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

LC2012-000218-001 DT 07/10/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
K. Waldner
Deputy

STATE OF ARIZONA

v.

JESSICA LAURA SEAVER (001)

WEBSTER CRAIG JONES

DIANA L BRAATEN

MESA MUNICIPAL COURT - COURT ADMINISTRATOR
MESA MUNICIPAL COURT - PRESIDING JUDGE
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 2010–090274.

Defendant-Appellant Jessica Seaver (Defendant) was convicted in Mesa Municipal Court of driving under the influence. Defendant contends the trial court erred in ruling Defendant would not be able to authenticate a videotape offered in evidence, and therefore abused its discretion in precluding admission of that videotape. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On October 31, 2010, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); and failure to drive in one lane, A.R.S. § 28–729(1). At trial, Officer Jeff Penrose testified he was on duty as a patrol officer on October 31, 2010. (R.T. of May 25, 2011, at 11–12.) He was riding with Officer Thomas Shore, and at 1:50 a.m., they were at Mesa Drive just south of the U.S. 60 when he saw a blue Honda traveling south on Mesa Drive and weaving in its lane. (*Id.* at 13–14, 29, 35.) The vehicle was in the number 1 lane and almost hit the raised median. (*Id.* at 14.) The road on which they were traveling is Mesa Drive north of Baseline Road, and McQueen Road south of Baseline Road. (*Id.* at 28, 38–39, 62.) The vehicle drifted into the number 2 lane, so Officer Penrose turned on his emergency lights to make a traffic stop. (*Id.* at 14–15, 63.) The vehicle did not stop, but instead continued for a block and put on its left-turn signal. (*Id.* at 15–16, 33.) On cross-examination, Officer Penrose said there was a sign or signs

prohibiting turns, but he did not remember whether it said no left turns or no U-turns. (*Id*. at 33–34, 42–43.) The vehicle did not, however, turn left, and instead put on its right-turn signal, and then moved into the number 2 lane and then the number 3 lane. (*Id*. at 17.) The vehicle still did not stop, so Officer Penrose activated his patrol siren. (*Id*. at 17, 43.) At that point, the vehicle pulled to the right into a driveway. (*Id*. at 17–18, 32, 40–42, 44.)

Officer Penrose approached the driver, whom he identified as Defendant. (R.T. of May 25, 2011, at 18.) He noticed a strong odor of alcohol coming from inside the vehicle. (*Id*. at 19.) Defendant was coming from a costume party and thought she was on Country Club Drive, which was actually 1 mile farther west of Mesa Drive. (*Id*. at 19–20.) When Defendant got out of the vehicle, Officer Penrose saw she was wearing a Halloween costume, which included boots with very high heels. (*Id*. at 20, 45–47.) Officer Penrose administered a HGN test to Defendant, and then called a DUI Officer. (*Id*. at 21–22.) A few minutes later, Officer Ybarra arrived, and after he conducted his investigation, Officer Penrose and Officer Shores transported Defendant to the central station for a blood test. (*Id*. at 23.)

Officer Michael Ybarra testified he was on duty as a motorcycle traffic officer on October 31, 2010, which included DUI investigations. (R.T. of May 25, 2011, at 65–66.) Sometime after 1:50 a.m., he received a call from Officers Penrose and Shore, and went to where they were. (*Id*. at 66–67.) When he arrived, Defendant was sitting in her vehicle wearing a Halloween costume, which included boots with 4-inch heels. (*Id*. at 70–73.) Defendant said she was upset because she had found her then-boyfriend making out with another girl. (*Id*. at 73.) She also said she was texting at the time Officer Penrose stopped her. (*Id*. at 73.) Officer Ybarra smelled what he described as a strong odor of alcohol coming from Defendant, and saw her face was flushed and her eyes were watery. (*Id*. at 74–75, 104.) Defendant said she had consumed one pint of Guinness malt liquor. (*Id*. at 76, 116.)

Officer Ybarra then had Defendant perform some field sobriety tests. (R.T. of May 25, 2011, at 77.) Prior to Defendant's doing the walk-and-turn test, Officer Ybarra asked Defendant if she wanted to take off her boots, and Defendant did so. (*Id*. at 95.) Officer Ybarra saw the following number of cues on the tests: On the HGN test, six out of six possible cues; on the walk-and-turn test, six out of eight possible cues; and on the one-leg stand test, three out of four possible cues. (*Id*. at 89, 91, 96, 97–99.) At 2:10 a.m., Officer Ybarra placed Defendant under arrest for DUI and had her taken to the station for a blood test, which was done at 3:07 a.m. (*Id*. at 106–09.) At 3:28 a.m., Defendant was released. (*Id*. at 125.)

Tad Hanson testified he was a criminalist for the City of Mesa. (R.T. of May 25, 2011, at 128–29.) He tested the blood sample taken from Defendant, and it showed she had a BAC of 0.083. (*Id*. at 134–35, 150, 156.) After that testimony, the State rested. (*Id*. at 157.)

Defendant testified she worked from 3:30 p.m. to 11:00 p.m. on October 20, 2010, and then drank a pint of Guinness after work. (R.T. of May 25, 2011, at 165–66.) She received a text message from her boyfriend telling her there was a costume party and he wanted her to attend, so

she drove to her house to change into her Halloween costume. (*Id.* at 166.) When she got to the party, she found her boyfriend making out with a girl, which caused Defendant to become very upset, so she left. (*Id*. at 168.) After she left, she texted a girlfriend to see if she could stay at her house. (*Id*. at 168.) This girlfriend lived at Country Club Drive and Guadalupe Road. (*Id*. at 168.) She said she got on the U.S. 60 to go there, but mistakenly got off on Mesa Drive rather than Country Club Drive because she was texting and did not read the sign properly. (*Id*. at 169.) Once she was headed south on Mesa Drive, she continued texting. (*Id*. at 169.)

At this point, Defendant's attorney questioned Defendant about a video that Defendant's attorney had made showing the route Defendant drove from Mesa Drive and the U.S. 60 to where she was stopped. (R.T. of May 25, 2011, at 169–72.) Defendant acknowledged she was not present when her attorney made that video. (*Id*. at 172.) The prosecutor objected to admission of the video because Defendant's attorney would have to be the one to authenticate it. (*Id*. at 173.) Defendant's attorney contended Defendant could authenticate the video by testifying it accurately showed the condition of the streets and surrounding areas. (*Id*. at 173–74, 175.) The trial court ruled Defendant's attorney was the only person who could authenticate the video because she was the only person present when the video was made, and because Defendant's attorney could not act as a witness, there was no one available who could authenticate the video, thus the trial court would not allow it introduced in evidence. (*Id*. at 174–77.) The trial court noted Defendant's attorney had photographs of the streets she could use as evidence. (*Id*. at 177.)

When testimony resumed, Defendant said she saw no signs prohibiting turns. (R.T. of May 25, 2011, at 179–80, 183–84.) She explained why she first signaled to turn left and then signaled to turn right. (*Id*. at 180–81.) She admitted telling the officer she was texting while she was driving. (*Id*. at 185–86.) She said the area where she stopped had gravel on the ground. (*Id*. at 184, 188–89.) In describing the conditions that made taking the field sobriety tests difficult, she said it was dark and very cold. (*Id*. at 191.) She did not, however, make any claim the gravel on the ground interfered with her ability to perform on the tests. (*Id*. at 191–92.)

On cross-examination, Defendant said she did not disagree with the results of the State's BAC test. (R.T. of May 25, 2011, at 198.) She said the result of the tests done by her criminalist gave a BAC reading of 0.081. (*Id*. at 199–200.) She acknowledged one of the photographs showed a "no u-turn" sign. (*Id*. at 202–03.) She said she did not know what street she was on because she was using her phone and was not looking where she was going. (*Id*. at 217.)

On re-direct examination, Defendant said she never intended to turn near where the "no u-turn" sign was. (R.T. of May 25, 2011, at 222.) When asked why she did not know she was on Mesa Drive rather than Country Club Drive, Defendant said the following:

> Q. [by Defendant's attorney] Okay. And then the prosecutor asked you about your driving and how you could have got turned around. And she said didn't you see your surroundings around you to see that you were on Mesa Drive. Explain why you didn't see that.

> A. I was texting on my phone. I was looking down the entire time. I would look up here and there to see where I was driving, see what lane I was in, and then I'd look back down. I—it's one of those two hand phones. So I was looking down most of the time and I was driving with my knees.

(R.T. of May 25, 2011, at 223.)

Defendant then rested, and the State recalled Officer Ybarra and then rested. (R.T. of May 25, 2011, at 230, 231, 234.) The attorneys presented their arguments to the jurors, and the trial court instructed the jurors. (*Id*. at 235, 241, 251, 257.) The jurors subsequently found Defendant guilty of the (A)(1) driving under the influence charge and not guilty of the (A)(2) driving with a 0.08 or greater charge. (*Id*. at 271.) The trial court later imposed sentence. (R.T. of June 13, 2011, at 275.) 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 ERR IN RULING DEFENDANT WOULD NOT BE ABLE TO AUTHENTICATE A VIDEOTAPE OFFERED IN EVIDENCE, AND THEREFORE ABUSE ITS DISCRETION IN PRECLUDING ADMISSION OF THAT VIDEOTAPE.

Defendant contends the trial court erred in ruling Defendant would not be able to authenticate a videotape offered in evidence, and therefore abused its discretion in precluding admission of that videotape. An appellate court reviews a trial court's rulings on the admissibility of photographic evidence for an abuse of discretion. *State v. Dann,* 220 Ariz. 351, 207 P.3d 604, ¶ 44 (2009). For admission of a photograph or video recording, the party must present sufficient evidence from which the trier-of-fact could determine the photograph or video recording accurately depicts the object in the photograph or video recording. *Lohmeier v. Hammer,* 214 Ariz. 57, 148 P.3d 101, ¶¶ 7–9 (Ct. App. 2006) (defendant offered photographs of plaintiff's vehicle and testified that photographs showed condition of vehicle after accident; court held this testimony was sufficient to support admission of photographs); *State v. Paul,* 146 Ariz. 86, 87–88, 703 P.2d 1235, 1236–37 (Ct. App. 1985) (although videotape was not of finest quality, persons depicted could be readily identified by someone who knew them, thus trial court did not abuse its discretion in admitting videotape for jurors' consideration); *State v. Pereida,* 170 Ariz. 450, 454–55, 825 P.2d 975, 979–80 (Ct. App. 1992) (because state presented testimony that photographs reflected condition of defendant's van at time photographs were taken, trial court properly admitted photographs). The person who took the photograph or made the video recording need not be the one to provide the authentication testimony and the person providing the authentication testimony need not have been present when the photograph or video recording was made; all that is necessary is for the person providing the authentication testimony to be able to attest that the photograph or video recording accurately portrays the scene or object depicted. *State v. Haight-Gyuro,* 218 Ariz. 356, 186 P.3d 33, ¶¶ 7, 15–17 (Ct. App. 2008) (state offered in evidence videotape of defendant using stolen credit card to purchase various items at retail store; store's loss

prevention officer testified about his job responsibilities in installing and maintaining store's surveillance system, how cameras were placed, and how he could match time stamps and dollar amounts to certain transactions; how he had used that procedure to identify videotape in question; and how he had made copy of videotape to give to detective; and he testified about specific items purchased with stolen credit card; court held this was sufficient for jurors to conclude videotape accurately depicted transaction in which stolen credit card was used); *Lohmeier* at ¶¶ 7–9 (defendant offered photographs of plaintiff's vehicle purportedly taken by auto body shop, and testified photographs showed condition of vehicle after accident; court held this testimony was sufficient to support admission of photographs). Although Defendant's attorney was the only person present when she made the videotape, it was not essential for her to be the one to authenticate the videotape. Because Defendant herself was in a position to testify that the videotape accurately reflected the condition of the roadway on the night she was arrested, Defendant could have authenticated the videotape. Thus the trial court erred in concluding Defendant herself could not authenticate the videotape.

The preclusion of the videotape does not necessarily mean Defendant is entitled to a reversal of her conviction on appeal. At the time of trial in this matter, the applicable rule of evidence provided as follows:

> **(a) Effect of erroneous ruling.** Error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, and
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> . . . .
>
> (2) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Rule 103(a)(2), ARIZ. R. EVID. In the present case, Defendant's attorney made no offer of proof, so the proposed videotape is not part of the record and thus this Court does not know exactly what it contained. Because this Court does not know exactly what was contained in that videotape, it appears Defendant has failed to establish "a substantial right of the party [was] affected." *State v. Dixon*, 226 Ariz. 545, 250 P.3d 1174, ¶ 44 (2011) (defendant contended trial court erred in precluding him from introducing entries from victim's diary; although defendant and his attorney discussed what they claimed was in diary, defendant failed to make offer of proof and failed to have diary marked for identification, thus appellate court had no basis for determining precisely what evidence was excluded). The only description in the record was the videotape showed "Mesa Drive from highway 60 down to where you were stopped," and "the actual route that you took before you were stopped." (R.T. of May 25, 2011, at 169–70.) The photographs presented showed the route Defendant took on Mesa Drive from U.S. 60 to where she was stopped, so to that extent the videotape was cumulative. One point of contention at trial was the presence or not of a sign prohibiting turns, and State's Exhibit 2 showed a "no u-turn" sign. Again, the videotape would have been cumulative and thus exclusion would not have affected a substantial right. *State*

v. Wassenaar, 215 Ariz. 565, 161 P.3d 608, ¶¶ 34–35 (Ct. App. 2007) (defendant claimed trial court erred in striking testimony that he had never previously assaulted correction officer; court held it did not have to address whether trial court erred because other evidence previously admitted showed defendant had no disciplinary actions for assaulting AzDOC personnel); *State v. Dunlap*, 187 Ariz. 441, 456–47, 930 P.2d 518, 533–34 (Ct. App. 1996) (because defendant had thoroughly attacked witness's credibility, any error in excluding other impeachment evidence - was harmless).

In her Appellant's Memorandum, Defendant makes several arguments why admission of the videotape was necessary for her case. Typically, an appellate court will not consider on appeal a claim that was not presented to the trial court. *See State v. Tankersley*, 191 Ariz. 359, 956 P.2d 486, ¶ 48 (1998) (on appeal, defendant claimed material was admissible as public record; because defendant did not assert that argument in trial court, issue was waived for appeal).

Even on the merits, those arguments do not entitle Defendant to relief on appeal. Defendant makes the following claim:

> The state presented evidence in order to argue that appellant was impaired because of her driving, the distance she drove, her knowledge of where she was driving, her ability to view traffic signs and side streets. The video of the actual route taken, the medians in the road, the road signs and the side streets was important evidence that was needed to rebut the state's argument point by point.

(Appellant's Memorandum, last page.) Although that video might have shown the jurors what Defendant would have seen if she had been looking where she was going, Defendant's testimony was she was not looking where she was going:

> Q. [by Defendant's attorney] Okay. And then the prosecutor asked you about your driving and how you could have got turned around. And she said didn't you see your surroundings around you to see that you were on Mesa Drive. Explain why you didn't see that.
>
> A. I was texting on my phone. I was looking down the entire time. I would look up here and there to see where I was driving, see what lane I was in, and then I'd look back down. I—it's one of those two hand phones. So I was looking down most of the time and I was driving with my knees.

(R.T. of May 25, 2011, at 223.) Because Defendant was not aware of the actual route taken, and apparently did not observe the medians in the road, the road signs, and the side streets, it is hard to understand how that videotape would have rebutted the State's argument point by point.

Defendant further states, "The video would have shown that there was a road for appellant to take a left turn." (Appellant's Memorandum, last page.) Officer Penrose testified, however, there were side streets to the left, and Defendant could have made a legal left turn there. (R.T. of May 25, 2011, at 34.) Again, the videotape would have been cumulative to testimony that was admitted.

Finally, Defendant states, "The video would have showed the actual slope of the location of the field sobriety test," and "The flat photographs did not have that ability." (Appellant's Memorandum, last page.) Defendant, however, made no claim at trial that the reason she did poorly on the field sobriety tests was the ground was sloped. (R.T. of May 25, 2011, at 191–92.) The videotape therefore would not have supported any claim she made at trial. Defendant has thus failed to establish exclusion of the videotape affected a substantial right of hers.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court erred in precluded admission of the videotape, but further concludes Defendant has failed to establish exclusion of the videotape affected a substantial right of hers.

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

IT IS FURTHER ORDERED remanding this matter to the Mesa 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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