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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. ARNALDO ZEPEDA, Appellant.	)	2 CA-CR 2011-0185 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR 20103954001

Honorable Michael O. Miller, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Joseph T. Maziarz
Phoenix
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Alex Heveri
Tucson
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K E L L Y, Judge.

¶1 Appellant Arnaldo Zepeda was convicted of four counts of aggravated driving under the influence of an intoxicant (DUI) after a jury found him guilty of driving or being in actual physical control of a vehicle while impaired and with an alcohol concentration of .08 or more, both while his driver's license was suspended or revoked and after he had been previously convicted of two DUI offenses within the past eighty-four months. After finding he had two or more historical prior felony convictions, the trial court sentenced Zepeda to partially mitigated, concurrent prison terms of seven years. On appeal, Zepeda argues the evidence was insufficient to sustain his conviction.

¶2 In reviewing a claim of insufficient evidence, we view the evidence "in the light most favorable to sustaining the conviction" and resolve all reasonable inferences against the defendant. *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981). We do not reweigh the evidence, and will affirm if substantial evidence supported the jury's verdict. *Id.* "Substantial evidence" is evidence sufficient for a rational trier of fact to have found the defendant guilty beyond a reasonable doubt. *Id.*

¶3 Relevant to Zepeda's claim, in November 2010, Tucson police officer Martin Escobar saw a truck stuck in a ditch by the side of the road. Escobar stopped his patrol vehicle less than thirty feet away and illuminated the truck with his headlights and spotlight. He saw that it was still running, with its rear wheels spinning and back-up lights on, and that a person in the driver's seat was "attempting to get [the truck] out"of the ditch. Escobar testified that Zepeda then turned off the ignition, opened the driver's side door, stepped out, and walked around the front of the truck to the passenger side. When Escobar asked Zepeda if he was "okay," he responded that he was "fine," but that "one of [his] tires had lost pressure, and he had veered into the ditch." Based on this statement, and because Zepeda was the only person in the truck or even in the area,

Escobar did not question Zepeda further about his having been the truck's driver. According to Escobar, during the course of the DUI investigation that followed, Zepeda never mentioned another driver.

¶4 In contrast, Zepeda testified he had not been in the truck when Escobar arrived at the scene but had met the officer on the road while walking back to the truck after seeking assistance. He stated that his friend, C.L., had been driving the truck when it veered off the road, but that he had left the area before Zepeda had returned; C.L. also testified that he, not Zepeda, had been driving the truck that night. According to Zepeda, he had told Escobar at "various times" that he had not been the driver of the truck.

¶5 As the sole issue raised on appeal, Zepeda argues the evidence was insufficient to support his convictions because "there was no witness to the driving" and "even if Escobar had seen Zepeda in the truck, . . . Zepeda could not legally have been in actual physical control" of the truck because it was "not drivable."[1] Acknowledging Escobar's testimony that Zepeda had implied he had been the driver when the truck had veered into the ditch, Zepeda suggests "that issue was the single issue disputed at trial," and he seems to contend Escobar's testimony "was thoroughly impeached" by his own assertions "that he told the officer he was not the driver, but was ignored."

¶6 "Both direct and circumstantial evidence should be considered in determining whether substantial evidence supports a conviction," *State v. West*, 226 Ariz. 559, ¶ 16, 250 P.3d 1188, 1191 (2011), and "a criminal conviction may rest solely upon proof of a circumstantial nature," *Tison*, 129 Ariz. at 554, 633 P.2d at 363. A conflict between testimony offered by state and defense witnesses does not render the evidence

[1]The state contends, and we agree, there is no evidence in the record that the truck was "not drivable." Instead, the evidence showed the truck was stuck in a ditch temporarily, and Zepeda was attempting to dislodge it.

insubstantial. *See State v. Toney*, 113 Ariz. 404, 408, 555 P.2d 650, 654 (1976). Rather, it is for the jury as the trier of fact to weigh the evidence, resolve conflicts in the evidence, and assess the credibility of witnesses. *State v. Manzanedo*, 210 Ariz. 292, ¶ 3, 110 P.3d 1026, 1027 (App. 2005). We do not reweigh the evidence; indeed, "[i]f conflicts in evidence exist, the appellate court must resolve such conflicts in favor of sustaining the verdict and against the defendant." *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

¶7 Here, Escobar's testimony provided substantial evidence to support jury determinations that Zepeda had been the driver of the truck when it had veered off the road and was in actual physical control of the vehicle when Escobar arrived. Accordingly, Zepeda'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