DIVISION ONE
FILED: 04/24/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 10-0868
	)	DEPARTMENT B
v.	)	**MEMORANDUM DECISION**
PETER ROY BIGGS, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-119711-001 DT

The Honorable Lisa Daniel Flores, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Division
Katia Méhu, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Louise Stark, Deputy Public Defender
Attorneys for Appellant

J O H N S E N, Judge

¶1 Defendant Peter Roy Biggs appeals from his convictions and sentences on two counts of aggravated driving under the influence ("DUI"). He argues the superior court committed

fundamental error by conducting an incomplete colloquy pursuant to Arizona Rule of Criminal Procedure 17 before accepting a stipulation by Biggs and allowing it in evidence. He also contends the court erred by failing to grant a mistrial because the prosecutor improperly commented on his decision not to testify. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Police pulled Biggs over early one morning because they saw him driving erratically.[1] He admitted he had drunk "too much alcohol and shouldn't [have] been driving." A blood test revealed his blood alcohol concentration was 0.20 approximately one hour after he was stopped. Biggs had two prior DUI convictions stemming from incidents that occurred on August 15, 2002 and September 6, 2003.

¶3 The State charged Biggs with two counts of aggravated DUI in violation of Arizona Revised Statutes ("A.R.S.") sections 28-1381(A)(1), (2), -1383(A)(2) (West 2012).[2] After a jury found him guilty, the court imposed concurrent three-year terms of probation with a condition of four months' incarceration.

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[1] We view the evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences against Biggs. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

[2] Absent material revision after the date of an alleged offense, we cite a statute's current version.

¶4 We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033(A)(1) (West 2012).

DISCUSSION

A. Biggs's Stipulation to Prior Convictions.

¶5 Midway through the State's case at trial, the parties informed the court that Biggs would stipulate to two prior DUI convictions. As Biggs concedes on appeal, his decision to enter into the stipulation was strategic. He chose to stipulate to the two prior DUI convictions so that, if the jury convicted him of the charged offense, he would be eligible for a term of incarceration of only four months pursuant to A.R.S. § 28-1383(D)(2). By contrast, if the jury found he had only one prior DUI conviction and found him guilty in the latest incident, he would be subject to serve 180 days in jail pursuant to A.R.S. § 28-1382(E)(1). As his counsel commented in a settlement conference prior to trial, if the jury found only one prior conviction "you can actually lose for winning because the mandatory minimum second offense is six months rather than four months."

¶6 Before accepting the stipulation, the superior court engaged in a colloquy with Biggs, after which the court found he had knowingly, intelligently and voluntarily waived his right to have the State prove the two prior convictions. Having failed

to object to the court's finding at the time, on appeal Biggs argues the court committed fundamental error by failing under Arizona Rule of Criminal Procedure 17 to inform him that the minimum four-month term of incarceration imposed pursuant to § 28-1383 would be served in prison, not in jail. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). But during the settlement conference, the superior court made clear to Biggs that the mandatory sentence imposed under § 28-1383 is "in the Department of [C]orrections." As the court expressly warned Biggs, "There is no way to avoid that four months in DOC."

¶7 Biggs also argues the court erred by failing to warn him that one convicted under § 28-1383 is subject to incarceration for up to three years. But the court sentenced Biggs only to the four-month term that he was hoping to receive when he entered into the stipulation. *See generally State v. Soliz*, 223 Ariz. 116, 119, ¶ 12, 219 P.3d 1045, 1048 (2009) (no error when harm threatened by asserted error did not materialize). Biggs also argues that the court erred by failing to inform him that the 180 days' incarceration that might have been imposed upon the finding of a single prior DUI pursuant to § 28-1382 would be served in jail, where he might enjoy work release or work furlough. But Rule 17 does not require the court to inform a defendant of collateral consequences such as

these before accepting an admission or stipulation to a prior conviction. *See State v. Pac*, 165 Ariz. 294, 295-96, 798 P.2d 1303, 1304-05 (1990) (failure to inform defendant he would not be eligible for early release credit); *State v. Lee*, 160 Ariz. 489, 491-94, 774 P.2d 228, 230-33 (App. 1989) (same).

¶8 We need not decide whether, as Biggs argues, Rule 17 requires a colloquy when, as here, a defendant stipulates to a prior conviction as an element of a charged offense. As demonstrated above, even assuming Rule 17 applied, Biggs cannot show he suffered any prejudice by the error he argues occurred.

B. Alleged Prosecutorial Misconduct.

¶9 During cross-examination, the police officer who stopped Biggs testified he noticed that Biggs's speech was slurred. Defense counsel then elicited that the officer had not met Biggs before the traffic stop and therefore "can't tell us how he speaks without any alcohol in him." During closing arguments, the prosecutor said:

> And what else do we have? Signs and symptoms that he was drinking alcohol. We have an odor of alcohol, bloodshot, watery eyes. We have slurred [speech], poor balance. . . .
>
> Now, defense counsel may get up here and say, well, a lot of people have that. Slurred [speech]. *We haven't heard the defendant talk.* Fumbling with papers, yeah, but often times, the simplest answer is the right answer.

(Emphasis added.)

¶10 Biggs did not object to the prosecutor's statement until after closing arguments ended and the jury was excused for the day, when he moved for a mistrial on this basis. The court denied the mistrial motion, but at Biggs's request, the court repeated to the jury the standard instruction regarding a defendant's right not to testify.[3]

¶11 On appeal, Biggs argues the emphasized language amounts to an improper reference to his decision to exercise his right not to testify. *See State v. Martinez*, 130 Ariz. 80, 82, 634 P.2d 7, 9 (App. 1981) (a prosecutor's comment on a defendant's failure to present evidence "is objectionable if such reference is calculated or intended to direct the jury's attention to the fact that a defendant has chosen to exercise his fifth amendment privilege").

¶12 Because the superior court is in the best position to determine the effect of a prosecutor's comments on the jury, we

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[3] The court instructed:

> The State must prove guilt beyond a reasonable doubt based on the evidence. You must not conclude that the Defendant is likely to be guilty because the Defendant did not testify. The Defendant is not required to testify. The decision on whether or not to testify is left to the Defendant, acting with the advice of an attorney. You must not let this choice affect your deliberations in any way.

will not disturb its ruling absent a clear abuse of discretion. *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997); *State v. Blackman*, 201 Ariz. 527, 545, ¶ 76, 38 P.3d 1192, 1210 (App. 2002). When considering a motion for a mistrial based on alleged prosecutorial misconduct, a court should first consider "whether the prosecutor's statements called jurors' attention to matters the jury was not justified in considering," then consider the effect those statements had on the jury. *Lee*, 189 Ariz. at 616, 944 P.2d at 1230.

¶13 The superior court in this case characterized the prosecutor's remark as "a poor choice of words." Nevertheless, it declined to grant a mistrial because it found the comment "was not something [the prosecutor] stressed. . . . It wasn't like a key point of his argument."

¶14 The record supports the court's determination that the prosecutor's argument did not focus on Biggs's failure to testify. Further, given the overwhelming evidence satisfying the elements of the charges, we cannot conclude that the brief comment affected the verdicts or otherwise was "so egregious" as to deprive Biggs of a fair trial. *See State v. Hernandez*, 170 Ariz. 301, 307, 823 P.2d 1309, 1315 (App. 1991); *see also Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) (to prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct "so infected the

trial with unfairness as to make the resulting conviction a denial of due process").

¶15 Finally, the court's curative and other instructions dispelled any prejudice resulting from the comment, and we presume jurors follow a court's instructions. *See State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006).

CONCLUSION

¶16 For the reasons stated above, we affirm Biggs's convictions and sentences.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
DONN KESSLER, Judge

/s/
MICHAEL J. BROWN, Judge