IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 04-01-2010
PHILIP G. URRY, CLERK
BY: GH

STATE OF ARIZONA,	)	1 CA-CR 09-0521
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
MOLLY JEAN TALAS,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Coconino County

Cause No. CR 2008-0994

The Honorable Charles D. Adams, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Suzanne M. Nicholls, Assistant Attorney General
Attorneys for Appellee

H. Allen Gerhardt, Coconino County Public Defender — Flagstaff
Attorney for Appellant

W I N T H R O P, Judge

¶1 Molly Jean Talas ("Appellant") appeals her conviction for aggravated driving while impaired to the slightest degree while her

driver's license was suspended or revoked, a class four felony in violation of Arizona Revised Statutes ("A.R.S.") sections 28-1381(A)(1) (Supp. 2009)[1] and 28-1383(A)(1) (Supp. 2009). She argues that the principles of double jeopardy and collateral estoppel require that her conviction be re-designated a misdemeanor. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 The State charged Appellant by information with two felony counts of aggravated DUI: Count I, aggravated driving while impaired to the slightest degree while her driver's license was suspended or revoked; and Count II, aggravated driving while under the influence of intoxicating liquor with a blood alcohol content ("BAC") of 0.08 or higher while her driver's license was suspended or revoked. *See* A.R.S. §§ 28-1381(A)(1)-(2), -1383(A)(1).

¶3 The evidence presented at trial indicated as follows[2]: On August 23, 2007, a Flagstaff police officer initiated a traffic stop of a vehicle driven by Appellant after observing the vehicle make an improper left turn. As the officer approached, he smelled a strong odor of alcohol emanating from inside the vehicle, which

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[1] We cite the current version of the applicable statutes because no revisions material to this decision have since occurred.

[2] We view the facts in the light most favorable to sustaining the conviction, and we resolve all reasonable inferences against Appellant. *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998).

was occupied by Appellant and two male passengers. Appellant admitted she did not have a driver's license, but she did produce an Arizona identification card.

¶4 While speaking with Appellant, the officer witnessed the male passenger in the rear of the vehicle drink from an open beer container. The officer arrested that male passenger. Meanwhile, another police officer who had responded to the scene requested that Appellant exit the vehicle. When questioned, Appellant initially denied drinking alcohol, but she ultimately admitted having consumed one beer before driving; she also ranked herself as a 1.5 on a scale of 1 to 10, with 1 being completely sober.

¶5 Appellant consented to performing several field sobriety tests, giving numerous cues of impairment during each test. She was placed under arrest and transported to jail, where she underwent breath testing. Her first breath test indicated a BAC of .108 and the second test, administered approximately six minutes later, indicated a BAC of .101. The State also presented evidence at trial that, at the time of Appellant's traffic stop, MVD records indicated her driving privileges were suspended and she had twice been sent notice regarding her suspension.

¶6 After presentation of the evidence, the trial court instructed the jury, including as to all elements of each charged crime and the lesser-included offenses, and provided the jury with eight forms of verdict: "guilty" and "not guilty" forms for each

of the two charged aggravated DUIs, and "guilty" and "not guilty" forms for each of the charged crimes' lesser-included offenses. While the jury was deliberating, the foreperson sent the court a question that stated as follows:

> We cannot agree on whether to find the defendant guilty or not guilty of aggravated driving with an alcohol concentration of 0.08 or more within two hours of driving. That being the case, do I sign the paper for guilty of the lesser included crime of driving under the influence of intoxicating liquor with a blood alcohol concentration of 0.08 or higher? We agree she knew or should have known her license was revoked.

¶7 After consulting with counsel, each of whom stated she had no objection to the answer, the court advised the jury as follows: "The foreperson can sign the guilty verdict form only if the state has proven beyond a reasonable doubt each element of a lesser included instruction. All eight of you must agree on the verdict."

¶8 Approximately forty-five minutes later, the jury returned its verdicts. After the forms of verdict were turned over to the court, but before the verdicts were announced, the trial court discussed the forms with counsel in chambers, advising counsel as follows:

> THE COURT: Okay, we are in chambers, counsel and the defendant are present, and I want to share these verdict forms with counsel.
>
> The jury did reach a verdict of guilty on the aggravated driving while impaired to the slightest degree while driver's license was suspended or revoked.

> They returned a not guilty verdict, not guilty of the lesser included crime of driving under the influence of intoxicating liquor with a blood alcohol concentration of 0.08 or higher.
>
> There is no verdict indicated otherwise on the remaining six forms, and I wanted to share that with you before we have those read.
>
> So what I think they –- it would appear to me they found her [not] guilty of the lesser included, they looked at the aggravated DUI .08, and they must have decided they couldn't decide, so they then went to the lesser included DUI .08 or higher and found her not guilty. That's the way it looks to me, but let me share those with you.

The record reflects that defense counsel and Appellant then had a conference off the record, followed by this brief discussion on the record:

> [DEFENSE COUNSEL]: Thank you, Your Honor.
>
> THE COURT: Seems in order to me; does it to you?
>
> [DEFENSE COUNSEL]: It does.
>
> [THE PROSECUTOR]: Yeah.
>
> THE COURT: Okay. I had so many forms, eight of them, only two of which they wrote on, so I wanted to check with counsel.
>
> Let's go back, and I'll have the clerk read the verdicts.

¶9 The jury found Appellant guilty of Count I as charged but found her not guilty of Count II's lesser-included offense of driving while under the influence of intoxicating liquor with a BAC of 0.08 or higher. Both counsel waived polling the jury.

¶10 The trial court suspended sentencing and placed Appellant on standard probation for four years, including as a term of probation that Appellant serve four months' incarceration in the Arizona Department of Corrections, with credit for thirty-six days of pre-sentence incarceration.

¶11 We have jurisdiction over Appellant's timely appeal. *See* Ariz. Const. art. 6, § 9; A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), -4033(A)(1) (2010).

ANALYSIS

¶12 Citing *State v. Webb*, 186 Ariz. 560, 925 P.2d 701 (App. 1996), and framing her argument as one relying on the principles of double jeopardy and collateral estoppel,[3] Appellant argues that her felony conviction for aggravated DUI should be re-designated a misdemeanor. She maintains that the jury's "not guilty" verdict on Count II's lesser-included offense demonstrates that the jury acquitted her of driving on a suspended license, an element required for a finding of guilt on the aggravated portion of Count

[3] The constitutional prohibition against double jeopardy protects a defendant from a second prosecution for the same offense after conviction or acquittal and from multiple punishments for the same offense. *State v. Bartolini*, 214 Ariz. 561, 563, ¶ 7, 155 P.3d 1085, 1087 (App. 2007); *State v. Rodriguez*, 198 Ariz. 139, 141, ¶ 4, 7 P.3d 148, 150 (App. 2000). The prohibition against double jeopardy also incorporates the doctrine of collateral estoppel, which prohibits the State from re-litigating an issue of ultimate fact that has been determined in a defendant's favor by a partial verdict or valid and final judgment. *See Bartolini*, 214 Ariz. at 563, ¶¶ 7-8, 155 P.3d at 1087; *Rodriguez*, 198 Ariz. at 141, ¶ 5, 7 P.3d at 150.

I. She concedes that her prosecution for the lesser-included (DUI) portion of the charge in Count I is, however, still proper. We find her reasoning without merit or logic.

¶13 We review *de novo* whether the principles of double jeopardy or collateral estoppel apply in a particular situation. *See Rodriguez*, 198 Ariz. at 141, ¶ 3, 7 P.3d at 150 (App. 2000). Because Appellant raised no objection in the trial court, however, she has waived her argument, *see* Ariz. R. Crim. P. 21.3(c), including any constitutional objection, *see State v. Tison*, 129 Ariz. 526, 535, 633 P.2d 335, 344 (1981), absent fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, 567-68, ¶¶ 19-26, 115 P.3d 601, 607-08 (2005). A defendant bears the burden to demonstrate prejudice and may not rely on mere speculation to carry that burden. *See State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006).

¶14 Additionally, Appellant arguably invited the alleged error by agreeing to the court's instruction in response to the jury question, agreeing that no problems existed with the forms of verdict and the fact that the jury had signed only two forms, and expressly declining to poll the jury in an effort to discover any potential error. "By the rule of invited error, one who deliberately leads the court to take certain action may not upon appeal assign that action as error." *Schlecht v. Schiel*, 76 Ariz. 214, 220, 262 P.2d 252, 256 (1953); *accord State v. Armstrong*, 208

Ariz. 345, 357 n.7, ¶ 59, 93 P.3d 1061, 1073 n.7 (2004) (stating that the invited error doctrine exists to prevent a party from injecting error into the record and later profiting from that error on appeal).

¶15 Further, after reviewing the record, we find no error, much less fundamental, prejudicial error. Appellant's assertion that principles of double jeopardy or collateral estoppel apply to her case rests solely on a misunderstanding of the elements of the offenses to which the jury returned judgments. The jury found Appellant guilty of Count I, aggravated driving while impaired to the slightest degree while her driver's license was suspended or revoked, but not guilty of Count II's lesser-included offense of driving while under the influence of intoxicating liquor with a BAC of 0.08 or higher. In finding Appellant guilty of Count I, the jury necessarily found the State had proved five elements beyond a reasonable doubt: (1) Appellant drove a vehicle in this state, (2) she was under the influence of intoxicating liquor at the time of driving, (3) her ability to drive a vehicle was impaired to the slightest degree by reason of being under the influence of intoxicating liquor, (4) her license to drive was suspended or revoked at the time she was driving, and (5) she knew or should have known that her license to drive was suspended or revoked at the time of driving. *See* A.R.S. §§ 28-1381(A)(1), -1383(A)(1).

¶16 At the same time, the jury did not return a guilty verdict on Count II as charged, aggravated driving while under the influence of intoxicating liquor with a BAC of 0.08 or higher while her driver's license was suspended or revoked.[4] Therefore, as instructed by the court,[5] the jury must have either determined that one or more of Count II's elements were not met or disagreed whether one or more elements were met. Elements 1, 4, and 5 of Count I are the same as elements 1, 4, and 5 of Count II; elements 2 and 3 differ between the counts. *Compare* A.R.S. §§ 28-1381(A)(1) *and* 28-1383(A)(1) *with* A.R.S. §§ 28-1381(A)(2) *and* 28-1383(A)(1). Accordingly, because the jury found beyond a reasonable doubt that elements 1, 4, and 5 were met in Count I, the jury must have determined that one or both of elements 2 and 3 were not met (or at least disagreed whether one or both elements were met) in Count II.

¶17 Assuming the jury continued to follow the court's instructions, the jury next examined whether Appellant was guilty

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[4] A guilty verdict on Count II required proof of the following elements: (1) Appellant drove a vehicle in this state, (2) she had a BAC of 0.08 or more within two hours of driving the vehicle, (3) the alcohol concentration resulted from alcohol consumed either before or while driving the vehicle, (4) her license to drive was suspended or revoked at the time she was driving, and (5) she knew or should have known that her license to drive was suspended or revoked at the time of driving. *See* A.R.S. §§ 28-1381(A)(2), -1383(A)(1).

[5] We generally presume the jury followed the court's instructions. *See State v. Ramirez*, 178 Ariz. 116, 127, 871 P.2d 237, 248 (1994).

of Count II's lesser-included offense of driving while under the influence of intoxicating liquor with a BAC of 0.08 or higher. Because elements 2 and 3 of the greater offense were also part of the lesser-included offense, however, the jury, if it was to be consistent, was compelled to find Appellant not guilty of the lesser-included offense as well, which is exactly what it did. *See* A.R.S. § 28-1381(A)(2) (indicating the lesser-included offense consisted of elements 1, 2, and 3 of the greater offense). Nothing in A.R.S. § 28-1381(A)(2), the lesser-included offense of Count II, called for the jury to determine whether a suspended or revoked license was involved. Consequently, Appellant's contention that the jury "acquitted [her] of the 'suspended license' part of her charges when the jury foreperson signed the 'not guilty' verdict for Count 2" is incorrect. The jury's verdicts were not predicated on inconsistent findings,[6] and we find no error in those verdicts.

¶18 Moreover, even if the verdicts *had* been inconsistent, the principles of double jeopardy and collateral estoppel still would not apply. Appellant was charged with two counts of aggravated DUI pursuant to different statutory subsections, and was tried for both counts together at one trial. Although a violation of subsections (1) and (2) of A.R.S. § 28-1381(A) can arise out of the same conduct, those subsections proscribe separate and distinct offenses

[6] Furthermore, inconsistent verdicts on different counts are not impermissible. *See Webb*, 186 Ariz. at 563, 925 P.2d at 704.

and do not violate the prohibition against double jeopardy. *See Anderjeski v. City Court of Mesa*, 135 Ariz. 549, 550, 663 P.2d 233, 234 (1983). The jury rationally could have found that Appellant was intoxicated to a level that impaired her driving while also finding that her BAC level was not 0.08 or more. Further, § 28-1383(A)(1), which increases the charge from a DUI to an aggravated DUI, merely enhances punishment and does not violate the prohibition against double jeopardy. *See State v. Zaragoza*, 21 Ariz. App. 596, 597-98, 522 P.2d 552, 553-54 (1974). Because Appellant was not tried twice for the same offense or given multiple punishments for the same offense, the principles of double jeopardy and collateral estoppel do not apply. *See Bartolini*, 214 Ariz. at 563, ¶¶ 7-8, 155 P.3d at 1087; *Rodriguez*, 198 Ariz. at 141, ¶ 5, 7 P.3d at 150.

¶19 This court's analysis in *Webb* also does not advance Appellant's argument. In *Webb*, this court held that requiring a jury to further deliberate after it had acquitted the defendant of the greater offense but found him guilty of both lesser-included offenses that made up the greater offense violated the defendant's double jeopardy rights because resubmitting the charge of the greater offense could work to the defendant's detriment. *See* 186 Ariz. at 563, 925 P.2d at 704. In this case, the trial court never instructed the jury to reconsider after the jury reached its

verdicts, and Appellant was not convicted of an offense that had been resubmitted to the jury.

CONCLUSION

¶20 The principles of double jeopardy and collateral estoppel do not apply to Appellant's case and *Webb* is inapposite. Accordingly, we affirm Appellant's felony conviction and placement on probation for aggravated driving while impaired to the slightest degree while her driver's license was suspended or revoked.

_____/S/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/S/_____
MAURICE PORTLEY, Presiding Judge

_____/S/_____
MARGARET H. DOWNIE, Judge