

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2012-000202-001 DT

08/07/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT  
K. Waldner  
Deputy

STATE OF ARIZONA

KENT C KEARNEY

v.

MATTHEW C SCHIMENTI (001)

TIMOTHY ECKSTEIN

PHX MUNICIPAL CT  
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

**Lower Court Case Number 14149652.**

Defendant-Appellant Matthew C. Schimenti (Defendant) was convicted in Phoenix Municipal Court of driving under the influence. Defendant contends the trial court erred in precluding testimony about the ability to test the small sample taken of his blood. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On December 1, 2010, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2); and failure to stop at a traffic signal, A.R.S. § 28-645(A)(3)(a). Prior to trial, Defendant filed a Motion To Suppress contending the State had violated his right to due process by failing to provide him with a reliable blood sample for his independent testing.

At the hearing on Defendant's motion, Defendant presented Michael Grommes, a forensic toxicologist. (R.T. of Nov. 2, 2011, at 10.) He said typically in a DUI case the police draw two tubes of a suspect's blood, one for the State to test and one available for the suspect to test, and the second sample would allow a suspect to have an independent analysis if they questioned the results of the state's test. (*Id.* at 11-12.) In response to a hypothetical question from Defendant's attorney about (1) blood being drawn, (2) the tube popping off the needle hub, (3) the tube falling to the floor, and (4) the tube having approximately 1 milliliter (ml.) of blood in it, Mr. Grommes said he had two concerns. (*Id.* at 12.) First would be volume, but as long as there were 1 ml. or more of a sample, there would be enough to test. (*Id.* at 12-13, 14, 44.) Second would be the possibility of cracks or some sort of damage. (*Id.* at 13.) He acknowledged, however, he had not seen the tube. (*Id.*)

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On cross-examination, Mr. Grommes said on April 22, 2011, he retested the sample the State tested, and he obtained results of 0.1170 and 0.1171. (R.T. of Nov. 2, 2011, at 13–14.) He did not see the other tube and thus did not test that sample, and because he did not see that tube, he could not say whether or not that tube was damaged. (*Id.* at 14.) He acknowledged it would have been better to have inspected both tubes. (*Id.* at 16.) He further said he did not have any specific reason to believe the sample the State tested was contaminated. (*Id.* at 43–44.)

The State presented Officer Hain Price, a phlebotomist for the City of Phoenix, who drew blood from Defendant on December 1, 2010. (R.T. of Nov. 2, 2011, at 18–19.) He put the first tube into the hub and onto the internal needle, and saw the blood start flowing into the tube. (*Id.* at 19.) As he reached down to grab the second tube, the first tube popped off the needle and fell to the floor. (*Id.* at 19–20.) He then put the second tube into the hub and onto the internal needle, and was able to obtain a full tube of blood. (*Id.* at 20.) He did not obtain a third tube of blood because he thought the first tube had enough blood to be tested, and he did not want to leave the needle in Defendant's arm and open another blood kit to obtain a third tube. (*Id.* at 20, 26.) He inverted both tubes at least eight times to mix the anticoagulant. (*Id.* at 21.)

The State presented James Hoban, a forensic scientist for the City of Phoenix, who analyzed the blood sample taken from Defendant. (R.T. of Nov. 2, 2011, at 27–28.) He said the blood kit had two tubes of blood in it, one containing 9 ml. [the large sample] and one containing 1 ml. [the small sample], and he took his sample from the large sample. (*Id.* at 30.) The results of his testing showed BAC readings of 0.1219 and 0.1223. (*Id.* at 39–40.) He said the blood in the large sample could have been retested at a later date, and it still would have been considered a valid sample. (*Id.* at 30–31.) When told Defendant had that sample retested approximately 5 months later and obtained results of 0.1170 and 0.1171, he said those results were within the 5 percent margin of error and thus indicated both tests gave forensically sound results. (*Id.* at 39–40.) He said the lower numbers were consistent with the normal break down of alcohol over time. (*Id.* at 40.) He said it would not have been possible for the sample he tested to be contaminated with alcohol during the testing process because there was no alcohol in the testing area, and he did not have any specific reason to believe the sample the State tested was contaminated. (*Id.* at 34–35.) He inspected the tube containing the small sample and saw no damage to it, and thus believed that sample was not contaminated in any way. (*Id.* at 37–39.) He said 1 ml. is the minimum amount of blood needed to test. (*Id.* at 30.)

In argument, Defendant's attorney noted he had asked to do an independent test of the blood taken from Defendant, and said the following concerning the tube with the small sample:

My assumption at the time was, and my assumption still today, is there was a sufficient amount of blood in that tube available for a reliable, independent test.

(R.T. of Nov. 2, 2011, at 47, ll. 4–7.) He said, however, the State gave them the tube with the large sample to test, and the results of the tests by Defendant's expert were close enough to the State's results that Defendant did not have any issue with the test Mr. Hoban performed. (*Id.* at 47, ll. 10–18.) He then said:

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[B]ut that doesn't answer the question of whether there's the possibility of contamination [in the 9 ml. tube], and frankly, we'll never be able to answer that question, because we didn't have the second sample to perform an independent analysis.

(*Id.* at 47, ll. 18–22.) Defendant's attorney then argued the State's failure to provide a second sample for Defendant to test deprived him of due process. (R.T. of Nov. 2, 2011, at 51–52.)

The prosecutor argued there was no burden on the State to provide an independent sample for Defendant to test, that drawing a second sample was a courtesy, and that the 1 ml. of blood was enough to test in any event. (R.T. of Nov. 2, 2011, at 52–55.) Defendant's attorney said he agreed the law did not require the State to draw a second sample for a suspect, but once the State undertakes to draw a second sample, there is a separate constitutional obligation to provide a reliable sample a defendant can use to impeach the State's evidence. (*Id.* at 55–56.)

After hearing arguments from the attorneys, the trial court denied Defendant's motion to suppress, stating as follows:

This Court does not see any integrity issues with regard to this blood whatsoever, especially with regard to the tube that apparently was analyzed by both sides. I would think that if there was going to be an integrity issue about anything it would have been the tube that fell on the floor, not the one that we took out of a man's arm. So I'm not seeing an integrity issue with any of the blood evidence in this case.

Additionally the evidence that I received from Mr. Grommes, as well as from Mr. Hoban was that, and I wrote it down when Mr. Grommes said it, 1 milliliter or more can be tested. The evidence that I have is that there was 1 milliliter in the vial that fell to the floor. I don't have any evidence about who chooses what vial the Defense gets to retest. The way I've heard the evidence, it sounds to me that the Defense could have retested either tube or both tubes if they had so desired. But the tube that was retested was the full tube, not the tube that fell to the ground. It's also my understanding that, that 1 milliliter tube is still available to be tested, and could be tested as we sit here today.

Accordingly, the Defense motion to suppress the blood evidence in this case is denied.

(R.T. of Nov. 2, 2011, at 56–57.) The prosecutor then made a motion in limine to preclude Defendant from re-litigating the issue of the second sample before the jurors. (*Id.* at 62.) The trial court denied the motion, stating the prosecutor could object during trial. (*Id.* at 63.)

Trial began with the preliminary instructions and the arguments of counsel. (R.T. of Nov. 3, 2011, at 64, 75, 80.) The prosecutor said the officer did a blood draw on Defendant and the test results were a 0.1219 and a 0.1223 BAC, but said nothing about the number of tubes of blood taken or the reliability of any of the tests. (*Id.* at 76.) In Defendant's attorney's opening statement, he said the "blood result was yielded as a result of an inexperienced, poorly trained officer

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who botched the blood taking of Matt Schimenti, and that affected the integrity and the reliability of the results.” (*Id.* at 83.) Defendant’s attorney then gave his version of what had happened:

It’s the State’s procedure to have two vials of blood, two full vials. And why is that? So that the State can test one, and the Defendant can test one, if he wants to; an untampered fully contained vial of blood that he can test. That doesn’t exist here.

That doesn’t exist here because Officer Price, as you will hear, thought it would have been a pain in the butt to open up a separate kit and take another vial. He wouldn’t have had to open that second kit, if he had done it right the first time, but he didn’t do it right the first time, because when he tried to attach the first vial to the needle in Mr. Schimenti’s arm, it popped off and fell to the floor. And he just sealed that up, put it away, took the second vial, filled it all the way up. The State has enough for its evidence. Officer Grommes was right there next to him, he could have handed him a kit, but again, he didn’t—Officer Price didn’t do that, because it was a pain in the butt. That’s not right; that’s not acceptable. This is cutting corners again.

(R.T. of Nov. 3, 2011, at 85–86.)

The State’s case began with Officer Trevor Grommes, who testified he arrested Defendant on December 1, 2010. (R.T. of Nov. 3, 2011, at 87–96.) He said he took Defendant to the precinct for a chemical test, but he did not describe anything about the test. (*Id.* at 97–98.) On cross-examination, Defendant’s attorney brought out what happened during the blood draw with the first tube popping off and then the officer’s filling of the second tube. (*Id.* at 118.) He further brought out that it was “standard practice . . . for police to draw two full vials of blood.” (*Id.*)

The State presented Officer Hain Price, who testified he did the blood draw on Defendant. (R.T. of Nov. 3, 2011, at 130–32.) He testified about what happened during the blood draw with the first tube popping off and then his filling of the second tube. (*Id.* at 135.) He said filling two tubes and providing one to a defendant was done as a courtesy for the defendant. (*Id.*)

On cross-examination, Defendant’s attorney brought out that it was “standard practice to obtain two full vials.” (R.T. of Nov. 3, 2011, at 142.) Officer Price further stated this was a courtesy for a defendant. (*Id.* at 143.) Defendant’s attorney brought out there was less volume in the first tube and that Officer Price did not try to fill what would have been a third tube of blood. (*Id.* at 145–48.) On redirect, the prosecutor brought out the minimum amount of blood needed in a tube for testing was 1 ml., and the crime lab did not always need two completely full vials. (*Id.* at 152–53.)

The State presented James Hoban, who testified he tested the blood taken from Defendant. (R.T. of Nov. 3, 2011, at 156, 159.) He said he received two tubes, one with 9 ml. and one with 1 ml., and he took his sample from the 9 ml. tube, but the 1 ml. was a sufficient amount for testing. (*Id.* at 159, 171, 174, 176, 180.) He said the results of his testing showed BAC readings of 0.1219 and 0.1223. (*Id.* at 164.) He said he generally takes the blood from the tube with the

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larger volume in case they have to do more testing on that blood sample. (*Id.* at 173.) He further stated, once blood is taken from a tube, it is still possible to take blood from that tube at a later date and test that blood. (*Id.* at 172.)

On cross-examination, Mr. Hoban stated, if he had received two tubes each having 1 ml. of blood, he could have tested either tube. (R.T. of Nov. 3, 2011, at 174–75.) He said when he did the testing, he did not know about the 1 ml. tube popping off the needle and hitting the ground. (*Id.* at 176–77.) On redirect, he said if he had seen any defects in either of the tubes, such as a cracked tube or a seal not intact, he would have noted it in his report, but there was nothing in his worksheet, and he could not recall anything being wrong. (*Id.* at 180–81.)

After the State rested, Defendant presented Dianna Mass, a retired professor from Arizona State University, who talked about phlebotomy techniques and experience. (R.T. of Nov. 3, 2011, at 194, 196–99, 203–04.) She further spoke about what would cause a vial to detach from the needle. (*Id.* at 207–09.) On cross-examination, she acknowledged she did not know anything about the blood draw done in this case. (*Id.* at 213, 215.)

Defendant then testified. (R.T. of Nov. 3, 2011, at 217.) He talked about the blood draw done on him, but because he did not watch the actual draw, he could not say what actually happened. (*Id.* at 232.)

Chester Flaxmayer, a self-employed criminalist, next testified. (R.T. of Nov. 4, 2011, at 243.) After discussing that the first tube popped off the needle, Defendant's attorney asked the following questions, which resulted in the following objections and rulings:

Q. Would that cause you some concern as to the reliability of the testability of that sample that was in that tube?

A. Yes.

Q. And why is that?

A. Two reasons. Realize the little stopper that's—

MR. CHAPMAN: Objection. Relevance. This tube was not tested.

THE COURT: Approach.

(Side Bar Conference)

MR. ECKSTEIN: (Indiscernible) either we do or we don't.

MR. CHAPMAN: Again, that is not relevant because the 1 milliliter tube was not at all tested. And, again, I would re-urge my objection or my prior motion in limine regarding these issues just confusing the jury and being issues that were already hashed out during the pretrial motion hearing. It's speculative and irrelevant.

(Indiscernible Conversation)

(End of Side Bar Conference)

THE COURT: The objection is sustained.

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BY MR. ECKSTEIN: All right. . . . As I've described it, given the volume of blood that was in there [1 ml.] and given the description of the blood tube having detached itself from the hub and fallen to the ground, would you have concerns about the ability to perform an independent analysis on the blood in that tube?

A. Yes.

MR. CHAPMAN: Objection. Relevance. Again, that tube was not tested. There's no relevant non-speculative basis to meaningfully (sic) question about the 1 ml. tube.

THE COURT: Counsel, approach.

(Indiscernible Side Bar Conference)

THE COURT: Objection is sustained.

BY MR. ECKSTEIN: Mr. Flaxmayer, describe it, would you be able to perform an independent analysis of that 1 milliliter sample in the tube that detached itself from the hub and fallen to the ground?

MR. CHAPMAN: Objection. Relevance. There's no relevance to the 1 milliliter tube. It wasn't tested. It's a non-factor.

THE COURT: Objection is overruled.

THE WITNESS: It would depend on how close to a milliliter it is. You need an absolute minimum, 500 microliters. So you have to have enough, more than that, that you're [sic] straw will be able to go down in and suck up those two samples. Normally too, you don't actually sample it out of the tube. You pour it out into another container. So there has to be enough present for you to be able to do that process to get the two 250 microliter sample [sic].

BY MR. ECKSTEIN: And assuming there was a sufficient amount in there to perform an independent analysis, at least by volume, and you were able to at least test it by volume, would there be concerns about the—are there concerns about the testability of that sample based on what I've described?

MR. CHAPMAN: Objection. Speculation.

THE COURT: Sustained.

BY MR. ECKSTEIN: How would we know for sure whether there was a milliliter in there?

MR. CHAPMAN: Objection. Relevance

THE COURT: I'll allow it.

THE WITNESS: The only way to tell with absolute certainty would be measure it. You obviously don't want to measure it because you don't want to open it up and potentially contaminate it. The other way you could tell would be if you prepped a series of vials and you put 1 milliliter in one, 2 milliliters in one, 3 milliliters in one, and you could then hold them up and compare them. That would be the best way for you to have an estimate for the volume.

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(R.T. of Nov. 4, 2011, at 253–56.)

On cross-examination, Mr. Flaxmayer acknowledged there is no legal requirement to provide a second sample to a suspect for testing. (R.T. of Nov. 4, 2011, at 263.) He also acknowledged the blood in a tube can be tested more than once, and the minimum amount needed to test is 1 ml. (*Id.* at 263–64.) He further said he had no personal knowledge of this case and did not know what had happened, thus he could not say whether anything unusual or irregular had happened and did not know whether the blood in the large sample was contaminated. (*Id.* at 264–65, 266.) He said he did not personally analyze blood, so even if someone had asked him to re-analyze the sample the State had analyzed, he would not have done so. (*Id.* at 265.)

After Mr. Flaxmayer testified, Defendant rested, and the State had no rebuttal. (R.T. of Nov. 4, 2011, at 268, 271.) Once the jurors retired, the trial court found Defendant responsible for failure to stop at a traffic signal. (*Id.* at 319.) After deliberating, the jurors were unable to reach a verdict on the driving while impaired (A)(1) charge, but found Defendant guilty on the *per se* (A)(2) charge. (*Id.* at 322–23.) The trial court later imposed sentence. (R.T. of Nov. 22, 2011, at 326–27.) On November 23, 2011, 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 ABUSE ITS DISCRETION IN PRECLUDING TESTIMONY  
ABOUT THE TESTABILITY OF THE SMALL SAMPLE.

Defendant contends the trial court abused its discretion in precluding testimony about the testability of the small sample. As an initial matter, this Court would note there are two similar but separate concepts: (1) A Defendant’s due process right to contest the state’s *inculpatory* evidence; and (2) a defendant’s due process right to obtain *exculpatory* evidence. For the second of these, the courts have held the state has no obligation to gather *exculpatory* evidence for a suspect. *California v. Trombetta*, 467 U.S. 479, 491 (1984) (“[T]he Due Process Clause of the Fourteenth Amendment does not require that law enforcement agencies preserve breath samples in order to introduce the results of breath-sample tests at trial.”); *State v. Velasco (Alday)*, 165 Ariz. 480, 489, 799 P.2d 821, 830 (1990) (“[*Trombetta*, *Oshrin*, *Montano*, *Baca*, and *Scales*] do not hold that due process requires the police to prepare the defendant’s case and to collect and preserve evidence for the defendant.”); *Montano v. Superior Court*, 149 Ariz. 385, 391, 719 P.2d 271, 277 (1986) (“The state has no obligation, apart from *Baca*, to actually gather evidence for a suspect . . . .”). Thus, the State was not required to obtain a second sample for Defendant to use as *exculpatory* evidence.

*Baca* and *Scales* were breath test cases that involved a defendant’s due process right to contest the state’s *inculpatory* evidence. *Baca v. Smith*, 124 Ariz. 353, 354, 604 P.2d 617, 618 (1979); *Scales v. City Court of Mesa*, 122 Ariz. 231, 234, 594 P.2d 97, 100 (1979). In those cases, the State used a Breathalyzer machine in which the sample of the suspect’s breath was destroyed in the testing process. In such a situation, the Arizona Supreme Court held the State was required to preserve a “second sample” for the defendant to use to contest the state’s evidence:

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We conclude . . . the right to test incriminating evidence where the evidence is completely destroyed by testing becomes all the more important because the defense has little or no recourse to alternate scientific means of contesting the test results, and, therefore, when requested, the police must take and preserve a separate sample for the suspect by means of a field collection unit.

*Baca*, 124 Ariz. at 356, 604 P.2d at 620. Thus, the right to a “second sample” existed only when the State took an actual sample of the defendant’s *breath* and the sample was destroyed in the testing process.

As noted above, in 1984 the United States Supreme Court held a state was not required to preserve a “second sample” for a defendant. *Trombetta*, 467 U.S. at 491 (“[T]he Due Process Clause of the Fourteenth Amendment does not require that law enforcement agencies preserve breath samples in order to introduce the results of breath-sample tests at trial.”). In 1991, in a *blood* test case, the Arizona Supreme Court declined the state’s invitation to eliminate the requirement of a “second sample” in *breath* test cases:

The State in this case requests that we reexamine the rules established by this line of cases, arguing that *California v. Trombetta* has overruled our decisions requiring that a defendant be given a *breath* sample. We decline the State’s invitation to reexamine the rules in *breath* testing cases because this is not a *breath* testing case; rather, it is a case involving *blood* testing.

Having declined the State’s invitation to reexamine the rule that a DWI defendant must be given a *breath* sample for independent testing, we must now determine whether the rule in *breath* testing cases should also apply in *blood* testing cases.

*State v. Kemp*, 168 Ariz. 334, 335–36, 813 P.2d 315, 316–17 (1991) (emphasis added, citations omitted). Although the Arizona Supreme Court declined the State’s invitation to do away with the “second sample,” the Arizona Legislature in 1992 accepted the invitation and did so with the following subsection:

If a law enforcement officer administers a duplicate breath test and the person tested is given a reasonable opportunity to arrange for an additional test pursuant to [A.R.S. § 28–692(H)], a sample of the person’s breath does not have to be collected or preserved.

Laws of 1992, Ch. 330, § 6; A.R.S. § 28–692(G); now A.R.S. § 28–1388(B). In *Moss v. Superior Court*, 175 Ariz. 348, 857 P.2d 400 (Ct. App. 1993), wherein the State used an Intoxilyzer machine rather than the Breathalyzer machine used in *Baca* and *Scales*, the Arizona Court of Appeals upheld the constitutionality of that statute:

Given the reliability and accuracy of replicate testing with an Intoxilyzer 5000, we do not believe that due process or fundamental fairness requires the state to provide defendants with breath samples.

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175 Ariz. at 352, 857 P.2d at 404; *accord*, *State v. Bolan*, 187 Ariz. 159, 161–62, 927 P.2d 819, 821–22 (Ct. App. 1996); *see also State ex rel. Dean v. City Court of Tucson*, 163 Ariz. 510, 514–15, 789 P.2d 180, 184–85 (1990). Thus as of 1992, the state was no longer required to preserve a “second sample” in breath test cases.

Although the Arizona Supreme Court in *Kemp* declined the State’s invitation to reexamine the rule that a DUI defendant in a breath test case must be given a breath sample for independent testing, it did hold breath test cases were different from blood test cases and thus different rules applied:

We believe that legitimate distinctions exist between breath testing and blood testing and, therefore, that the rule for breath testing cases need not be extended to blood testing cases.

....

. . . Thus, the rationale used in *Montano* is not present in a blood testing case because blood, when properly stored and maintained, is still available for testing by the defendant at the time of trial. This availability lessens the need for law enforcement officials to advise a DWI suspect that he may obtain, for independent testing, a portion of the blood sample being tested by the law enforcement agency.

We believe that the due process clause, as applied in DWI cases, can legitimately have two standards—one for breath testing cases and one for blood testing cases. Thus, we hold that law enforcement officers, when obtaining a blood sample pursuant to A.R.S. § 28–692(M), need not advise the suspect of his right to obtain a portion of the same sample for independent testing, at least when the sample taken by law enforcement officers will still be available for testing by the defendant at the time of trial.

168 Ariz. at 336–37, 813 P.2d at 317–18 (citations omitted). Thus, in a blood test case, a defendant’s due process right to contest the state’s *inculpatory* evidence is satisfied by allowing the defendant to obtain a portion of the blood sample the state tested and subject that sample to the defendant’s own independent testing, which is what happened in the present case. The State tested the blood from the tube containing the large sample and obtained BAC results of 0.1219 and 0.1223. Defendant’s expert obtained a portion of the blood sample the State tested, and obtained BAC results of 0.1170 and 0.1171, which were within the statistical error range. Defendant was accorded his full due process right to contest the State’s *inculpatory* evidence, thus the trial court properly denied Defendant’s Motion To Suppress. And at that point, it would have been within the trial court’s discretion to preclude at trial any testimony about the small sample.

Defendant nonetheless contends he was entitled to introduce evidence of the testability of the small sample, and thus the trial court abused its discretion in sustaining the State’s objections to his questions asked of Mr. Flaxmayer. For several reasons, this Court concludes Defendant is not entitled to relief. At the time of trial in this matter, the applicable rule of evidence read as follows:

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**(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

. . . .

(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. The record provided to this Court contains no offer of proof showing exactly what answers Mr. Flaxmayer would have given. Defendant's attorney contends he made those answers known to the trial court and notes defects in the recording process resulted in an indiscernible recording that could not be transcribed. It is, however, the duty of counsel who raises an issue on appeal to see the appellate record contains the material to which counsel takes exception, and when matters are not included in the record on appeal, the reviewing court will presume the missing portions of the record supported the action of the trial court. *State v. Zuck*, 134 Ariz. 509, 512–13, 658 P.2d 162, 165–66 (1982); *State v. Spinks*, 156 Ariz. 355, 360, 752 P.2d 8, 13 (Ct. App. 1987). Because Defendant did not make an offer of proof of exactly what Mr. Flaxmayer would have said, this Court must presume the trial court ruled correctly.

Defendant contends, however, the substance of the evidence was apparent from the context within which questions were asked, pointing to the testimony from Michael Grommes at the hearing on the motion to suppress and the report from criminalist Erik Brown. Mr. Grommes testified he was concerned (1) with the volume of blood in the small sample and (2) the possibility of cracks or some sort of damage to the tube. (R.T. of Nov. 2, 2011, at 12–13.) Mr. Brown's report stated it was not possible to obtain a reliable analysis of the small sample because (1) that tube had a concentration of 10 times the recommended amount of preservatives, (2) it was possible the sample got contaminated when the tube hit the ground, and (3) it was possible the sample got contaminated during storage if there were any cracks or other defects in the glass container. (Exhibit B, attached to Notice of Errata, dated Apr. 14, 2011.) Although this indicates what Mr. Grommes and Mr. Brown would have said if they had testified, that does not necessarily indicate what answers Mr. Flaxmayer would have given. Assuming, however, the information from Mr. Grommes and Mr. Brown was what Mr. Flaxmayer would have said, for three reasons this Court concludes Defendant is not entitled to relief.

First, Mr. Flaxmayer testified the 1 ml. of blood in the small sample was sufficient to test. (R.T. of Nov. 4, 2011, at 255–56, 264.) Thus Mr. Grommes' concerns about the volume of blood in the small sample did not apply to Mr. Flaxmayer.

Second, the prosecutor objected based on speculation. Defendant's attorney acknowledged none of Defendant's experts had attempted to test the blood in the small sample, to which the trial court stated, "It's also my understanding that, that one milliliter tube is still available to be tested, and could be tested as we sit here today." (R.T. of Nov. 2, 2011, at 56–57.) Because neither Mr. Grommes nor Mr. Brown nor Mr. Flaxmayer had ever tested much less even saw the

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tube containing the small sample, any testimony about not being able to obtain a reliable test of that blood sample was speculative. The trial court therefore did not abuse its discretion in precluding Mr. Flaxmayer's testimony on the basis of speculation.

Third, the prosecutor objected based on relevance. Assuming Mr. Flaxmayer would have testified a test of the blood in the small sample would not have given reliable results, this Court concludes that testimony would not have been relevant. At the time of trial in this matter, the applicable rule of evidence read as follows:

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 401, ARIZ. R. EVID. The “fact that [was] of consequence to the determination of the action” was whether the alcohol content in Defendant's blood was 0.08 or more. The State's expert testified his test of Defendant's blood sample showed the alcohol content in Defendant's blood was 0.121, which was, of course, relevant evidence. Testimony that a test of the blood in the small sample would not have given reliable results would not have made it any “more probable or less probable” that the alcohol content in Defendant's blood was more than 0.08 or less than 0.08, or that the State's test result of 0.121 was or was not accurate. Thus, the trial court did not abuse its discretion in precluding Mr. Flaxmayer's testimony on the basis of relevance.

Defendant contends, however, the State was the first to make a claim that a test of the small sample would have given accurate results, and this then gave Defendant the right to introduce evidence that a test of the small sample would not have given accurate results. The record does not support Defendant's contention, and shows instead Defendant's attorney first raised the issue of the accuracy of a test of the small sample. In his opening statement, the prosecutor said the officer drew Defendant's blood and the test results were a 0.1219 and a 0.1223 BAC, but said nothing about the number of tubes of blood taken or the reliability of any of the tests. (R.T. of Nov. 3, 2011, at 76.) In Defendant's attorney's opening statement, he said the “blood result was yielded as a result of an inexperienced, poorly trained officer who botched the blood taking of Matt Schimenti, and that affected the integrity and the reliability of the results.” (*Id.* at 83.) Thus, Defendant's attorney first raised the issue of the reliability of the testing.

The State's first witness was Officer Grommes, who testified he took Defendant to the precinct for a chemical test, but he did not describe anything about the test. (R.T. of Nov. 3, 2011, at 97–98.) On cross-examination, Defendant's attorney brought out what happened during the blood draw when the first tube popped off and the officer filled the second tube. (*Id.* at 118.) He further brought out that it was “standard practice . . . for police to draw two full vials of blood.” (*Id.*) Again, it was Defendant's attorney who first brought out the problems with the blood draw.

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The State next presented Officer Price, who testified he did the blood draw on Defendant and told what happened during the blood draw with the first tube. (R.T. of Nov. 3, 2011, at 130–32, 135.) On cross-examination, Defendant’s attorney brought out that there was less volume in the first tube and that Officer Price did not try to fill what would have been a third tube of blood. (*Id.* at 145–48.) On redirect, the prosecutor brought out the minimum amount of blood needed in a tube for testing was 1 ml., and the crime lab did not always need two completely full vials. (*Id.* at 152–53.) Again, it was Defendant’s attorney who first brought out the amount of blood in the small sample. The prosecutor did bring out the fact that 1 ml. of blood was enough to be tested, but made no claim about the possible accuracy of a test of the blood in the small sample.

The State’s final witness was James Hoban, who testified he tested the blood taken from Defendant. (R.T. of Nov. 3, 2011, at 156, 159.) He said he received two tubes and took his sample from the tube with 9 ml. of blood, but the 1 ml. of blood in the other tube was a sufficient amount for testing. (*Id.* at 159, 171, 174, 176, 180.) He made no claim, however, about the possible accuracy of a test of the blood in the small sample. On cross-examination, he said, if he had received two tubes each having only 1 ml. of blood, he could have tested either tube, and that he did not know about the 1 ml. tube popping off the needle and hitting the ground. (*Id.* at 174–77.) On redirect, he said if he had seen any defects in either of the tubes, such as a cracked tube or a seal not intact, he would have noted it in his report, but there was nothing in his worksheet, and he could not recall anything being wrong. (*Id.* at 180–81.) Again, this witness made no claim about the possible accuracy of a test of the blood in the small sample.

Defendant then presented Dianna Mass, who gave her opinion about the problems with the blood draw done on Defendant. (R.T. of Nov. 3, 2011, at 207–09.) On cross-examination, she acknowledged she did not know anything about the blood draw done in this case. (*Id.* at 213, 215.)

From the foregoing testimony, it appears Defendant’s attorney first raised the issue of the possible inaccuracy of a test of the blood in the small sample. The only claim the State’s witnesses made was the amount of blood in the small sample was enough that it could have been tested, but made no claim about what might have been the accuracy of any such test. The record thus does not support Defendant’s contention that the State was the first to make a claim about the accuracy of a test of the small sample. Thus, the State did not “open the door” to Mr. Flaxmayer’s proposed testimony.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court properly sustained the prosecutor’s objections to Mr. Flaxmayer’s proposed testimony about the testability of the small sample.

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**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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