FILED BY CLERK
NOV -1 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ROLANDO CORTEZ SIERRA, Appellant.	)	2 CA-CR 2010-0313 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR200901280

Honorable Janna L. Vanderpool, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and David A. Sullivan — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

K E L L Y, Judge.

¶1 Appellant Rolando Sierra appeals from his convictions for aggravated driving under the influence (DUI) and aggravated DUI with an alcohol concentration ("AC") of .08 or greater. He maintains he was deprived of his "right to a fair and

impartial jury" and the trial court incorrectly instructed the jury. Finding no error we affirm.

¶2 In December 2008, Sierra, who had a flushed face, an odor of intoxicants, watery and bloodshot eyes, and spoke with slurred speech, was found attempting to start a car that was stopped in a roadway. He failed three out of three field sobriety tests given at the scene, and a breath test showed his AC was .191. Sierra admitted his license to drive had been "cancelled, revoked, refused or suspended" at that time. The state charged him with driving or being in actual physical control of a vehicle while under the influence of an intoxicant and with having had an AC of .08 or more within two hours of driving or having been in actual physical control of a motor vehicle, both while his license "to drive was suspended, canceled, revoked, or refused." The trial court suspended the imposition of sentence and placed Sierra on concurrent, five-year terms of probation. This appeal followed.

¶3 Sierra first maintains the trial court denied him "his constitutional right to a fair and impartial jury" by "virtue of [its] conduct of the voir dire process." "A trial court's decision concerning voir dire will not be overturned absent a clear abuse of the judge's discretion." *State v. Davolt*, 207 Ariz. 191, ¶ 52, 84 P.3d 456, 472 (2004); *see also State v. Moore*, 222 Ariz. 1, ¶ 37, 213 P.3d 150, 159 (2009) (decision to strike potential juror for cause reviewed for abuse of discretion).

¶4 During voir dire, the trial court excused several venire members who stated, in response to general questioning about DUI cases, that they would be unable to decide the case fairly. Defense counsel did not object to their being stricken and did not request

the opportunity to engage in further voir dire. Later, the prosecutor explained to the potential jurors that in Arizona a person could be convicted of DUI if they were found in "actual physical control" of the vehicle "even if the officer doesn't witness them driving." He asked if anyone felt "that shouldn't be the law." A few potential jurors expressed confusion about the statement and an unrecorded bench conference was held, after which the court provided further explanation of the concept of actual physical control, using part of the language from what it would later give as a jury instruction. One potential juror stated that although he understood the law, he disagreed with it. After further discussion during another unrecorded bench conference, the potential juror indicated he would not be able to apply that law and the court excused him.

¶5 Subsequently, during a discussion outside the jury's presence, defense counsel stated she wanted to "make a record" about the prosecutor's question on actual physical control. She stated that everyone had agreed a question about actual physical control "was okay," but that the question had resulted in "a huge confusion with the jurors" that may have given the panel "the wrong impression of the law." She pointed out that she had objected to the trial court's having read a single jury instruction defining actual physical control. She then objected to the potential juror having been stricken because he was unable "to understand what the law truly is because we were only giving him partial parts of the law." After the court overruled her objection, counsel stated she had not had the chance to rehabilitate the potential juror. The court pointed out that it had attempted to do so and had, in fact, rehabilitated another potential juror who had expressed similar concerns about the law.

¶6 On appeal, relying on *State v. Anderson*, 197 Ariz. 314, 4 P.3d 369 (2000), Sierra argues the court erred because it "excused a number of prospective jurors for cause without conducting sufficient inquiry itself, or without giving the defense the opportunity to rehabilitate the prospective jurors." But, unlike the defendant in *Anderson*, Sierra did not request additional voir dire to attempt to rehabilitate the venire members who were excused. *Id.* ¶ 5. Indeed, he objected to the excusal of only one of the potential jurors and did so only in relation to his objection to the discussion about actual physical control. That juror already had been excused at that point, and again unlike the situation in *Anderson*, had been orally examined by the court and prosecutor as to his views. Thus, *Anderson*, which "held that structural error results if jurors are dismissed based on their generalized answers to a written questionnaire without any opportunity to rehabilitate them through oral voir dire," is inapplicable here. *Moore*, 222 Ariz. 1, ¶ 41, 213 P.3d at 159-60. The court in this case did not deny Sierra the opportunity "to conduct a further oral examination of the prospective jurors" upon request, rather no such request was made. Ariz. R. Crim. P. 18.5(d). "[A] defendant who believes a trial court's voir dire to be deficient cannot sit on his rights and bypass the opportunity to cure the error . . . ." *State v. Moody*, 208 Ariz. 424, ¶ 98, 94 P.3d 1119, 1147 (2004). And, as the state points out, Sierra has not established that an impartial jury was not ultimately secured. *See State v. Lujan*, 184 Ariz. 556, 560, 911 P.2d 562, 566 (App. 1995).

¶7 Sierra further contends the trial court erred in failing to stop the prosecutor from "discussi[ng] . . . the law on actual physical control" and in engaging in "its own lengthy discussion of the law." "The scope of voir dire is left to the sound discretion of

the trial court and error will not be found unless the court abused its discretion." *State v. McMurtrey*, 136 Ariz. 93, 99, 664 P.2d 637, 643 (1983). And, as noted above, Sierra did not object below to the prosecutor's question, and in fact agreed it "was okay," but rather objected to the confusion the question created and the court's subsequent use of the language of a partial jury instruction to further explain the law.

¶8 In any event, the purpose of voir dire is to ascertain if the potential jurors hold any prejudice in favor of either the state or the defendant, and we do not consider the prosecutor's question, which simply and accurately stated that one could be convicted of DUI even if not actually seen driving, "to be [an] instruction[] on the law which ha[s] the effect of prejudicing the jury throughout the trial," but rather to be "merely [an] indicator[] of potential prejudice." *State v. Bullock*, 26 Ariz. App. 149, 153, 546 P.2d 1158, 1162 (1976). And, although Sierra argues on appeal that the court erred in engaging in "its own lengthy discussion of the law" after the jurors expressed confusion about the prosecutor's question, he cites no authority suggesting a trial court abuses its discretion by stepping in to dispel confusion created in the course of voir dire. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi).

¶9 Sierra also challenges the trial court's jury instructions on the law relating to actual physical control. He contends the court should have given an instruction about the operability of the vehicle he was accused of driving or controlling and that it "emphasized that the jury could convict . . . based on circumstantial evidence without giving the jury any guidance as to the type of evidence they were permitted to consider."

¶10 The trial court instructed: "A person can be convicted of either 'driving' or 'being in actual physical control' while under the influence of intoxicating substances, as long as the State also proves the remaining elements of the DUI charges beyond a reasonable doubt."[1] It further instructed the jury, consistent with *State v. Zaragoza*, 221 Ariz. 49, ¶ 21, 209 P.3d 629, 634 (2009), about various factors that the jury might consider in determining "whether the defendant's current or imminent control of the vehicle presented a real danger." The factors listed by the court included "[a]ny explanation of the circumstances shown by the evidence," and the court further noted that the list was "not meant to be all-inclusive." Sierra objected to the first instruction on several grounds: 1) it was not included by our supreme court in the *Zaragoza* instruction, 2) it repeated that the jury could convict based on circumstantial evidence, and 3) it repeated that the jury could convict if Sierra had either driven or been in actual physical control of the vehicle and unduly "emphasiz[ed] that."

¶11 On appeal, however, Sierra maintains "operability of the vehicle was identified as one of many factors for the jury's consideration in determining actual physical control" in *State v. Love*, 182 Ariz. 324, 897 P.2d 626 (1995). And, he contends, he was therefore entitled to an instruction that "provided the jury with guidance on this issue." But even assuming arguendo that Sierra is correct that our supreme court has

[1]This statement of the instruction comes from a document in the record entitled "Instructions Read by Court." Copies of the instructions also were provided to the jurors and to counsel. Sierra did not request a transcript of the court's reading of the jury instructions, but neither he nor the state contends the court deviated from the written instructions reflected in the record.

identified operability of the vehicle as a factor in determining actual physical control by including whether the vehicle was "running" and other "explanation[s] of the circumstances advanced by the defense," *Love*, 182 Ariz. at 326, 897 P.2d at 628, both of those factors were included in the *Zaragoza* instruction the trial court gave. In any event, nothing in the record suggests Sierra requested an instruction on the operability of the vehicle beyond that which was given,[2] or that he objected on that basis to the instruction at issue on appeal. Therefore, absent fundamental error, which Sierra does not assert and we do not find, he cannot "assign as error on appeal" the court's failure to give such an instruction. Ariz. R. Crim. P. 21.3(c); *State v. Kuhs*, 223 Ariz. 376, ¶ 52, 224 P.3d 192, 202 (2010).

¶12 Finally, Sierra also claims the trial court instructed the jurors they could convict him based on circumstantial evidence "without giving the jury any guidance as to the type of evidence they were permitted to consider." Sierra also did not raise this objection below, and it is likewise forfeited absent fundamental error, which he again does not assert, and we do not find. *See State v. Moreno–Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error waived on appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it). And, as noted above, in keeping with *Zaragoza*, the court

[2]Notably, however, there was considerable discussion of the role of the operability of the vehicle in determining actual physical control during a pretrial motion hearing and in relation to an objection to defense counsel's closing argument, which the trial court sustained, ordering stricken counsel's comment that inoperability could be considered as a factor in determining actual physical control and instructing the jury that there was no evidence the vehicle was permanently inoperable. Sierra does not object on appeal to the court's rulings during these discussions, and any such objection is therefore waived.

did in fact instruct the jurors on the various factors they could consider in determining whether Sierra had been in actual physical control of his vehicle while intoxicated. The court therefore did, contrary to Sierra's assertion, provide guidance "as to the type of evidence" they could consider.

Disposition

¶13 Sierra's convictions and sentences are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

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

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge