NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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MAY 13 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2009-0251
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
ROBERT DANIEL COMSTOCK,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20083997

Honorable Deborah Bernini, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and David A. Sullivan — Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Alex Heveri — Tucson
Attorneys for Appellant

B R A M M E R, Judge.

¶1 Robert Daniel Comstock appeals from his conviction and sentence for driving under the influence of an intoxicant (DUI) while impaired to the slightest degree and with a suspended license. He asserts the trial court erred by permitting the state to introduce his breath-test results without a proper foundation. He further asserts the court erred in denying his motion for a mistrial, arguing he was prejudiced by the improper admission of that evidence.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding Comstock's conviction and sentence. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On October 1, 2008, Tucson police officers Ruben Cajigas and Bernard Avalos were directed to a vehicle that had crashed into a house. Comstock was standing in front of the house and announced that he had crashed into it with his car. Neither Cajigas nor Avalos knew how long before they arrived Comstock had crashed.

¶3 Cajigas noticed Comstock had watery and bloodshot eyes, a flushed face, slurred speech, and swayed as he spoke. Avalos similarly noticed Comstock's bloodshot eyes and slurred speech. And both Cajigas and Avalos noted Comstock was emitting a strong odor of intoxicants.

¶4 Comstock admitted that he had started drinking three hours earlier, had drunk "a couple" beers within the previous hour, and had stopped drinking twenty minutes before. Cajigas asked Comstock to describe to what degree he felt the effects of alcohol "at the time of driving." Comstock described himself as having been a three on a

one-to-ten scale, with one being "not drinking, not feeling the effects," and ten being "falling down drunk." Cajigas also asked Comstock "if he had felt the alcohol that he drank ha[d] affected his driving to the slightest degree," to which Comstock answered "that he did, and that's why the incident occurred." Comstock gave Cajigas his driver's license, which had been suspended.

¶5 About forty-five minutes after Cajigas and Avalos had reported to the scene, Officer Corie Nolan arrived to administer breath tests to Comstock. Comstock voluntarily submitted to two tests, the first of which was conducted about fifteen minutes later. The tests produced readings of .193 and .190 alcohol concentration (AC), respectively. Nolan ultimately testified the crash likely had not occurred more than fifteen minutes before Cajigas and Avalos first arrived, or about an hour and fifteen minutes before Comstock submitted to the breath tests, but acknowledged that was speculation.

¶6 The state indicted Comstock for aggravated DUI while his license was suspended, in violation of A.R.S. § 28-1381(A)(1) and A.R.S. § 28-1383(A)(1); aggravated driving with an alcohol concentration of .08 while his license was suspended, in violation of § 28-1381(A)(2) and § 28-1383(A)(1); and criminal damage. Comstock filed a pretrial motion to preclude, inter alia, testimony regarding the "correlation between any possible [AC] and results on [a Horizontal Gaze Nystagmus] [(]HGN[)] Test without a retrograde to the time of the HGN or without a chemical test at the time of the HGN." Although Comstock asserts, without citation to the record, that the trial court

granted the motion, the record indicates Comstock had withdrawn this part of his motion on the first day of trial.

¶7 During trial, Comstock objected on foundational grounds to the admission of testimony regarding the breath-test results. The trial court overruled his objection. At the conclusion of the two-day trial, Comstock moved for a judgment of acquittal on the charge under § 28-1381(A)(2), arguing the state had not met its burden of either demonstrating that the breath tests were administered within two hours of the crash or offering expert testimony to relate the test results back to the pertinent time. *See* § 28-1381(A)(2) (unlawful to have "alcohol concentration of 0.08 or more within two hours of driving or being in actual physical control" of vehicle). Specifically, Comstock contended that, because the officers had testified they did not know precisely when Comstock had crashed his vehicle and no relation-back testimony was offered at trial, no reasonable juror could conclude the state had proven that Comstock's AC was .08 or greater within the two hours after the crash.

¶8 The trial court granted Comstock's motion for a judgment of acquittal on the § 28-1381(A)(2) charge. Comstock also moved for a mistrial, contending that his defense to the remaining DUI charge was prejudiced by testimony regarding his breath-test results and that a curative instruction could not remedy the error. The court denied the motion, noting that an appropriate curative instruction was sufficient. The court also denied Comstock's subsequent motion for a new trial, in which he reiterated his prejudice argument.

¶9 The jury was unable to reach a verdict on the criminal damage charge, and the trial court declared a mistrial. The jury did, however, find Comstock guilty of the § 28-1381(A)(1) DUI charge. The court sentenced Comstock to a mitigated prison term of eight years. This appeal followed.

Discussion

¶10 Comstock first asserts the trial court erred by permitting the state to introduce his breath-test results, arguing they lacked a proper foundation because the state offered no testimony relating the results back to within two hours of the crash. He similarly had objected below to the admission of the results on foundational grounds, although the court did not permit him to articulate the specifics of his objection. We review the court's decisions admitting or excluding evidence for an abuse of discretion. *State v. Hampton*, 213 Ariz. 167, ¶ 45, 140 P.3d 950, 961 (2006). We similarly review for an abuse of discretion a ruling that adequate foundation exists for admission of evidence. *State v. McCray*, 218 Ariz. 252, ¶ 8, 183 P.3d 503, 507 (2008).

¶11 Comstock argues, without citation to authority, that relation-back testimony to within two hours of driving is a foundational requirement to the admission of breath-test results. It is not. *See* A.R.S. § 28-1323 (setting forth foundational requirements for breath test). His argument confuses proof beyond a reasonable doubt of an essential element of an offense under § 28-1381(A)(2) with a foundational requirement for the admission of evidence under § 28-1323.

¶12 Section 28-1381(A)(2) proscribes having "an alcohol concentration of 0.08 or more within two hours of driving or being in actual physical control of [a] vehicle" when the alcohol concentration results from "alcohol consumed either before or while driving or being in actual physical control of the vehicle." If a breath test is administered more than two hours after driving or being in actual physical control, relation-back testimony to within that two-hour time frame is required to obtain a conviction. *See State ex rel. O'Neill v. Superior Court*, 187 Ariz. 440, 441, 930 P.2d 517, 518 (App. 1996) (breath testing need not be performed within two hours of driving to establish violation of predecessor statute to § 28-1381(A)(2)). The quantum of evidence necessary to obtain a conviction, and the evidence necessary to establish a proper foundation for the admission of evidence, are distinct concepts governed by different standards. Comstock does not argue the evidence here was insufficient to sustain his conviction for DUI. The trial court did not abuse its discretion in admitting the breath-test results.

¶13 Comstock next contends the trial court erred in denying his motion for a mistrial "based on the prejudicial effect the [test] results had to have had upon the jur[y]'s verdict." Declaring a mistrial is "the most dramatic remedy," reserved for those circumstances "when it appears that [it] is the only remedy to ensure justice is done." *State v. Maximo*, 170 Ariz. 94, 98-99, 821 P.2d 1379, 1383-84 (App. 1991), *citing State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983). A trial court's denial of a motion for mistrial will not be disturbed on appeal absent an abuse of discretion. *State v.*

Lee, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997); *Maximo*, 170 Ariz. at 99, 821 P.2d at 1384.

¶14 Under § 28-1381(A)(1) and (A)(2), there are two different crimes involving drinking and driving. Subsection (A)(1) proscribes driving "while under the influence of intoxicating liquor," "if the person is impaired to the slightest degree." As noted above, subsection (A)(2) proscribes having "an alcohol concentration of 0.08 or more within two hours of driving or being in actual physical control of the vehicle" when the alcohol concentration results from "alcohol consumed either before or while driving or being in actual physical control of the vehicle."

¶15 Comstock relies on *Desmond v. Superior Court*, 161 Ariz. 522, 779 P.2d 1261 (1989), as support for his assertion that "[t]his issue was long ago decided" in his favor. He characterizes *Desmond* as requiring a defendant's conviction be vacated if breath-test results are introduced without relation-back testimony. But *Desmond* did not so hold. Rather, the court in *Desmond* concluded that, for the statutory presumption of intoxication in former A.R.S. § 28-692(E)[1] to apply to § 28-692(A) offenses,[2] there must be testimony relating the breath-test results back to the time of the arrest. *Desmond*, 161

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[1]Section 28-692(E)(3), A.R.S., provided that, in proving an alleged violation of § 28-692(A), "if there was at that time 0.10 or more alcohol concentration in the defendant's blood or breath, it may be presumed that the defendant was under the influence of intoxicating liquor." 1988 Ariz. Sess. Laws, ch. 246, § 3.

[2]Subsection (A) of former § 28-692 proscribed driving or being in actual physical control of any vehicle while "under the influence of intoxicating liquor." 1988 Ariz. Sess. Laws, ch. 246, § 3. Subsection (B) proscribed driving "while there is 0.10 or more alcohol concentration in the person's blood or breath at the time of the alleged offense." *Id*.

Ariz. at 527-28, 779 P.2d at 1267-68. Accordingly, Comstock's characterization of *Desmond* is inaccurate. And, Comstock does not explain how the state's failure to relate his breath-test results to within two hours of driving prejudiced him with respect to the DUI charge under § 28-1381(A)(1).

¶16 In fact, Comstock cannot demonstrate prejudice. The jury heard testimony he had admitted not only that, "at the time of driving," he had experienced the effects of alcohol as a three on a one-to-ten scale, but also that "the alcohol that he drank ha[d] affected his driving to the slightest degree" and "that's why the incident occurred." Moreover, the trial court gave an appropriate limiting instruction explaining that the jury was to disregard any evidence about the breath tests. It instructed:

> [The charge under § 28-1381(A)(2)] alleged in the Indictment has been removed from your consideration. That means that you are not to consider any testimony or exhibits that were admitted as to that count. That testimony includes anything pertaining to the breath tests, the breath test results or the Intoxilyzer 8000.

The court further cautioned the jury to "not allow any evidence that pertain[s] to [the § 28-1381(A)(2) charge] to influence your determination of the facts or your decision on the remaining counts in any way." We presume jurors follow the instructions they are given, *State v. McCurdy*, 216 Ariz. 567, ¶ 17, 169 P.3d 931, 938 (App. 2007), and that they did so here. Thus, even if the court had erred in not adhering strictly to *Desmond*, the error was harmless beyond a reasonable doubt and did not warrant the grant of a mistrial. *See State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993) ("Error . . . is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to

or affect the verdict."). Accordingly, the court did not abuse its discretion in denying Comstock's motion.

Disposition

¶17 For the foregoing reasons, we affirm Comstock's conviction and sentence.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge