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UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

GARY LYNN FOSHEE, *Appellant*.

No. 1 CA-CR 12-0249

FILED 1-30-2014

Appeal from the Superior Court in Maricopa County

No. CR2009-154132-001

The Honorable Cari A. Harrison, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michael T. O'Toole

Counsel for Appellee

Shell & Nermyr PLLC, Chandler
By Charles K. Shell

Counsel for Appellant

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MEMORANDUM DECISION

Judge Lawrence F. Winthrop delivered the decision of the Court, in which Presiding Judge Patricia A. Orozco and Judge Kenton D. Jones joined.

WINTHROP, Judge:

¶1 Gary Lynn Foshee appeals his convictions for one count of manslaughter and two counts of endangerment. Foshee argues the trial court erred when it excluded evidence the decedent had methamphetamine in his system, when it admitted evidence of Foshee's blood alcohol concentration, and when it admitted evidence of Foshee's prior conviction for driving under the influence. For the reasons that follow, we affirm Foshee's convictions.

FACTS AND PROCEDURAL HISTORY¹

¶2 Foshee left a bar sometime before 2:00 a.m. on the morning of August 15, 2009 after the bar refused to serve him further and security personnel asked him to leave. At some point after he left the bar, Foshee drove his pickup truck east on a two-lane road. Ahead of Foshee on that same road, three men on bicycles rode west on and/or near the shoulder of the westbound lane. The decedent and at least one of the other cyclists had lights on their bicycles.

¶3 Shortly after 2:00 a.m., Foshee drove east in the westbound lane to overtake and pass another eastbound vehicle. Once he passed the vehicle, Foshee drove down the center of the road. Foshee then moved into the westbound lane again, possibly to attempt to pass another eastbound vehicle. Regardless of the reason, Foshee drove towards the three cyclists as they rode west on or near the shoulder of the westbound lane. At some point in the sequence of events, Foshee swerved left and then right. Two of the cyclists turned right to avoid being struck by Foshee's truck. The decedent, however, apparently turned left. Foshee

¹ "We construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998) (citation omitted).

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struck the decedent with the right front corner of his truck. Foshee then lost control of the truck and crashed. The victim died moments after the collision. The State's accident reconstructionist determined the impact occurred in the westbound lane in a no passing zone at a speed of fifty-two to fifty-seven miles per hour. Foshee's reconstructionist believed the impact occurred in the eastbound lane.

¶4 A jury convicted Foshee of manslaughter and two counts of endangerment. The trial court sentenced Foshee to presumptive, concurrent terms of imprisonment for an aggregate term of 10.5 years. Foshee timely appealed. We have jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A) (West 2014),² 13-4031 and 13-4033.

DISCUSSION

I. Evidence of Methamphetamine in the Decedent's System

¶5 Foshee contends the trial court erred when it granted the State's motion to exclude evidence of methamphetamine in the decedent's system at the time of the incident. Foshee argues the evidence was relevant to support his defense that the decedent was impaired and caused the incident by negligently turning his bicycle south across the road and directly in front of Foshee in the eastbound lane.

¶6 "The trial court has considerable discretion in determining the relevance and admissibility of evidence, and we will not disturb its ruling absent a clear abuse of that discretion." *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990). Abuse of discretion is "an exercise of discretion which is manifestly unreasonable, exercised on untenable grounds or for untenable reasons." *State v. Woody*, 173 Ariz. 561, 563, 845 P.2d 487, 489 (App. 1992) (citation omitted). In reviewing an exercise of discretion,

[T]he question is not whether the judges of this court would have made an original like ruling, but whether a judicial mind, in view of the law and circumstances, could have made the ruling without exceeding the bounds of reason. We cannot substitute our discretion for that of the trial judge.

² We cite the current Westlaw versions of the applicable statutes and court rules unless changes material to our analysis have since occurred.

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Associated Indem. Corp. v. Warner, 143 Ariz. 567, 571, 694 P.2d 1181, 1185 (1985) (quoting *Davis v. Davis*, 78 Ariz. 174, 179, 277 P.2d 261, 265 (1954) (Windes, J., specially concurring)).

¶7 At a pretrial hearing on the State’s motion to exclude, a forensic toxicologist testified there were “trace” amounts of methamphetamine and one of its metabolites in the decedent’s blood. The amount present was similar to that one would find in a person who had taken a medically prescribed form of methamphetamine for weight loss. Further, the decedent ingested the methamphetamine at least six hours before his death. The toxicologist testified that due to the amount of methamphetamine in the decedent’s system and the amount of time that had passed since its ingestion, the decedent was not impaired at the time of the incident.

¶8 The trial court granted the State’s motion and excluded the evidence. The court noted no witness would testify the decedent was impaired and that Foshee was otherwise asking the jury to speculate the decedent was impaired. The court further noted that even if the jury chose to believe Foshee’s version of where the impact occurred, Foshee was also asking the jury to speculate that the alleged impairment was the reason the decedent was in the eastbound lane. Finally, the court found that any relevance was outweighed by the potential prejudice.³

¶9 We find no abuse of discretion. The State’s toxicologist testified the decedent was not impaired at the time of the incident and Foshee offered only speculation to the contrary. Despite Foshee’s representations on appeal, there is nothing in the testimony of the two witnesses he identifies to even hint the decedent was negligent, let alone impaired. A trial court may exclude evidence of a victim’s alleged impairment when there is no evidence of actual impairment nor any evidence regarding how the substance that caused the alleged impairment affected the victim. *State v. Krantz*, 174 Ariz. 211, 213, 848 P.2d 296, 298 (App. 1992) (excluding the victim’s alleged use of methamphetamine).

¶10 Foshee’s reliance upon cases from foreign jurisdictions is unavailing. In *Williams v. State*, the issue was whether the trial court erred when it failed to instruct the jury on the victim’s negligence, not whether the court should have admitted evidence the victim was impaired.

³ The court also denied Foshee’s renewed motions to admit the evidence, as well as his motion for new trial based on this evidence.

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Williams v. State, 554 P.2d 842, 843-844 (Okla. Crim. App. 1976). Further, there was direct evidence the victim in *Williams* was negligent when he rode his bicycle in the middle of the street, weaving from side to side and causing at least one vehicle to move into the opposing lane to avoid the victim. *Id.* at 845. In *State v. Woodman*, the issue was, again, not whether the trial court should have admitted evidence the victim was impaired, but whether the court erred when it failed to instruct the jury regarding the victim's negligence. *State v. Woodman*, 735 P.2d 1102, 1106 (Kan. Ct. App. 1987). There was direct evidence that the victim in *Woodman* was negligent when he ran a red light at the time of the collision with the defendant. *Id.* at 1107. Finally, in *Buckles v. State*, the issue was whether the court should have admitted evidence the victim had cocaine metabolites in his system. *Buckles v. State*, 830 P.2d 702, 705 (Wyo. 1992). In *Buckles*, however, there was direct evidence that at the time of the incident, the victim operated his vehicle in a manner consistent with impairment. *Id.* at 706.

¶11 In the instant case, there was neither direct nor non-speculative circumstantial evidence the decedent was actually impaired. Therefore, the trial court did not abuse its discretion when it excluded the evidence of methamphetamine and/or its metabolites in the decedent's system.

II. Admission of Foshee's Blood Alcohol Concentration

¶12 Foshee asserts the trial court erred when it allowed an expert witness to testify that Foshee's blood alcohol concentration ("BAC") two hours after the incident was between .144 and .194. Foshee argues the expert's opinion was unreliable because she did not have all the information necessary to make such a calculation. For these same reasons, Foshee further argues the expert's opinions were not admissible pursuant to the then newly amended Arizona Rules of Evidence 702.⁴

⁴ While Foshee claims the simultaneous changes to Rule 703 also support his position, we need not reach the merits of his argument because the changes to Rule 703 were "intended to be stylistic only." Ariz. R. Evid. 703, cmt.

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¶13 We review a ruling on the admission of expert testimony for a clear abuse of discretion. *State v. Hyde*, 186 Ariz. 252, 276, 921 P.2d 655, 679 (1996) (citation omitted). Under Arizona Rule of Evidence 702:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

A. Background

¶14 At a pretrial hearing on the admissibility of the expert's testimony, the State's expert testified regarding her training, education, experience and other qualifications. The expert further testified regarding alcohol absorption and elimination rates for non-drinkers and heavy drinkers alike as well as her familiarity with "hundreds" of studies that have studied these rates. The expert was also familiar with studies that addressed the effect of food on alcohol absorption and elimination rates. The expert testified that based on her experience, education, and training, she could "relate back" or "retrograde" a person's BAC to within two hours of an incident.

¶15 The expert explained how one can relate back BAC evidence based upon the time of the incident, the time of the blood draw, and the BAC at the time of the blood draw. Based upon that information, she could then calculate a range of BAC at two hours after the incident for both a novice drinker and a heavy drinker. She further testified it is not necessary to know when a person stopped drinking or any other information to conduct such an analysis. The State's expert testified that her methods of relating back and the studies she relied upon were "good science" that had been generally accepted and relied upon by the scientific community for decades.

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¶16 Foshee's expert disagreed with the State's expert. He testified at the hearing that to accurately relate back a BAC, one must also know if and when the subject consumed food, the type of alcohol consumed, when the subject consumed the alcohol and the subject's sex and weight. Foshee's expert claimed that a specific study supported his views. Foshee's expert testified that the failure to know this additional information could result in an overestimation of a person's BAC when related back to a specific time. He acknowledged, however, that many criminalists believe that relating back a BAC level can be accurately done in the manner used by the State's expert.

¶17 The trial court held that the State's expert was qualified to give her opinions regarding how she could relate back Foshee's BAC to within two hours of driving. The court acknowledged that Foshee's expert disagreed with the State's expert, but noted that Arizona case law allowed relation back evidence, and the question of which expert to believe was a question for the jury.⁵

¶18 At trial, the parties presented a classic "battle of the experts." The State's expert testified consistent with her pretrial testimony. She also addressed the study relied upon by Foshee's expert to criticize her methods. The State's expert noted that the relevant scientific community found the study "flawed" for numerous reasons that she explained. Foshee's expert also testified consistent with his pretrial testimony. He argued the study he relied upon was not flawed and again claimed the State's expert's opinions were not reliable because she did not have enough information.

B. Analysis

¶19 The trial court did not abuse its discretion when it admitted the expert's testimony. First, evidence that a defendant was intoxicated is relevant in a prosecution for manslaughter; the amount of alcohol in the defendant's system is relevant to determine whether the defendant acted recklessly. *State v. Superior Court (Rigsby)*, 168 Ariz. 481, 482-83, 815 P.2d 408, 409-10 (App. 1991).

¶20 Second, Arizona has long recognized that the State may prove a defendant had a BAC of .08 or higher within two hours of driving

⁵ The trial court also denied Foshee's renewed motions to exclude the evidence.

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by using “evidence relating the defendant’s blood alcohol content back.” *State v. Claybrook*, 193 Ariz. 588, 590, ¶ 14, 975 P.2d 1101, 1103 (App. 1998) (citation omitted). This evidence has variously been referred to as a “retroactive extrapolation,” “retrograde extrapolation,” and “relation back evidence.” *See id.* (“retroactive”); *State v. Cannon*, 192 Ariz. 236, 239, ¶ 11, 963 P.2d 315, 318 (App. 1998) (“retrograde”); *Rigsby*, 168 Ariz. at 483, 815 P.2d at 410 (“relation back evidence”). Through relation back evidence, a “minimal alcohol elimination rate” may be used to calculate a defendant’s BAC at a specific time prior to the breath test. *Claybrook*, 193 Ariz. at 590, ¶ 15, 975 P.2d at 1103 (citation omitted). These procedures are generally accepted in the scientific community. *Id.*

¶21 Third, the State provided evidence that its expert’s opinions were based upon sufficient facts and/or data, the expert’s testimony was the product of reliable principles and methods, and the expert had reliably applied the principles and methods to the facts of the case. That Foshee’s expert disagreed and opined the State’s expert did not have enough information was not enough to require exclusion of the evidence. “Questions about the accuracy and reliability of [an expert] witness’ factual basis, data, and methods go to the weight and credibility of the witness’ testimony and are questions of fact.” *Logerquist v. McVey*, 196 Ariz. 470, 488, ¶ 52, 1 P.3d 113, 132 (2000). “It is the jury’s function to determine accuracy, weight, or credibility.” *Id.*

¶22 The comment to the 2012 amendment to Rule 702, which became effective only a month before this trial began, is instructive. The comment notes that while trial courts should be “gatekeepers” to assure that expert testimony is reliable and, therefore, helpful to the jury:

The amendment is not intended to supplant traditional jury determinations of credibility and the weight to be afforded otherwise admissible testimony, nor is the amendment intended to permit a challenge to the testimony of every expert, preclude the testimony of experience-based experts, or prohibit testimony based on competing methodologies within a field of expertise. The trial court’s gatekeeping function is not intended to replace the adversary system. Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

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A trial court's ruling finding an expert's testimony reliable does not necessarily mean that contradictory expert testimony is not reliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. Where there is contradictory, but reliable, expert testimony, it is the province of the jury to determine the weight and credibility of the testimony.

Ariz. R. Evid. 702, cmt.

¶23 The trial court properly admitted the expert testimony pursuant to Rule 702. Whether or not to accept or reject the opinions of the State's expert, in whole or in part, was a matter for the jury.

III. Admission of the Prior DUI Conviction

¶24 As the final issue on appeal, Foshee argues the trial court erred when it admitted evidence of his prior conviction for driving under the influence. We review admission of evidence of other acts pursuant to Rule 404(b) for abuse of discretion. *State v. Van Adams*, 194 Ariz. 408, 415, ¶ 20, 984 P.2d 16, 23 (1999). Evidence of prior acts is admissible if relevant and admitted for a proper purpose, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.*

¶25 We find no error. As recognized by the trial court, evidence of a prior DUI is relevant to the issue of whether a defendant acted recklessly in causing the death of another person through an incident involving a motor vehicle where alcohol is involved. *See Woody*, 173 Ariz. at 563, 845 P.2d at 489. The court did not abuse its discretion in determining that the relevance of such evidence in this case was not outweighed by the danger of unfair prejudice. Further, despite Foshee's arguments to the contrary, *Woody* is not distinguishable. That the defendant in *Woody* had nine prior DUIs as opposed to Foshee's single DUI is not determinative; the evidence was still relevant, there was simply less of it in Foshee's case. Further, that the defendant in *Woody* was charged with reckless second degree murder rather than manslaughter is also not significant; the mens rea of "recklessly" is the same whether in the context of reckless manslaughter or reckless second degree murder. A.R.S. §§ 13-105(10)(c) (defining "recklessly"); 13-1103(A)(1) (reckless

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manslaughter); 13-1104(A)(3) (reckless second degree murder).⁶ Finally, while Foshee complains there was insufficient evidence to show his prior DUI was sufficiently similar to the instant case, it is sufficient that he has a prior conviction for driving under the influence and there was evidence in this case that Foshee was, again, driving under the influence at the time of the incident.

CONCLUSION

¶26 Because we find no error, we affirm Foshee's convictions and sentences.



Ruth A. Willingham · Clerk of the Court
FILED : mjt

⁶ The defendant in *Woody* was ultimately convicted of the lesser-included offense of manslaughter. *Woody*, 173 Ariz. at 562, 845 P.2d at 488.