FILED BY CLERK
FEB 28 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RICARDO JOSE CARRILLO, Appellant.	2 CA-CR 2011-0168 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201000554

Honorable Ann R. Littrell, Judge

AFFIRMED IN PART; VACATED IN PART

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B R A M M E R, Judge.

¶1 Ricardo Carrillo appeals from his convictions and sentences for five counts of aggravated driving under the influence (DUI). He argues the trial court erred by disclosing to the jury during voir dire the fact of his prior DUI convictions, denying his motion for a mistrial, and denying his challenge to the jury panel for cause. Although we vacate his conviction and sentence on count two, we affirm in all other respects.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to sustaining Carrillo's convictions and sentences. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). Carrillo was attempting to pass a truck on a highway in Cochise County when his vehicle collided with it and veered into a ditch beside the road. Following the accident, Carrillo was verbally combative with emergency personnel, smelled of alcohol, and had bloodshot and watery eyes. An officer and a detective at the scene observed the odor of beer coming from Carrillo's car and beer cans lying nearby.

¶3 Carrillo's blood was drawn at a hospital approximately one hour after the accident, showing a blood alcohol concentration (BAC) of .331, the equivalent of consuming sixteen standard alcoholic drinks. Carrillo's blood also contained benzoylecgonine, a metabolite of cocaine. At the time of the collision, Carrillo's driver's license had been suspended and revoked. He previously had been convicted of DUI offenses in January 2005 and July 2007.

¶4 After a two-day jury trial, Carrillo was convicted of five counts of aggravated DUI for: 1) driving while impaired to the slightest degree while his driver

license was suspended; 2) driving while having a BAC of .08 or more while his driver license was suspended; 3) driving while having a BAC of .20 or more while his driver license was suspended; 4) driving with a drug metabolite in his body while his driver license was suspended; and 5) committing a third or subsequent violation of A.R.S. §§ 28-1381, 28-1382 or 28-1383 within a period of eighty-four months. He was sentenced to a slightly aggravated term of eleven years' imprisonment on each of the five counts, with the sentences to be served concurrently. This appeal followed.

Discussion

Voir Dire

¶5 Carrillo argues the trial court erred in disclosing his prior DUI convictions. In summarizing Carrillo's case for the prospective jurors, the court stated:

> The defendant is charged with committing driving under the influence on June 24th of 2009. And this is aggravated driving under the influence. There are several counts. Some of them involve driving under the influence while a driver's license was suspended, canceled, revoked, refused. Others involve driving under the influence within 84 months. That would be a third violation within 84 months. And one count involves driving under the influence with an illegal drug other than alcohol.

Carrillo did not object to the court's statement and, therefore, we review solely for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

¶6 The trial court is required to "initiate the examination of jurors by . . . briefly outlining the nature of the case." Ariz. R. Crim. P. 18.5(c); *see also State v. Allie*,

147 Ariz. 320, 329, 710 P.2d 430, 439 (1985) (in conducting voir dire court may outline nature of case in exercise of its discretion). Carrillo was charged with five counts of aggravated driving under the influence. Count five alleged he had violated A.R.S. § 28-1383(A)(2)—committing a third or subsequent DUI violation within a period of eighty-four months. The court's statement was nothing more than a brief outline of the nature of the case against Carrillo. *See* Ariz. R. Crim. P. 18.5(c). Therefore, there was no error, fundamental or otherwise. *See Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d at 608 (to obtain relief under fundamental error review first must prove error).

¶7 Carrillo further contends he was denied a fair trial because of "repetitive and continuing juror statements" during voir dire that "injected a tone of suspicion and bias [that] w[as] surely prejudicial and damaging to [his] right to a fair and impartial jury." These juror statements, he asserts, followed from the trial court's statement to the prospective jurors about count five and the court's failure to sever count five.[1] Carrillo moved for a mistrial because of the "conversation and carrying on in the jury pool." The court agreed to ask the prospective jurors about any comments they may have made and then stated, "So, we'll see how it goes"; Carrillo did not renew the motion. He argues on

[1]Carrillo contends the appropriate procedure in a case like his is to "bifurcate the trial and introduce the fact of the alleged priors, after proof of the substantive offense of [DUI] was proven to the jury," pursuant to Rule 19.1(b), Ariz. R. Crim. P. But Carrillo concedes "[t]hat argument was not presented and no request of bifurcation by motion or otherwise was made." Rule 19.1(b) expressly excludes instances where the prior conviction is an element of the crime charged; thus we cannot conclude the court's failure to bifurcate the trial sua sponte was error, let alone fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 23, 115 P.3d at 608.

appeal the court erred in denying the motion for a mistrial. Carrillo also argues the court erred in denying his challenge to the entire jury panel for cause. We review the court's rulings on motions for a mistrial or to dismiss jurors for an abuse of discretion. *State v. Lehr*, 227 Ariz. 140, ¶ 43, 254 P.3d 379, 389 (2011).

¶8 Carrillo directs us to several comments by prospective jurors during voir dire in support of his claim. He asserts: Juror F. could not put her feelings about "drunk drivers" aside and stated: "[Carrillo] has had so many counts against [him] already, you know, why is he here?" Juror M. had formed an opinion about the case because "[Carrillo] already had prior counts." Juror H. similarly stated he had formed an opinion "because it's not just one incident, but more than one incident," although in response to the trial court's inquiry, he also stated that he could try to set his opinion aside. And Juror V. thought that, although "everybody deserves one chance," he did not agree with "[m]ultiple chances to continue to do the same thing." Juror B. stated "I kind of feel right now he's guilty. He's a repeat offender." Jurors F., M., H., V., and B. were excused. In addition, one prospective juror said, "That's right," in response to another's comment about Carrillo's prior convictions. The court asked the panel who had made the comment and one prospective juror stated it was someone who had been excused.

¶9 The trial court is in the best position to assess the impact of a prospective juror's comments on others. *See State v. Doerr*, 193 Ariz. 56, ¶ 23, 969 P.2d 1168, 1174 (1998). Therefore, "[u]nless the record affirmatively shows that a fair and impartial jury was not secured, the trial court must be affirmed." *State v. Greenawalt*, 128 Ariz. 150,

167, 624 P.2d 828, 845 (1981). We will not "indulge in an assumption" that the jury panel was tainted by the remarks of fellow prospective jurors. *See State v. Davis*, 137 Ariz. 551, 558, 672 P.2d 480, 487 (App. 1983); *see also Doerr*, 193 Ariz. 56, ¶ 18, 969 P.2d at 1173.

¶10 Carrillo has not demonstrated that any selected juror was not fair and impartial, thus warranting either a mistrial or striking the entire panel for cause. *See State v. Reasoner*, 154 Ariz. 377, 384, 742 P.2d 1363, 1370 (App. 1987) (appellant's burden to show remarks of excused juror prejudiced others). Each of the prospective jurors who had made allegedly prejudicial statements was dismissed. Moreover, the trial court adequately minimized the potential for prejudice. First, the court instructed the jury panel that Carrillo was innocent until proven guilty and the charges against him were not proof, in spite of opinions expressed by some of the prospective jurors. Later, the court again reminded the panel that Carrillo was presumed innocent and that the charges were not evidence. In addition, the court asked the prospective jurors several times if any of them "ha[d] any reason for feeling [he or she] could not be a fair and impartial juror." None of the jurors who served had responded in the affirmative. And the court specifically asked the prospective jurors whether they felt a charge stating Carrillo had prior convictions meant he must be guilty and thus already had made up their minds; again, none of them responded affirmatively. Because prejudice does not appear affirmatively from the record, *see Greenawalt*, 128 Ariz. at 167, 624 P.2d at 845, we

conclude the court did not abuse its discretion in denying either Carrillo's motion for a mistrial or his motion to strike the panel, *see Lehr*, 227 Ariz. 140, ¶ 43, 254 P.3d at 389.

Conviction and Sentence on Count Two Vacated

¶11 The state acknowledges Carrillo's conviction and sentence for count two of the superseding indictment should be vacated because it was for a lesser-included offense of his conviction for count three. We agree. Count two of the indictment alleged Carrillo had committed aggravated DUI by driving while having a BAC of 0.08 or more while his driver license was suspended or revoked. *See* §§ 28-1381(A)(2), 28-1383(A)(1). Count three alleged Carrillo had committed aggravated DUI by driving with a BAC of 0.20 or more while his driver license was suspended or revoked. *See* §§ 28-1382(A)(2), 28-1383(A)(1). Carrillo was convicted and sentenced for both counts.

¶12 "A lesser-included offense is one that contains all but one of the elements of the greater offense." *Peak v. Acuna*, 203 Ariz. 83, ¶ 5, 50 P.3d 833, 834 (2002). The state may charge both lesser-included and greater offenses, *Merlina v. Jejna*, 208 Ariz. 1, ¶ 19, 90 P.3d 202, 206 (App. 2004), but a defendant may not be convicted for both, *State v. Welch*, 198 Ariz. 554, ¶ 13, 12 P.3d 229, 232 (App. 2000). In this case, count two was a lesser-included offense of count three. *See Merlina*, 208 Ariz. 1, n.1, 90 P.3d at 204 n.1 (DUI lesser-included offense of extreme DUI because elements identical except BAC level). To cure the error, we vacate Carrillo's conviction and sentence for count two. *See Welch*, 198 Ariz. 554, ¶ 13, 12 P.3d at 232.

Disposition

¶13 We vacate Carrillo's conviction and sentence for count two of the superseding indictment. In all other respects, we affirm.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge