DIVISION ONE
FILED: 04-20-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. TAMARA JEAN GONZALEZ, Appellant.	)	1 CA-CR 08-0701 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Mohave County

Cause No. CR-2007-1095

The Honorable Lee F. Jantzen, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Julie A. Done, Assistant Attorney General
Attorneys for Appellee

Dana P. Hlavac, Mohave County Public Defender — Kingman
by Jill L. Evans, Deputy Public Defender
Attorneys for Appellant

W E I S B E R G, Judge

¶1 Tamara Jean Gonzalez ("Defendant") appeals her convictions and sentences on two counts of aggravated driving while under the influence of alcohol (“DUI”) and one count of aggravated driving while under the extreme influence of alcohol. For reasons that follow, we affirm her convictions and sentences.

FACTS AND PROCEDURAL HISTORY

¶2 Defendant was charged with one count of aggravated DUI for driving while impaired by alcohol while her driver's license was suspended; one count of aggravated extreme DUI for having a breath alcohol concentration of .15 percent or more while her driver's license was suspended; and one count of aggravated DUI for driving while impaired by alcohol and while required to equip her vehicle with an ignition interlock device. The facts presented at trial showed the following.

¶3 A Mohave County Deputy Sheriff stopped Defendant at about 3 a.m. on June 30, 2007, after observing her turning outside of the turn lane and traveling south in the northbound lane. When he approached Defendant's vehicle, he smelled a heavy odor of alcohol and noticed that her eyes were extremely red and watery. Defendant told the deputy she did not have her driver’s license. When Defendant exited the vehicle at his request, she swayed slightly from side-to-side. When he asked her if she had been drinking, she responded “not a lot," but

told him she had left a bar at about 2 a.m. The deputy observed that her speech was slightly slurred.

¶4 Defendant exhibited four of six cues of alcohol level over the legal limit on the horizontal gaze nystagmus test and was unable to properly complete the finger-to-nose field sobriety test. One breathalyzer test showed a blood alcohol concentration of .220, and a second test showed a blood alcohol concentration of .236.

¶5 At trial, the parties stipulated to the following facts:

> One, on June 30, 2007, the Defendant Tamara Gonzalez' license was suspended and she knew it was suspended.
>
> Two, on June 30, 2007 Defendant Tamara Gonzalez was required pursuant to Arizona Revised Statute Section 28-3319 by the Department, assuming that's the Department of Motor Vehicles, to equip any motor vehicle she operated with a certified ignition interlock device and she knew of this requirement.

Defendant testified that she did not drink any alcohol at the bar that night, but said she had been drinking alcohol earlier in the day. She testified that she suffers from a blood clotting disease that can cause shortness of breath and slurred speech.

¶6 On cross-examination, contrary to the stipulation, Defendant testified that at the time she was stopped, she did

not know that her driver's license was suspended, or that she was required to equip her vehicle with an ignition interlock device. She explained that she had reinstated her license before this incident and claimed she never received the letter sent by the Department of Motor Vehicles to her address of record notifying her that she was required to equip her vehicle with an ignition interlock device. Defendant's attorney argued, however, that Defendant did not dispute that her license was suspended and that she was required to equip her vehicle with an ignition interlock device; rather, the sole issue for the jury to decide was whether Defendant was guilty of DUI, that is, driving while she was impaired and/or driving with a blood alcohol concentration in excess of .15 percent.

¶7 The jury convicted Defendant of the charged offenses. The judge found that the absence of prior felonies and injuries were mitigating circumstances, and sentenced Defendant to mitigated, concurrent, terms of one and one-half years in prison on each offense. Defendant timely appealed.

DISCUSSION

¶8 Defendant raises four issues for the first time on appeal. Because Defendant failed to raise these issues below, we review for fundamental error only. *State v. Henderson,* 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Under this standard, Defendant bears the burden of establishing that the

trial court erred, that the error was fundamental, and that the error caused her prejudice. *Id.* at 568, ¶ 22, 115 P.3d at 608. Error is fundamental only when it reaches the foundation of defendant's case, takes from Defendant a right essential to her defense, and is error of such magnitude that she could not possibly have received a fair trial. *Id.* at 567, ¶ 19, 115 P.3d at 607.

Stipulation to Elements of the Offense

¶9 Defendant argues that the stipulation that she knew her driver's license was suspended and that she was required to install an ignition interlock device was tantamount to a guilty plea to aggravated DUI. She claims that the court was required to conduct a *Boykin*[1] colloquy to ensure that she understood the consequences of waiving her trial rights.

¶10 As she concedes in her reply brief, our Supreme Court recently vacated the portion of this court's opinion in *State v. Allen*, 220 Ariz. 430, 207 P.3d 638 (App. 2008), on which she relies for her argument. *See State v. Allen,* 223 Ariz. 125, 126, ¶ 1, 220 P.3d 245, 246 (2009). The Supreme Court held that due process does not require a full *Boykin* colloquy in the absence of a guilty plea, and specifically does not require it when the defendant stipulates to facts comprising elements of the offense. *See id.* at 127-28, ¶ 14, 220 P.3d at 247-48. Like

[1]*Boykin v. Alabama,* 395 U.S. 238 (1969).

the appellant in *Allen*, Defendant stipulated only to certain facts comprising the elements of the offense, and disputed facts comprising another key element, that is, that she was driving while under the influence of alcohol. This case is controlled by *Allen*. *See id.*[2] The judge did not err in failing to secure from defendant a knowing, intelligent, and voluntary waiver before accepting the stipulation.

Failure to Instruct Jury on *Mens Rea* of Knowledge

¶11 Defendant also argues that the trial court committed reversible error by failing to instruct the jury that the crime of aggravated DUI under Arizona Revised Statutes ("A.R.S.") section 28-1383(A)(4)(b)(Supp. 2009) requires proof that she knew she was required to equip any vehicle she operated with a certified ignition interlock device. We review the legal adequacy of an instruction *de novo*. *State v. Martinez*, 218 Ariz. 421, 432, ¶ 49, 189 P.3d 348, 359 (2008). We will not reverse "unless we can reasonably find that the instructions, when taken as a whole, would mislead the jurors." *State v. Sucharew*, 205 Ariz. 16, 26, ¶ 33, 66 P.3d 59, 69 (App. 2003) (citation omitted).

[2]Defendant's claim that "[b]ased on her testimony, she was obviously not in agreement with the stipulation" is based on sheer speculation. In any event, "the power to decide questions of trial strategy and tactics rests with counsel." *State v. Lee*, 142 Ariz. 210, 215, 689 P.2d 153, 158 (1984). Such decisions are binding on the criminal defendant. *See State v. Levato*, 186 Ariz. 441, 444, 924 P.2d 445, 448(1996).

¶12 Here, the judge instructed the jury with respect to this offense that proof was required "of the following three things: 1) The defendant drove a vehicle; and 2) The defendant was under the influence of intoxicating liquor; and 3) The defendant was required to equip any motor vehicle the person operates with a certified ignition interlock device." Section 28-1383(A)(4)(b) provides that a person is guilty of aggravated DUI if the person commits DUI "[w]hile the person is ordered by the court or required pursuant to 28-3319 by the department to equip any motor vehicle the person operates with a certified ignition interlock device . . . ." *See* A.R.S. § 28-1383(A)(4)(b).

¶13 Although the statute does not expressly require any culpable mental state, we construe criminal offenses, including those defined in Title 28, to include a *mens rea* unless there is a clear legislative intent to the contrary. *See State v. Williams*, 144 Ariz. 487, 488, 698 P.2d 732, 733 (1985); A.R.S. § 13-202(B)(2010). It is well settled that the offense of aggravated DUI based on driving on a suspended license pursuant to A.R.S. §28-1383(A)(1) requires that Defendant knew or should have known that her license was suspended. *See Williams*, 144 Ariz. at 489, 698 P.2d at 734 (interpreting former A.R.S. § 28-692.02). On this record, however, we need not decide whether A.R.S. § 28-1383(A)(4)(b) requires that Defendant knew or should

have known that she was required to equip her vehicle with an ignition interlock device.

¶14 Defendant stipulated that she knew she was required to equip the vehicle she was driving with an ignition interlock device. Although she also testified that she learned of this requirement only after this incident, she did not defend on this basis. Rather, she argued at trial that the only issue for the jury to decide was whether she was impaired by alcohol or had a blood alcohol concentration in excess of the legal limits at the time she was stopped. Accordingly, Defendant has failed to meet her burden to show that any alleged error in the instruction went to the foundation of her case or took away from her a right essential to her defense. There was no fundamental error. *See State v. Finch,* 202 Ariz. 410, 415, ¶ 20, 46 P.3d 421, 426 (2002)(court's failure to instruct on proximate cause was not fundamental error because causation was not at issue); *State v. Fullem*, 185 Ariz. 134, 139, 912P.2d 1363, 1368 (App. 1995) (failure to instruct the jury on intent not fundamental error when there is no issue as to that element of offense).

Instruction on Rebuttable Presumption

¶15 Defendant next argues that the trial judge deprived her of due process and a fair trial by improperly instructing the jury on the rebuttable presumption of notice of suspension that arises from mailing. She argues that the final sentence of

the instruction improperly shifted the burden of proof of knowledge of the suspension to her by requiring her to disprove receipt of notice if the jury was convinced the notice had been mailed.

¶16 To prove Defendant guilty of aggravated DUI under A.R.S. § 28-1383(A)(1), the State was required to prove that Defendant was driving under the influence of alcohol on a suspended license, and that she "knew or should have known" that her license was suspended. *See Williams*, 144 Ariz. at 489, 698 P.2d at 734. A rebuttable presumption of notice, and, accordingly, knowledge, arises from mailing of the notice. *See* A.R.S. § 28-3318(E) (2004) (providing that compliance with mailing provisions constitutes notice, and state is not required to prove actual receipt or actual knowledge in prosecution for aggravated DUI); A.R.S. § 28-3318(C)(providing that the notice shall be mailed to the address of record); *see State v. Cifelli*, 214 Ariz. 524, 527, ¶¶ 12-13, 155 P.3d 363, 366 (App. 2007). Once the State proves the notice was mailed to the address of record, the burden shifts to Defendant to rebut the presumption by showing that she did not receive the notice. *Id. at* ¶ 13.

¶17 Defendant does not challenge the judge's instruction that the jury may presume knowledge of the suspension if written notice of the suspension was mailed to her, or to the instruction that Defendant "may rebut this presumption with

evidence that she did not receive the notice or have actual knowledge of the suspension or revocation." Defendant challenges only the last sentence in this instruction, which was as follows:

> If you are convinced beyond a reasonable doubt that MVD properly mailed notice of the suspension, then the defendant has the burden of proving that it is more likely true than not true that the defendant did not receive the notice or have actual knowledge of the suspension.

We review the legal adequacy of an instruction *de novo*. *Martinez*, 218 Ariz. at 432, ¶ 49, 189 P.3d at 359. Only when the instructions taken as a whole may have misled the jury, will we find reversible error. *Sucharew*, 205 Ariz. at 26, ¶ 33, 66 P.3d at 69. "Closing arguments of counsel may be taken into account when assessing the adequacy of jury instructions." *State v. Bruggeman,* 161 Ariz. 508, 510, 779 P.2d 823, 825 (App. 1989). There was no fundamental error.

¶18 The instruction properly informed the jury that if it was convinced that the Department of Motor Vehicles had properly mailed the notice of the suspension, Defendant might rebut the presumption of receipt by showing that she did not receive it. *See Cifelli*, 214 Ariz. at 527, ¶ 13, 155 P.3d at 366. Arguably, the third sentence of this instruction erroneously suggested to the jury that once the State proved the notice was mailed, the burden of proving the element of knowledge, shifted to

Defendant, who was required to prove by a preponderance of the evidence that she had not received notice. *Lee v. State*, 218 Ariz. 235, 237, ¶ 8, 182 P.3d 1169, 1171 (2008) (explaining that the "mail delivery rule" creates a presumption of delivery that "disappears" if the addressee denies receipt but the fact of mailing still has evidentiary force); *cf.* A.R.S. § 13-205(A) (2010) (imposing burden on defendant to prove affirmative defenses by preponderance of evidence).

¶19 The judge, however, properly advised the jury that it was "free to accept or reject" the presumption, and that the State had the burden to prove each element of the offense, including knowledge of the suspension. In closing argument, defense counsel emphasized the State's burden of proving each element of each offense beyond a reasonable doubt. In light of all of the instructions as well as counsel's closing argument, we are not convinced that the third sentence of the presumption instruction misled the jury. Moreover, because Defendant did not defend on the basis that she did not know her license was suspended, any error in this instruction was not fundamental error.

Failure to Consider Mitigating Circumstance

¶20 Defendant also argues that the trial court erred in sentencing her to prison "without considering the mitigating evidence that Defendant suffered from an extremely severe

medical condition." Defendant failed to ask the court to consider her illness as a mitigating factor at sentencing, and did not object to the trial court's failure to do so.

¶21 A trial court has broad discretion to impose a sentence within statutory limits, and we will find an abuse of such discretion "only if the court acted arbitrarily or capriciously or failed to adequately investigate the facts relevant to sentencing." *State v. Cazares*, 205 Ariz. 425, 427, ¶ 6, 72 P.3d 355, 357 (App. 2003). A sentencing court is not required to find that mitigating circumstances exist simply because evidence has been proffered in mitigation; it is required only to "consider" such evidence. *Id.* ¶ 8. The trial court, however, need only consider evidence that is offered in mitigation. *See State v. Long*, 207 Ariz. 140, 148, ¶ 41, 83 P.3d 618, 626 (App. 2004). Here, Defendant never presented evidence of her medical condition at sentencing or argued that it should be considered as a mitigating circumstance. Further, physical illness is not one of the enumerated mitigating circumstances that a trial court is obligated to consider at sentencing. *See* A.R.S. § 13-701(E) (2010).

¶22 Moreover, the trial court was aware of Defendant's claim that she had a terminal blood-clotting disorder based on her trial testimony, her statements to the court when it released her after the verdict, and her statements in the

presentence report. At the first sentencing hearing, at which Defendant did not appear allegedly due to her illness, the judge acknowledged Defendant's medical condition. The judge noted, however, that Defendant's absence from this sentencing hearing, ostensibly because of unconfirmed plans to check herself into a hospital, may have turned "the most minimal prison sentence into a longer one by not cooperating with the Court." The judge concluded that her "absolute disdain" for the court, as evidenced by her failure to appear at the first sentencing hearing, made her a poor candidate for probation. The judge did not err in failing to find Defendant's medical condition as a mitigating factor.

CONCLUSION

¶23 For the foregoing reasons, we affirm Defendant's convictions and sentences.

/s/_____
SHELDON H. WEISBERG, Presiding Judge

CONCURRING:

/s/_____
PHILIP HALL, Judge

/s/_____
JOHN C. GEMMILL, Judge