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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. CRIS RAYMOND LEGGETT, Appellant.	2 CA-CR 2011-0173 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20103774001

Honorable Michael O. Miller, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 After a jury trial, Cris Leggett was convicted of two counts of aggravated driving or actual physical control of a vehicle while under the influence of an intoxicant (DUI) and two counts of aggravated DUI for having a blood alcohol concentration (BAC) of .08 or greater within two hours of driving or being in actual physical control of a vehicle. The trial court sentenced him to concurrent, ten-year prison terms on all four counts.[1] On appeal, Leggett argues the evidence was insufficient to sustain his convictions and the court erroneously admitted evidence of a prior misdemeanor DUI conviction. Finding no error, we affirm.

Factual Background and Procedural History

¶2 We view the facts in the light most favorable to upholding the jury's verdicts. *State v. Cifelli*, 214 Ariz. 524, ¶ 11, 155 P.3d 363, 366 (App. 2007). On an evening in October 2010, Leggett's vehicle struck a curb on West Grant Road in Tucson and came to a stop in the parking lot of a nearby store. Within a few seconds after hearing the accident, some of the store's customers went outside and discovered a man later identified as Leggett lying on his right side, apparently asleep, in the cab of the truck. A customer called the police and, while awaiting their arrival, saw Leggett awake and try unsuccessfully to start the truck before again "slump[ing] back down on the seat."

[1]At the time of his offenses, Leggett was on probation for a prior offense. Pursuant to a petition to revoke probation, the trial court found he had violated his probation by committing the instant offenses and ordered his sentence to run consecutively to a mitigated one-year prison term imposed for the probation violation.

¶3 Tucson Police Department Officer Jeffrey Hawkins arrived in about ten minutes and found Leggett "in the driver's seat [of the truck] slumped over to the right" with the keys "half on in the ignition." The officer awakened Leggett and observed signs he was intoxicated, including a strong odor of alcohol; watery, bloodshot eyes; dilated pupils; droopy eyelids; a flushed face; mood swings; unsteadiness; and speech that was "slurred, thick-tongued and confused." After administering field sobriety tests, the officer conducted two breathalyzer tests, which measured Leggett's BAC at .312 and .324 respectively. During the testing, Leggett made statements, including, "I'm sorry for what I did. I didn't do much. I just tried to angle my car," and "I'm sorry. I could do some damage. I'm sorry, Officer."

¶4 At trial, Leggett admitted he had been drinking "for some time" that night, but denied driving the vehicle. He testified, rather, that the truck had been parked at his apartment, and he had been nearby, when two men "ambushed" him and tried to steal the vehicle. Leggett claimed he jumped into the bed of the truck before the men drove away and threw "junk" at the driver through the window, eventually striking him with a bottle and causing the accident. He maintained the men fled after the wreck and he entered the cab, where he was discovered shortly afterward.

¶5 Leggett was convicted of four counts of aggravated driving or actual physical control of a vehicle: (1) while under the influence of an intoxicant and while his driver license was suspended, (2) with a BAC of .08 or greater while his driver license was suspended, (3) while under the influence and having two or more prior DUI

convictions within the preceding eighty-four months, and (4) with a BAC of .08 or greater and having two or more prior DUI convictions within the preceding eighty-four months. He was sentenced as described above. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Sufficiency of Evidence

¶6 Leggett first argues the trial court erred in denying his motion for a judgment of acquittal because the evidence was insufficient to show he had been in actual physical control of the vehicle. Rule 20(a), Ariz. R. Crim. P., requires a trial court to enter a judgment of acquittal "if there is no substantial evidence to warrant a conviction." Whether a conviction is supported by sufficient evidence is a question of law that we review *de novo*. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011).

¶7 At trial, Leggett admitted he had been convicted of two DUI offenses within the eighty-four months preceding the instant offenses, and also that his license had been suspended and he knew his license was suspended at the time of the instant offense. He also admitted he had been drinking "a lot" and was feeling the effects of the alcohol that day. But Leggett denies, as he did at trial, that he was driving or in actual physical control of the vehicle—an essential element of DUI. *See* § A.R.S. 28-1381(A).

¶8 Arizona's DUI statutes are silent as to the meaning of "actual physical control," but the phrase has been defined over time by case law. *State v. Dawley*, 201 Ariz. 285, ¶¶ 3-4, 34 P.3d 394, 396 (App. 2001); *see generally* A.R.S. §§ 28-1381

through 28-1390. Our supreme court has explained that whether a person is in actual physical control of a vehicle depends on the totality of the circumstances. *State v. Love*, 182 Ariz. 324, 326, 897 P.2d 626, 628 (1995). The court provided a non-exclusive list of factors that the trier of fact may take into consideration, including

> whether the vehicle was running or the ignition was on; where the key was located; where and in what position the driver was found in the vehicle; whether the person was awake or asleep; if the vehicle's headlights were on; where the vehicle was stopped (in the road or legally parked); whether the driver had voluntarily pulled off the road; time of day and weather conditions; if the heater or air conditioner was on; whether the windows were up or down; and any explanation of the circumstances advanced by the defense.

Id. The court also emphasized that "in every case the trier of fact should be entitled to examine all available evidence and weigh credibility in determining whether [the] defendant was simply using the vehicle as a stationary shelter or actually posed a threat to the public." *Id.*

¶9 The evidence presented at trial was sufficient to show that Leggett had been in actual physical control of the vehicle. Within three or four seconds after the collision, a witness saw Leggett in the cab of the truck. The witness also saw Leggett wake up and try to start the truck, and when Hawkins arrived, he discovered the key in the ignition, which was "half on" with the dashboard lights illuminated. The vehicle was parked "awkwardly," and bore signs of severe damage, including fluid leakage, deflated tires, and dented wheels, all of which supported a conclusion that Leggett had not voluntarily pulled off of the road. Finally, the jury heard evidence that Leggett had told Hawkins

that he had "just tried to angle [his] car" and that he was "sorry" because he "could [have done] some damage." All of these facts, considered together and viewed in the light most favorable to supporting the jury's verdicts, are sufficient to establish that Leggett was not simply using the vehicle as a stationary shelter, but in fact had been driving or in actual physical control of it. *See Love*, 182 Ariz. at 326-27, 897 P.2d at 628-29.

¶10 Relying on *Love*, Leggett calls attention to a number of other factors that he argues could have supported his acquittal, including that the engine was not running, that the truck was discovered in a parking lot rather than on the road, and that Leggett was found unconscious on the truck seat. He also points out that, at trial, he denied driving the truck and presented the jury with an explanation of events that contradicted the state's theory of the case.

¶11 In essence, Leggett asks us to reweigh the evidence and find that the balance weighs in his favor. But "[w]hen the evidence supporting a verdict is challenged on appeal, an appellate court will not reweigh the evidence." *State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997). And, although the jury was entitled to take into consideration Leggett's explanation of events, *see Love*, 182 Ariz. at 326, 897 P.2d at 628, it was not required to accept his account and could properly reject it as incredible, particularly as he did not provide this account to Hawkins on the night of his arrest and the witness who called the police testified he had not seen anyone except Leggett in or around the vehicle immediately after the crash. *See State v. Harrison*, 111 Ariz. 508, 509, 533 P.2d 1143, 1144 (1975) ("The credibility of witnesses is an issue of fact to be

resolved by the jury; as long as there is substantial supporting evidence, we will not disturb their determination."). For the foregoing reasons, we conclude there was substantial evidence to support the jury's finding that Leggett had been driving or in actual physical control of the vehicle, and we therefore find no error.

Admissibility of Prior Conviction

¶12 Leggett next argues the trial court erred in admitting evidence of a DUI offense he had committed in May 2003. Although his trial argument relied solely on Rule 403, Ariz. R. Evid., he does not make the same argument on appeal. Instead he raises two new arguments: first, that the 2003 offense could not be used to aggravate his 2010 offenses because it occurred outside of the eighty-four month range established in § 28-1383(A)(2), and second, that it was inadmissible "other act" evidence under Rule 404(b), Ariz. R. Evid. By failing to make these arguments below, Leggett has forfeited review for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005); *see also State v. Moody*, 208 Ariz. 424, ¶ 39, 94 P.3d 1119, 1136 (2004) (objection to admissibility of evidence must state specific grounds to preserve issue for appeal).

¶13 But because Leggett does not argue the allegedly erroneous admission of the 2003 DUI was fundamental error, he has abandoned the argument. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶¶ 17-18, 185 P.3d 135, 140 (App. 2008) (review abandoned where appellant failed to argue alleged error was fundamental). And, because we see no error that can be so characterized, we do not consider the issue further. *State v.*

Fernandez, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if apparent).

Disposition

¶14 For the foregoing reasons, Leggett's convictions and sentences are affirmed.

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

CONCURRING:

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

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