

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2014-000424-001 DT

01/22/2015

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

STATE OF ARIZONA

GARY L SHUPE

v.

MONICA RENEE JONES (001)

JEAN JACQUES CABOU

PHX CITY MUNICIPAL COURT

PHX MUNICIPAL PRESIDING JUDGE

REMAND DESK-LCA-CCC

HIGHER COURT RULING / REMAND

**Lower Court Case Number 2013–9021636.**

Defendant-Appellant Monica Renee Jones (Defendant) was convicted in Phoenix Municipal Court of manifesting an intent to commit or solicit an act of prostitution. Defendant contends as follows: (1) the trial court abused its discretion in admitting evidence of her prior conviction; (2) the trial court erred in considering her potential punishment in assessing her credibility; (3) the trial court erred in not holding a jury trial; and (4) the trial court erred in holding the city code constitutional. For the following reasons, this Court vacates the judgment of guilt.

I. FACTUAL BACKGROUND.

On September 3, 2013, the State filed a Misdemeanor Complaint charging Defendant with manifesting an intent to commit or solicit an act of prostitution in violation of Phoenix City Code (P.C.C.) § 23–52(A). Defendant requested a jury trial, which the trial court denied.

Prior to the start of testimony, Defendant’s attorney asked the trial court to preclude evidence of Defendant’s other acts. (R.T. of Apr. 11, 2014, at 40.) The trial court essentially did not rule at that time and instead said it would address the issue as the testimony was presented:

THE COURT: The defense motion in limine is denied at this time without prejudice but it can certainly (indiscernible). I don’t know what I’m going to hear. So—and because it is a bench trial, I think it’s just appropriate for me to hear of whatever of the 404-related evidence that is in dispute to make a determination at a more appropriate time.

[Defendant’s attorney]: That’s fine.

(R.T. of Apr. 11, 2014, at 40–41.)

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The undercover officer testified about what he observed. (R.T. of Apr. 11, 2014, at 45–58.) After the officer’s testimony, the State rested. (*Id.* at 89.) Defendant’s attorney then made a motion for judgment of acquittal, which the trial court denied. (*Id.* at 90–94.)

Defendant then testified. (R.T. of Apr. 11, 2014, at 97.) On cross-examination, the following exchange took place:

Q. [by the prosecutor] You’ve not been bashful or shy about your, at least previous sex work experience, correct?

A. I’m not—I’m not ashamed. I’m not shy. I talk about it very openly. And that’s the reason I was out there protesting.

Q. Okay. And so your protest of project ROSE is related to your work as a sex worker, correct?

A. No. It’s related to my activism for human rights and civil rights. That’s the reason why.

Q. And would you agree with me that you’ve previously been arrested for prostitution activities, correct?

A. Yes. My past is my past.

Q. And would you agree with me that you’ve previously been convicted for prostitution activities, correct?

A. Yes. That’s open records.

Q. And your prior acts related to prostitution and conviction from May of 2012 also relates to an oral sex allegation, correct?

A. That’s what they wrote in the papers so you can sit there and say yes.

(R.T. of Apr. 11, 2014, at 116–17.) Defendant’s attorney made no objection. (*Id.* at 117–19.) After Defendant’s testimony, the defense rested. (*Id.* at 122.)

In explaining its verdict, the trial court said the following:

Although I am very familiar with the jury instructions because I give them routinely and I do believe they are important factors to consider by the triers of fact about not elevating someone’s testimony because of their status of law enforcement officer, and I believe that to be very critical. At the same time, I also have to consider factors such as mode of intent by any witnesses testifying.

And with respect to this particular proceeding, the Defendant having acknowledged, admitted, a record of not too long ago, less than 2 years ago, of a—of prior conviction, the—a motive to avoid a mandatory 30-day sentence would be something that I can’t ignore.

When evaluating the credibility of the witnesses in front of me, I do find that the State has met its burden. I’m going to find the Defendant guilty.

(R.T. of Apr. 11, 2014, at 127–28.) The trial court then imposed sentence. (*Id.* at 130–35.) On April 17, 2014, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZ. CONST. Art. 6, § 16, and A.R.S. § 12–124(A).

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II. ISSUES.

A. *Did the trial court err in considering Defendant's potential punishment in assessing her credibility.*

Defendant contends the trial court erred in considering her potential punishment in assessing her credibility. In Arizona, trial courts routinely instruct jurors not to consider the possible punishment in determining the defendant's guilt or innocence. *See State v. Moore*, 222 Ariz. 1, 213 P.3d 150, ¶ 40 (2009). In *United States v. Gaines*, 457 F.3d 238 (2d Cir. 2006), the court discussed why the concern about being found guilty and thus punished does not necessarily give a defendant a motive to testify *falsely*:

This principle leads us to denounce any instruction, including the one at issue here, that tells a jury that a testifying defendant's interest in the outcome of the case creates a motive to testify falsely. We do so not because the instruction is necessarily inaccurate, either generally or as applied to Gaines. To the contrary, we think it clear that defendants frequently have a motive to lie. Indeed, in a perfect world, where prosecutors charged only the guilty, defendants would always have a motive to testify falsely. But an instruction that the defendant has a motive to testify falsely undermines the presumption of innocence. In this regard, there is an important distinction between a "motive to lie" instruction and an instruction that a defendant has a deep personal interest in the case. A defendant has a deep personal interest in the outcome of a trial whether or not he is guilty. Thus, the instruction, though unnecessary and potentially prejudicial, as we discuss further below, is at least always true. But a defendant does not always have a motive to testify falsely. An innocent defendant has a motive to testify truthfully. As the government candidly acknowledged at oral argument, the district court's charge that Gaines's "interest create[d] a motive for false testimony" was true only if Gaines was, in fact, guilty.

457 F.3d at 246. Because both a defendant who is truly innocent and thus should not be punished has a motive to testify truthfully that he or she did not commit the crime, and a defendant who is truly guilty and wants to avoid punishment has a motive to testify falsely that he or she did not commit the crime, the fact that a defendant testifies that he or she did not commit the crime is not a valid indicator whether the defendant is testifying truthfully or falsely. For the trial court to have concluded Defendant was not credible and thus guilty because she was facing conviction and sentence deprived Defendant of a fair trial. The conviction must therefore be reversed and remanded to a new trial.

B. *Did the trial court err in not holding a jury trial.*

Because this issue may arise at a new trial, this Court will address Defendant's contention that the trial court erred in not holding a jury trial. Defendant has presented authorities and arguments in support of her position that she was entitled to a jury trial, and the State has presented authorities and arguments in support of its position that Defendant was not entitled to a jury trial. Based on the State's authorities and arguments, this Court concludes Defendant was not entitled to a jury trial.

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C. *Did the trial court abuse its discretion in admitting evidence of Defendant's prior conviction.*

Defendant contends the trial court abused its discretion in admitting evidence of her prior conviction. When the trial court discussed Defendant's motion in limine at the start of the trial, the trial court said Defendant should object if and when the State sought to admit the evidence in question. (R.T. of Apr. 11, 2014, at 40–41.) When the State did present that evidence, Defendant's attorney never objected. (*Id.* at 116–19.) Evidence of a defendant's other crimes, wrongs, or acts is admissible if relevant for some purpose other than showing character and actions in conformity with character:

[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404(b), ARIZ. R. EVID. Because Defendant never objected and thus the trial court never was called upon to give reasons for admission of that evidence, there is no ruling of the trial court for this Court to assess. At a new trial, if Defendant objects to the admission of evidence of her prior acts, the trial court will be able to review the testimony from the first trial and thus make an informed ruling on the admissibility of that evidence.

D. *Did the trial the trial court err in holding the city code constitutional.*

Defendant contends the trial court erred in holding P.C.C. § 23–52(A) constitutional. In *State v. Savio*, 186 Ariz. 487, 924 P.2d 491 (Ct. App. 1996), the Arizona Court of Appeals held that code section was constitutional. As the court of appeals has said, “We are bound by decisions of the Arizona Supreme Court and have no authority to overrule, modify, or disregard them.” *State v. King*, 222 Ariz. 636, 218 P.3d 1093, ¶ 6 (Ct. App. 2009) (court of appeals felt constrained to follow *State v. Dumaine*, 162 Ariz. 392, 783 P.2d 1184 (1989)), *vac'd*, *State v. King*, 225 Ariz. 87, 235 P.3d 240, ¶ 12 (2010) (disapproving language in *Dumaine*); *State v. Miranda*, 198 Ariz. 426, 10 P.3d 1213, ¶¶ 8, 13 (Ct. App. 2000) (court of appeals felt constrained to follow *State v. Angle*, 149 Ariz. 478, 720 P.2d 79 (1986), rather than *State v. Cutright*, 196 Ariz. 567, 2 P.3d 657 (Ct. App. 1999), which seemingly changed the law established by the Arizona Supreme Court in *Angle*); *approved*, *State v. Miranda*, 200 Ariz. 67, 22 P.3d 506, ¶¶ 1, 5 (2001) (approving decision of court of appeals in *Miranda* and disapproving decision of court of appeals in *Cutright*). Similarly, both this Court and the trial court are bound by the decisions of the Arizona Court of Appeals and have no authority to overrule, modify, or disregard them. Thus, until such time as the Arizona Court of Appeals or the Arizona Supreme Court modifies or vacates the decision in *Savio*, this Court and the trial court are bound to follow that decision as written.

The *Amicus* Brief raises additional issues never presented to the trial court. Because the trial court was never asked to rule on those issues, there is no ruling of the trial court for this Court to assess. This Court therefore will not give an advisory opinion on an issue never raised.

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III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court erred in considering Defendant's potential punishment in assessing her credibility.

**IT IS THEREFORE ORDERED** vacating the judgment of guilt entered by the Phoenix Municipal Court.

**IT IS FURTHER ORDERED** remanding this matter to the Phoenix Municipal Court for a new trial.

**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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