 86 P.3d 370, ¶¶ 5–15 (2004) (trial court ruled defendant could be impeached with his prior conviction for attempted child abuse; because defendant chose not to testify, defendant waived on appeal correctness of trial court's ruling). The same rationale in *Smyers* applies here: (1) This Court does not know whether it was the trial court's ruling that motivated Defendant not to testify; (2) this Court does not know whether the State might have chosen not to impeach Defendant with this information; and (3) this Court is not able to conduct a harmless-error analysis. *Smyers* at ¶ 9.

And third, it is apparent from the record the prosecutor would not have been able to impeach Defendant with this information. The Arizona Rules of Evidence provide a witness may not testify about a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Rule 602, ARIZ. R. EVID. In the present case, Defendant's attorney knew Defendant did not have personal knowledge about the obtaining of the blood sample, and so informed both the trial court and the prosecutor. (Vol. 1, R.T. of Jan. 26, 2009, at 59.) Because the prosecutor thus knew Defendant did not have the necessary personal knowledge, the prosecutor, in good faith, could not have questioned Defendant about the blood sample. Thus, the trial court's ruling did not have the effect of precluding Defendant from testifying.

C. *Has Defendant waived any claim about the prosecutor's argument by not objecting.*

Defendant contends the prosecutor erred in makings arguments that could have caused the jurors to realize Defendant did not testify. If a defendant fails to object to the prosecutor's argument, the defendant will have waived any claim on appeal. *State v. Laird,* 186 Ariz. 203, 207, 920 P.2d 769, 773 (1996) (trial court sustained defendant's objection to testimony and admonished jurors to disregard it; court rejected defendant's claim that trial court should have declared a mistrial on its own motion); *State v. Musgrove,* 223 Ariz. 164, 221 P.3d 43, ¶ 4 (Ct. App. 2009) (defendant contended he should receive new trial due to alleged prosecutorial misconduct relating to specific line of questioning; court noted defendant never asked trial court for new trial, nor did his objection based on relevance preserve claim of prosecutorial misconduct; defendant never asserted error was fundamental, thus defendant waived issue on appeal). Moreover, the prosecutor is permitted to make comments that are a fair rebuttal to comments made by the defendant. *State v. Rosas-Hernandez,* 202 Ariz. 212, 42 P.3d 1177, ¶¶ 21–24 (Ct. App. 2002) (because defendant's attorney in opening statement gave detailed version of events, when defendant did not testify and thus there was no evidence corresponding to defendant's attorney's version, prosecutor permitted to argue evidence did not support defendant's attorney's version). In the present case, in his Opening Statement, Defendant's attorney gave a detailed recitation of Defendant's version of the facts. (Vol. 3, R.T. of May 4, 2009, at 14–18.) In his Closing Argument, Defendant's attorney again gave a detailed recitation of Defendant's version of the facts. (Vol. 6, R.T. of May 5, 2009, at 20–23.) When the prosecutor made his comments, Defendant's attorney did not object. (*Id*. at 41–42.) Because Defendant's attorney did not object to the prosecutor's comments, and because the prosecutor's comments were a fair response to the arguments Defendant's attorney made, Defendant has failed to show she is entitled to relief.

D. *Has Defendant waived any error in the giving of jury instructions by agreeing to them.*

Defendant contends the jury instructions on presumption of impairment were error. If the defendant does not object at trial to the giving of a jury instruction, the appellate court will review only for fundamental error, and will not grant relief if the defendant fails to prove fundamental, prejudicial error. *State v. Dann,* 220 Ariz. 351, 207 P.3d 604, ¶¶ 52–54 (2009) (on appeal, defendant contended trial court's instruction impermissibly shifted burden to defendant; court found no error); *State v. Smith,* 228 Ariz. 126, 263 P.3d 675, ¶¶ 9–10 (Ct. App. 2011) (on appeal, defendant contended jury instruction was erroneous because it "blended the question whether Smith was under the influence with the question whether he was impaired to the slightest degree," thereby "eliminat[ing] the possibility that Smith could have been under the influence while driving, but not impaired to the slightest degree"; because defendant did not object at trial, court reviewed for fundamental error only; court stated, "Novel assignments of error in this context seldom warrant relief, particularly when the argument urged on appeal is primarily of academic interest.").

In the present case, when the trial court asked Defendant's attorney if he had any issues with the jury instructions, he said, "They're fine." (Vol. 6, R.T. of May 5, 2009, at 2.) Defendant therefore has the burden of showing the jury instructions were error, and that she was prejudiced by any error. As noted by the State in its brief, numerous opinions have upheld the same jury instructions the trial court gave. The jury instructions did not create a mandatory presumption, and instead only provided for a permissive presumption. Further, the trial court clarified to the jurors that any presumption was permissible. Defendant thus has failed to show either error or prejudice.

E. *Has Defendant waived any error in admission of the blood test evidence by not making a proper pre-trial motion.*

Defendant contends the trial court should not have admitted testimony about the blood test results. In the present matter, Defendant's attorney did not object to this testimony until the day after it had been given. (Vol. 4, R.T. of May 4, 2009, at 1–42 [testimony]; Vol. 4, R.T. of May 5, 2009, at 46–47 [objection].) As the trial court stated, "this is a motion that it really has to be made before trial, because I can't strike a blood test without some kind of written motion." (Vol. 4, R.T. of May 5, 2009, at 49.) Again, under a fundamental error analysis, Defendant had the burden of showing both error and resulting prejudice.

Defendant contended A.R.S. § 41–2063 required the test samples to be traceable to NITS. That statute applies to the weights and measures the Arizona State Department of Weights and Measures must apply to businesses engaging in commercial transactions. Defendant has provided no case authority applying those standards to a police crime laboratory. Defendant as thus failed to show any error.

Further, Defendant has failed to establish prejudice. Defendant's expert could not give an opinion that the State's test results were inaccurate. (Vol. 5, R.T. of May 5, 2009, at 52.) And as discussed above, Defendant's attorney obtained the second sample of Defendant's blood so his office could have it tested. Under the authority of *Keen* cited above, this Court must presume the results of those tests were not favorable to Defendant, otherwise Defendant's attorney would have offered the results of his testing at trial. Defendant has thus failed to establish that the State's test results were not accurate.

F. *Has Defendant waived any issue about post-trial discovery by withdrawing the motion for discovery.*

Defendant contends the trial court erred in summarily denying her post-trial motion for discovery. The record in this matter shows Defendant's attorney filed a Motion To Vacate for Newly-Discovered Evidence on August 7, 2009, but on September 24, 2009, filed a notice withdrawing that Motion. Because Defendant never gave the trial court a chance to rule on her motion, Defendant may not claim the trial court erred in doing something it was never requested to do. Moreover, in *Canion v. Cole*, 210 Ariz. 598, 115 P.3d 1261 (2005), the court ruled discovery

is a pre-trial issue, thus a defendant is not entitled to file a post-trial request for discovery with the hope of obtaining some information upon which to base a claim. *Canion* at ¶¶ 9–11. Defendant has thus failed to show grounds for relief.

III. CONCLUSION.

Based on the foregoing, this Court concludes Defendant has failed to establish any error entitling her to relief on appeal.

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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