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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. MICHAEL ANTHONY FLORES, Appellant.	)	2 CA-CR 2011-0269 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20101123001

Honorable Michael Miller, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 After a jury trial, appellant Michael Flores was convicted of one count of aggravated driving under the influence of intoxicating liquor or drugs (DUI) while his driver license was suspended or revoked and one count of criminal damage. After

finding Flores had two or more historical prior felony convictions, the trial court sentenced him to minimum, concurrent prison terms, the longer of which is eight years. On appeal, Flores argues the evidence was insufficient to sustain his convictions.

Background

¶2 In reviewing a claim of insufficient evidence, we view the facts "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). The evidence at trial established the following. At about eleven o'clock on the morning of April 13, 2009, Tucson Police Department officers responded to a report of a possibly drunk driver who had hit two cars in a grocery store parking lot and had then gone inside the store.[1] Officers approached Flores and noticed he had trouble walking, and one officer noticed he was slurring his speech.

¶3 Before administering field sobriety tests, Officer Matthew Powell asked Flores if he had any injuries, and Flores, whose hand was bandaged with a splint, responded that he had an injury to his hand and had also undergone back surgery.[2] Powell then administered the tests and reported that Flores had exhibited four out of eight

[1]Flores does not dispute the jury's finding that damages to the two vehicles amounted to "$2,000 or more, but less than [$]10,000."

[2]Although Flores initially argued that his leg was also "in a full-length leg brace," he appears to have conceded in his reply that, although his leg was in a brace at the time of his trial in May 2011, there was no evidence he had been suffering from a leg injury at the time of his arrest.

possible cues indicating intoxication on the walk-and-turn test and three out of four cues on the one-leg-stand test.

¶4 Officer William Bonanno, a drug recognition evaluator, testified Flores exhibited six out of six possible cues on the horizontal gaze nystagmus (HGN) test. Although Bonanno reported Flores had performed competently on an "alphabet/number" test, he noted his "slower, delayed reaction overall" and "upper-body sway," consistent with the use of central nervous system depressants. Flores told Bonanno he was taking a variety of medications that Bonanno identified as "both depressants and narcotics."

¶5 Criminalist Gregory Ohlson testified an analysis of Flores's blood revealed the presence of prescription drugs known by the trade names of Soma[3] and Ambien,[4] as well as meprobamate, a metabolite of Soma. Ohlson agreed he could not state that Flores had been impaired, or that his driving had been affected, by the presence of these drugs, and explained that impairment was tested by HGN and field sobriety tests, which would reveal "if your brain is being affected by these drugs." But Ohlson also explained that studies had shown someone receiving a therapeutic effect from either Soma or Ambien could be impaired in the same manner as someone who had consumed alcohol and thus, "people don't need to abuse these things, take an excessive amount to have these negative effects." Based on his analysis, Ohlson stated that the Soma in Flores's system was "very likely to be" in the therapeutic range at the time his blood was tested.

[3]Carisoprodol.

[4]Zolpidem.

Discussion

¶6 Section 28-1381(A)(1) prohibits a person from driving or being in actual physical control of a vehicle "[w]hile under the influence of . . . any drug . . . if the person is impaired to the slightest degree." According to Flores, evidence that he was driving while impaired was insufficient because "the field sobriety tests were not conducted in a standardized way and did not account for [his] visible injuries" and because Ohlson "could not say Flores was impaired based upon his blood test." On appeal, we do not reweigh the evidence, and will affirm if substantial evidence supported the jury's verdict. *Tison*, 129 Ariz. at 552, 633 P.2d at 361. "Substantial evidence" is that which is sufficient for a rational trier of fact to have found the defendant guilty beyond a reasonable doubt.[5] *Id.*

¶7 Although Flores implies the field sobriety test results were unreliable, he does not argue the trial court erred in admitting them. Instead, he argues the evidence was insufficient to support the jury's verdicts. He cites his extensive cross-examination of Powell about the National Highway Traffic Safety Administration (NHTSA) DUI training manual, which cautions that the walk-and-turn and one-leg-stand tests may yield false positive indications of impairment in individuals having leg or back problems, and which emphasizes the importance of providing a detailed description of the cues exhibited. Flores asserts, as he did at trial, that Powell had recorded insufficient detail of

[5]To the extent Flores also argues the trial court erred in denying his pretrial motion for acquittal pursuant to Rule 20(a), Ariz. R. Crim. P., our inquiry about that issue is the same. *See* Ariz. R. Crim. P. 20(a) (court "shall enter a judgment of acquittal" before verdict "if there is no substantial evidence to warrant a conviction").

Flores's behavior when performing the tests and had reported "nothing more" than that he had failed to "touch heel to toe," had stepped over an imaginary line, and had taken an incorrect number of steps. He notes Powell testified he was unable to recall at trial "how [Flores] had difficulty turning." And, as he suggested during his cross-examination of Bonanno, Flores points out that NHTSA has not "validated" the HGN test for indications other than alcohol use.

¶8 Thus, Flores contends Powell was impeached by evidence that he "was not properly trained or qualified to conduct a DUI investigation." But "[q]uestions about the accuracy and reliability of a witness' factual basis, data, and methods go to the weight and credibility of the witness' testimony and are questions of fact" for the jury to determine. *Logerquist v. McVey*, 196 Ariz. 470, ¶ 52, 1 P.3d 113, 131 (2000); *see also State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995) ("The finder-of-fact, not the appellate court, weighs the evidence and determines the credibility of witnesses.").

¶9 Both Bonanno and Ohlson suggested the HGN test is a commonly used and reliable indicator that a person's behavior is being affected by central nervous system depressants, and Flores does not dispute that he had a full opportunity to cross-examine these witnesses. *Cf. State v. Lehr*, 201 Ariz. 509, ¶ 30, 38 P.3d 1172, 1181 (2002) (error to limit cross-examination concerning Department of Public Safety protocol that "would have provided information with which the jury could weigh testimony concerning the DNA results"). Nor does he cite any authority for the proposition that the state was required to prove his impairment based on Ohlson's analysis alone. *See State v. Cañez*, 202 Ariz. 133, ¶ 42, 42 P.3d 564, 580 (2002) ("Physical evidence is not required to

sustain a conviction where the totality of the circumstances demonstrates guilt beyond a reasonable doubt.").

¶10 Considering the record as a whole, substantial evidence of impairment was presented by Powell, Bonanno, and Ohlson, as well as the testimony of a witness who had observed Flores driving and of police officers who had observed him on the scene. The evidence was thus sufficient to support the jury's guilty verdict on the charge of aggravated DUI.

¶11 In a related argument, Flores contends the evidence was insufficient to establish that he committed criminal damage by "recklessly . . . damaging [the] property of another," *see* A.R.S. § 13-1602, arguing the state's theory of recklessness was based on his impairment which, he asserts, the state failed to prove. *See* A.R.S. § 13-105.[6] Because we have concluded the evidence was sufficient to support the jury's finding that Flores was impaired, his argument with respect to his criminal damage conviction also fails.

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[6]Section 13-105(10)(c) provides:

> "Recklessly" means, with respect to a result or to a circumstance described by a statute defining an offense, that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. *A person who creates such a risk but who is unaware of such risk solely by reason of voluntary intoxication also acts recklessly with respect to such risk.*

(Emphasis added.)

Disposition

¶12 For the foregoing reasons, Flores'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