

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2009-179824-001 DT

11/07/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

ANDREA L KEVER

v.

JAMES NICHOLAS HICKS (001)

SIMONE ANNE ATKINSON

MESA JUSTICE CT-WEST
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number TR 2009-179824.

Defendant-Appellant James Hicks (Defendant) was convicted in West Mesa Justice Court of driving under the influence. Defendant contends the trial court erred in precluding him from presenting expert opinion testimony about potential defects in the breath testing procedure. For the following reasons, this Court concludes Defendant has failed to preserve this issue for appeal and therefore affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On December 12, 2009, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2); driving under the extreme influence, A.R.S. § 28-1382(A); and impeding the movement of traffic, A.R.S. § 28-704(A). Prior to trial, Defendant filed a motion in limine asking the trial court to allow him to present expert opinion testimony about partition ratios, breathing patterns, body temperature, and RFI issues. (Motion in Limine, filed Aug. 17, 2010.) The State filed a motion in limine based on *Guthrie v. Jones*, 202 Ariz. 273, 43 P.3d 601 (Ct. App. 2002), asking the trial court to preclude that expert opinion testimony. (Motion in Limine, filed Dec. 21, 2010.)

At the hearing on these motions, Mark Stoltman testified Defendant's breath was tested on an Intoxilyzer 8000. (R.T. of Mar. 8, 2012, at 5-7.) He explained multiplying the amount of alcohol in a person's breath by 2100 would give the amount of alcohol in the blood. (*Id.* at 10-12.) He noted that conversion ratio is not the same from person to person, and is not always constant in the same person. (*Id.* at 12-13, 19.) He also said the body temperature, breath temperature, and breathing patterns can change that ratio. (*Id.* at 13, 22-24.) He said the range could be plus or minus 40 to 50 percent if the person is in the absorptive phase, and could be plus or minus 20 to 30 percent if the person is in the elimination (post-absorptive) phase. (*Id.* at 13-14.)

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Thus, if the person were in the post-absorptive phase and the reading were 0.10, the actual range could be from 0.07 to 0.13. (*Id.* at 15, 27.) On cross-examination, he stated using the 2100:1 ratio would understate a person's actual blood BAC if the person were in the post-absorptive phase, and would overstate a person's actual blood BAC if the person were in the absorptive phase. (*Id.* at 19–20.) He also acknowledged he had no direct evidence of knowledge of this subject (the Defendant). (*Id.* at 26.)

Although neither side presented any testimony about the times events happened in the present case, during arguments the attorneys said Defendant had his last drink 29 minutes before the stop, which would have been at 1:00 a.m.; the stop was at 1:29 a.m.; the first test was at 2:13 a.m., and the second test was at 2:19 a.m. (R.T. of Mar. 8, 2012, at 35–36.) After hearing arguments from the attorneys, the trial court took the matter under advisement. (*Id.* at 31, 36, 38, 40.) The trial court subsequently ruled Mr. Stoltman's opinions were speculative in nature, and thus Mr. Stoltman would not be allowed to testify unless he could tie his opinions to Defendant's actual condition at the time of the breath tests. (Ruling, filed Mar. 12, 2012.)

Defendant subsequently submitted the matter on the record. (R.T. of Mar. 16, 2012, at 3.) That included the results of Defendant's BAC tests, which gave readings of 0.236 and 0.246. (*Id.* at 11.) The trial court found Defendant guilty of all three DUI charges. (*Id.* at 12.) The trial court then imposed sentence. (*Id.* at 12–18.) 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: HAS DEFENDANT WAIVED THIS ISSUE BY NOT PROCEEDING TO TRIAL.

Defendant contends the trial court abused its discretion in granting the State's motion in limine to preclude Defendant from introducing expert opinion testimony. The most recent opinion in this area is *State v. Cooperman*, 230 Ariz. 245, 282 P.3d 446 (Ct. App. 2012). For **two** reasons, this Court concludes Defendant has failed to preserve this issue for appeal.

The **first** reason is Defendant failed to make an offer of proof showing how the evidence Defendant would have presented would have related to Defendant's actual situation. The applicable rule of evidence provides as follows:

(a) **Preserving a Claim of Error.** A party may claim error in a ruling to . . . exclude evidence only if the error affects a substantial right of the party and:

. . . .

(2) . . . a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

Rule 103(a)(2), ARIZ. R. EVID. In the present matter, Defendant's witness, Mr. Stoltman, testified in general about the variables that affect breath BAC readings, but he never testified how these variables would affect the actual readings in this case. For example, he said the range could be plus or minus 20 to 30 percent if the person is in the elimination (post-absorptive) phase, and

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could be plus or minus 40 to 50 percent if the person is in the absorptive phase, but never gave an opinion whether Defendant was in the absorptive phase or the elimination (post-absorptive) phase. (From the attorneys' statements, it appeared the first breath test was 1 hour, 13 minutes after Defendant was driving, so it appears an expert could have given an opinion whether Defendant was in the absorptive phase or the elimination phase.) If one were to use, for example, a reading of 0.24 for Defendant, Defendant's actual reading would have been 0.1846 if that 0.24 reading were 30 percent high and 0.3429 if that 0.24 reading were 30 percent low; and would have been 0.16 if that 0.24 reading were 50 percent high and 0.48 if that 0.24 reading were 50 percent low. Defendant's attorney, however, made no offer of proof relating Mr. Stoltman's general testimony to the actual facts of this case, thus this Court has no way of knowing what numbers Mr. Stoltman would have given and therefore does not know whether that testimony would have been relevant. For this reason, this Court concludes Defendant has failed to preserve this issue for appeal.

The **second** reason Defendant failed to preserve this issue for appeal is Defendant chose not to go to trial and instead submitted the matter to the trial court on the record. This conclusion is based on Arizona cases from **three** different areas that have held, when the trial court makes a pre-trial ruling against the defendant on what might be an issue at trial, if the defendant does not take action at trial that makes it an actual, rather than just a theoretical, issue, the defendant will be considered not to have preserved the issue for appeal.

The **first** of these areas is impeachment with a prior conviction. The law in Arizona is that, if the trial court rules the state may use a prior conviction to impeach the testimony of a defendant who testifies, if the defendant then chooses not to testify, the defendant will be deemed not to have preserved for appeal the correctness of the trial court's ruling. The Arizona Supreme Court stated this rule 49 years ago in a case when the defendant claimed the trial court erred in denying his motion to direct the State "to refrain from cross-examining him on a former conviction for manslaughter which occurred some sixteen (16) years prior." *State v. Barker*, 94 Ariz. 383, 385, 385 P.2d 516, 517 (1963). The defendant contended the denial of his motion to preclude the use of his prior conviction "prevented him from taking the witness stand and testifying on his own behalf." *Id.* Rejecting that argument, the court stated:

The State argues that there is nothing before this Court on which to predicate a reversal of the trial court, that having received this adverse ruling appellant should have proceeded with his case by taking the stand then raising the question if the State attempted to establish the prior conviction. We are in agreement with the position adopted by the State. First, the appellant is assuming that had defendant taken the stand the county attorney would have used the prior manslaughter conviction by attempting to impeach his credibility. Second, appellant is assuming that the trial court would have adhered to its initial ruling

94 Ariz. 386, 385 P.2d at 518. The court thus did not address the merits of the defendant's issue.

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The United States Supreme Court reached the same conclusion in *Luce v. United States*, 469 U.S. 38 (1984), in which the trial court denied the defendant's motion to preclude the government from using his prior conviction to impeach him if he testified. The Court stated, if the defendant chose not to testify, any possible harm from the trial court's in limine ruling permitting impeachment by a prior conviction would be wholly speculative because (1) the ruling could have been subject to change as the case unfolded, particularly if the actual testimony differed from what was contained in the defendant's proffer, so the trial court may not have allowed the government to impeach the defendant with the prior conviction, and (2) the government might have chosen not to impeach the defendant with the prior conviction if, for example, the government's case was strong, and the defendant was subject to impeachment by other means. 469 U.S. at 41–42. Additionally, unless the defendant testified and the government actually did impeach with evidence of the prior conviction, the reviewing court would not be able to undertake a harmless-error analysis. 469 U.S. at 42. The Court thus held, to preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify. 469 U.S. at 43.

The Arizona Supreme Court continued to adhere to this rule in *State v. Allie*, 147 Ariz. 320, 710 P.2d 430 (1985), a case it decided after it had adopted the Arizona Rules of Evidence. In that case, after conducting a pretrial hearing, the trial court ruled the state could use Allie's prior convictions to impeach him if he took the stand; Allie then chose not to testify. 147 Ariz. at 327, 710 P.2d at 437. On appeal, Allie challenged the trial court's pretrial ruling. Without examining the merits of Allie's argument, the court reiterated the rule that a defendant must testify at trial to preserve a challenge to an adverse pretrial ruling allowing admission of a prior conviction. *Id.* Arizona continues to follow this rule for impeachment with a prior conviction. *See State v. Smyers*, 207 Ariz. 314, 86 P.3d 370, ¶ 12 (2004) (citing cases).

The Arizona Supreme Court extended this reasoning into a **second** area, the use, for impeachment purposes, of a statement taken in violation of *Miranda*:

The admission of involuntary statements is subject to harmless error analysis. Without the defendant's testimony, however, we are unable to determine whether error is prejudicial. The state may choose not to use a statement. Requiring the defendant to testify ensures that the reviewing court is presented with an actual, rather than hypothetical, injury. It also "prevents defendant from 'cynically manufacturing a basis for a possible appeal by falsely alleging that the threat of impeachment alone deterred him from testifying.'" Whether the impeaching statement was obtained in violation of *Miranda* or was involuntary, prejudice is hypothetical when the defendant does not testify. We hold that by choosing not to testify, Gonzales waived his right to claim that the trial court erroneously ruled involuntary statements admissible to impeach.

State v. Gonzales, 181 Ariz. 502, 512, 892 P.2d 838, 848 (1995) (citations omitted).

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We believe *Luce* and *Allie* are based on sound policy considerations. Without defendant's testimony, a reviewing court cannot properly weigh the probative value of the testimony against the prejudicial impact of the impeachment. This balancing requires a complete record, including defendant's testimony, the cross-examination and an analysis of the impact of the impeachment evidence on the jury. Furthermore, without defendant's testimony, the court is left to speculate on review whether the state would have in fact sought to impeach defendant with the prior convictions, and whether the adverse ruling in fact motivated defendant's decision not to testify.

The same policy considerations that lead to the result in *Luce* and *Allie* are present here. Although the impeaching questions are permitted under *Harris*, the trial court is still required to balance probative value against prejudice under Rule 403, Ariz. R. Evid. . . . Furthermore, this requirement ensures that the reviewing court is presented with an actual, rather than hypothetical, injury.

Because defendant did not testify, we hold that he may not attack the pretrial ruling conditionally admitting his statements for impeachment in the event he did testify.

State v. Connor, 163 Ariz. 97, 102–03, 786 P.2d 948, 953–54 (1990) (citations omitted).

The Arizona Court of Appeals extended this reasoning into a **third** area, the use of the defendant's prior conviction to impeach on cross-examination the testimony of Defendant's character witnesses:

By failing to call his character witnesses, forcing us to speculate what precisely the witnesses would have testified had they in fact appeared, what the prosecutor would have ultimately asked, and how the judge would have finally ruled, defendant failed to preserve his claim of error. The policy reasons behind the long-established rule that a defendant who chooses not to testify cannot claim error in a ruling allowing him to be impeached with his prior conviction apply with equal force to a ruling on the use of prior convictions to rebut character witnesses.

. . . .

The policy reasons behind this rule apply equally to bar defendant from urging error in the judge's conditional ruling on cross-examination of character witnesses, none of whom testified at trial. Application of the rule is especially warranted on the circumstances in this case, in which the judge advised that he would allow the prosecutor to ask about the specific nature of the conviction in this case, sexual abuse of a child, only if the witnesses testified that defendant would never commit a crime against a child, not if the witnesses testified only that defendant was a "good guy." Asked for clarification, the judge noted that his rulings would depend on how the witnesses testified, as the case unfolded at trial. Under these circumstances, the judge's pretrial ruling by its terms was a conditional ruling, based on purely hypothetical testi-

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mony. Any review by this court would require us to speculate about what would have happened had the character witnesses testified, had the prosecutor attempted to impeach them, and had the judge adhered to his pretrial ruling. The policy reasons enunciated in *Luce*, and reiterated in *Smyers*, for refusing to rule on an adverse pretrial ruling on impeachment of a defendant by his prior conviction if the defendant fails to testify, are equally applicable to an adverse pretrial ruling on cross-examination of character witnesses. On these facts, we hold that defendant failed to preserve his claim of error, and we decline to consider it.

State v. Romar, 221 Ariz. 342, 212 P.3d 34, ¶¶ 6, 9 (Ct. App. 2009) (footnote and citations omitted).

In the present case, the trial court correctly ruled the partition-ratio evidence was not admissible for the (A)(2) charge because “partition-ratio evidence is inadmissible in an (A)(2) case.” *Cooperman* at ¶ 25; *Guthrie* at ¶ 18. For the (A)(1) charge, all the factors concerning failure to preserve an issue for appeal in this *Barker/Allie/Gonzales/Connor/Romar* line of cases apply with equal force to the issue involved in this appeal, and based on those factors, for **three** reasons this Court concludes Defendant has failed to preserve this issue for appeal.

The **first** reason is, because Defendant chose not to go to trial, this Court has no way of knowing what evidence might have been offered and what evidence might have been admitted. In *Guthrie*, the court held as follows:

In a traditional DUI prosecution under § 28–1381(A)(1), however, when the State uses breath test results to take advantage of the § 28–1381(H) (now § 28–1381(G)) presumption, partition ratio evidence may be relevant to rebut that presumption and thus admissible.

Guthrie at ¶ 18; *accord*, *People v. McNeal*, 46 Cal. 4th 1183, 1200, 210 P.3d 420, 431, 96 Cal. Rptr. 261, 274 (2009); *State v. Hanks*, 172 Vt. 93, 94, 772 A.2d 1087, 1088 (2001). Thus, under *Guthrie*, if the State chose not to rely on the statutory presumptions in A.R.S. § 28–1381(G), partition-ratio evidence would have not been admissible.

Cooperman, however, expanded the holding of *Guthrie* and rejected the state’s argument that partition-ratio evidence was admissible only if the state asked for, and relied upon, the statutory presumption in A.R.S. § 28–1381(G)(3). *Cooperman* at ¶¶ 15–17. It held, instead, the statutory presumption arises for an (A)(1) offense whenever the state introduces evidence that a defendant had an alcohol concentration of .08 or more:

[T]he statutory presumption of intoxication is raised in a prosecution for an (A)(1) offense whenever the state introduces evidence that a defendant had an alcohol concentration of .08 or more. . . .

....

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Accordingly, we hold that when a defendant is charged with DUI under A.R.S. § 28–1381(A)(1) and the state introduces evidence of [the defendant’s] breath-alcohol concentration at trial, [the defendant] may offer evidence explaining how partition ratios vary within an individual and among the general population and how that variability may result in breath-test results that overstate a defendant’s actual level of intoxication.

Cooperman at ¶¶ 17, 25. The court then held, when the state introduces evidence of the defendant’s alcohol concentration, the statutory presumption of intoxication arises as a matter of law, and the trial court must so instruct the jurors.

Trial courts have a duty to instruct the jury on the general principles of law that pertain to a criminal offense. This duty exists regardless of who requests a particular instruction. Although the presumption contained in § 28–1381(G)[3] is permissive and “nothing more than an inference,” the trial judge still has a duty to instruct the jury on this general principle of law pertaining to a prosecution under (A)(1) once evidence is introduced of the defendant’s alcohol concentration.

Cooperman at ¶ 18 (citations omitted). And thus, because the statutory presumption of intoxication would now be before the jurors, the defendant would have the right to introduce partition-ratio evidence. But again, this happens “whenever the state introduces evidence that a defendant had an alcohol concentration of .08 or more,” and because Defendant in this matter chose not to go to trial, this Court has no way of knowing whether the State would have introduced evidence of Defendant’s alcohol concentration in the (A)(1) charge. Again, Defendant has failed to preserve this issue by going to trial.

In a footnote, the court in *Cooperman* did state, “Either party [may] introduce evidence of the defendant’s alcohol concentration, thereby triggering the statutory presumption.” *Cooperman* at ¶ 17 n.6. It thus appears the court was of the opinion that, even if the state chose not to introduce evidence of a defendant’s alcohol concentration in the (A)(1) charge, the defendant could do so, which would then require the trial court to instruct the jurors on the statutory presumption of intoxication, and would then give the defendant the right to introduce partition-ratio evidence. Thus in the present case, even if the State chose not to introduce evidence of Defendant’s alcohol concentration in the (A)(1) charge, Defendant could have done so and introduced evidence that Defendant’s breath alcohol concentration was 0.236 and 0.246, after which Defendant could have introduced partition-ratio evidence. But it is not clear from this record whether Defendant would have taken this course of action. As noted above, Defendant’s attorney did not make an offer of proof connecting the general testimony of Defendant’s expert with Defendant’s specific situation, and Mr. Stoltman never gave an opinion whether Defendant was in the absorptive phase or the elimination (post-absorptive) phase, but did say the range could be plus or minus 40 to 50 percent if the person is in the absorptive phase. Using the 50 percent variable for

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Defendant's breath alcohol concentration readings of 0.236 and 0.246 would give the following blood alcohol concentrations for Defendant:

Defendant's Breath BAC reading	Blood BAC if Breath reading is 50% high	Blood BAC if Breath reading is 50% low
0.236	0.157	0.472
0.246	0.164	0.492

Thus, if Defendant introduced evidence that his breath alcohol readings were 0.236 and 0.246, the State then could have introduced evidence Defendant's blood alcohol could be no lower than 0.157 and could have been as high as 0.492. It is thus questionable whether Defendant would have wanted to open the door to this type of testimony. But the point is this Court has no idea what Defendant or the State would have presented if this matter had gone to trial because Defendant chose not to go to trial. And because Defendant chose not to go to trial, this Court concludes Defendant has failed to preserve for appeal the correctness of the trial court's ruling.

Cooperman further expanded the holding of *Guthrie*, and held physiological factors, such as breathing patterns, breath and body temperature, and hematocrit (a device for separating cells and other particulate elements of blood from plasma) are relevant in both (A)(1) and (A)(2) cases. *Cooperman* at ¶¶ 4 n.2, 26–30. Again, Defendant made no offer of proof of what evidence of physiological factors he would have wanted to introduce. The court in *Cooperman* noted the defendant's expert testified that "hematocrit can change [either breath or blood alcohol concentration] by about plus or minus five percent." *Cooperman* at ¶ 28 (brackets in original). Applying this plus or minus 5 percent range to Defendant's BAC readings of 0.236 and 0.246 would give a range of 0.225 to 0.248 for the first reading and 0.234 to 0.259 for the second reading. Because all these readings are more than 2¾ times the 0.08 statutory limit, this Court does not see how that evidence would be relevant to a claim that Defendant's BAC was less than 0.08.

The **second** reason from the *Barker/Allie/Gonzales/Connor/Romar* line of cases showing why Defendant has failed to preserve this issue for appeal is that, if Defendant had gone to trial and the State had presented its evidence, the trial court may have reversed its ruling and allowed Defendant to present this evidence, in which case there would be no issue on appeal. Because Defendant chose not to go to trial, however, this Court has no way of knowing whether the trial court would have reconsidered its ruling, thus again Defendant has failed to preserve this issue for appeal.

The **third** reason from the *Barker/Allie/Gonzales/Connor/Romar* line of cases showing why Defendant has failed to preserve this issue for appeal is that, if Defendant had gone to trial and the State had presented its evidence, this Court would have been able to conduct a harmless-error analysis, which is what the California Supreme Court did in *McNeal*. The court there held the defendant should have been allowed to present his partition-ratio evidence, but held any error was harmless in light of the other evidence showing the extent of Defendant's impairment. *McNeal*, 210 P.3d at 432–33.

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In the present case, the arresting officer did not testify, but the Narrative of his report gives the following facts showing Defendant was impaired. Defendant's vehicle almost struck a cement barrier as it turned onto the SR-101 on-ramp. Defendant entered the freeway at 35 miles per hour in what was a 65 miles per hour zone, and drove through the gore point when entering the freeway. Defendant's vehicle drifted within its lane, and almost struck another vehicle when it changed lanes. Once the officer turned on his emergency lights, Defendant almost lost control of his vehicle when trying to stop. Once the officer made contact with Defendant, he saw Defendant had watery bloodshot eyes, had a strong odor of alcohol coming from him, and move slowly and lethargically. Defendant stumbled when he got out of his vehicle, and one of the officers had to hold out his hand to keep Defendant from falling over. As noted above, at best with partition-ratio evidence, Defendant's blood BAC content would have been 0.157. Thus, if Defendant had gone to trial and raised these issues on appeal if he had been found guilty, this Court could have been able to assess whether any error was harmless. Again, Defendant has failed to preserve this issue for appeal.

III. CONCLUSION.

Based on the foregoing, this Court concludes Defendant has failed to preserve this issue for appeal.

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

IT IS FURTHER ORDERED remanding this matter to the West Mesa Justice 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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