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MAY -2 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. BRIAN JEFFERY MCCALL, Appellant.	)	2 CA-CR 2011-0285 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20110141001

Honorable Clark W. Munger, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 After a jury trial, appellant Brian McCall was found guilty of aggravated driving under the influence (DUI) and aggravated driving with an alcohol concentration

of .08 or more. He appeals from those convictions, arguing they should be reversed because "the trial court refused to instruct the jury solely on 'actual physical control' and erroneously allowed the jury to consider that [he] 'drove,' thus risking a non-unanimous jury verdict and violating due process." Finding no error, we affirm.

Background

¶2 "We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdicts." *State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). On January 1, 2011, sometime around 10:00 or 10:30 a.m., the truck McCall was driving broke down and his passengers pushed it into the parking lot of a nearby business while he steered. The others left while McCall remained, "trying to get the thing going." At 1:00 p.m., Pima County Deputy Sheriff Matthew Salmon noticed the truck in the parking lot "with an individual," later identified as McCall, "sitting in the driver's seat," apparently "sleeping or passed out." The truck "was oddly parked" and "not in a parking space," but rather "was kind of blocking the main way the vehicles travel behind the [business's] complex." McCall "was slumped over," with the keys in the ignition, his foot on the brake, and the vehicle in drive. Salmon roused McCall, who appeared "incoherent and confused." McCall had difficulty walking, smelled of intoxicants, and his eyes were red, watery, and bloodshot.

¶3 McCall, whose license to drive was suspended, performed poorly on field sobriety tests and consented to have his blood drawn. Subsequent testing showed he had a blood alcohol content (BAC) of .222. McCall was charged with aggravated DUI while

his license was suspended and aggravated driving with an alcohol concentration of .08 or more while his license was suspended. As noted above, McCall was convicted as charged, and the trial court imposed concurrent, minimum terms of 1.5 years' imprisonment. This appeal followed.

Discussion

¶4 In the sole issue raised on appeal,[1] McCall contends that by giving a jury instruction that included both driving and being in actual physical control of a vehicle while under the influence, the trial court violated his right to due process and exposed him to the risk of being convicted of an uncharged offense and of a nonunanimous jury verdict. McCall maintains this is so because the state charged him only with being in the truck at 1:00 p.m. when Salmon found him and not with having driven the truck before that time, which he argues was a separately chargeable offense.

¶5 During a discussion on preliminary jury instructions on the first day of trial, McCall moved to "strike all the drove or driven or drive language" from the instructions because it was not "relevant to the case." The prosecutor objected, maintaining that based on the anticipated testimony of defense witnesses, "the State actually could establish driving." The court and the parties discussed what had been presented to the grand jury, and the court concluded an instruction on driving under the influence should be given.

[1]To the extent McCall's arguments can be read to raise additional issues of sufficiency of the evidence to sustain his conviction or prosecutorial misconduct, we decline to address those claims because they have not been adequately developed or supported by relevant authority. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi).

The court noted that because it was not yet known if there would be any testimony as to whether McCall had been driving, the final instructions might need to be changed.

¶6 Later, the trial court and the parties again discussed whether an instruction on driving under the influence should be given. The court pointed out that a defense witness had testified McCall's truck had broken down in a different location in the parking lot from where Salmon ultimately found it. It concluded that on that basis, the jury could "find reasonably that the defendant was able to get in the [truck], drive it from the parking space up to where it was found, and that the . . . [truck] then failed again as it had before" and that this had happened during the two hours before McCall's blood was drawn. It therefore gave the instruction on driving under the influence, as well as one for being in actual physical control while under the influence. Because McCall did not raise below the due process arguments he now makes, we review for fundamental error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

¶7 As the state points out, and as McCall concedes, driving under the influence and being in actual physical control of a vehicle while under the influence are two ways of committing the same offense. *State v. Rivera*, 207 Ariz. 69, ¶ 8, 83 P.3d 69, 72 (App. 2004). And, a jury need not unanimously agree on the theory by which the state proves the charge, "so long as it unanimously agrees on a verdict." *Id.* ¶ 12. But McCall essentially maintains that his actions on January 1 constituted two separate acts—one committed when Salmon found him at 1:00 p.m. and the other committed, if at all, before that time. Thus, he argues, because the state sought to convict him of a single offense

comprised of multiple acts, the court violated his due process rights when it instructed the jury on both theories of the offense rather than forcing the state to choose one theory and, by his reasoning, one of the acts it had alleged. *See State v. Klokic*, 219 Ariz. 241, ¶ 14, 196 P.3d 844, 847 (App. 2008) (when state attempts to prove one charge with multiple acts court should employ remedial measures to avoid nonunanimous verdict).

¶8 But, the remedial measures set forth in *Klokic*, on which McCall relies, are not required "in those instances in which all the separate acts that the State intends to introduce into evidence are part of a single criminal transaction." *Id.* ¶ 15. In this case, McCall summarily asserts that any events before 1:00 p.m. were part of a separately chargeable offense, but he does not develop any legal argument as to how his acts were not part of the same transaction. Even assuming he has not therefore waived the argument, *see* Ariz. R. Crim. P. 31.13(c)(1)(vi), we conclude his assertion is incorrect.

¶9 In examining whether separate acts are part of the same transaction, we examine whether the "'acts form part of one and the same transaction, and as a whole constitute but one and the same offense.'" *Klokic*, 219 Ariz. 241, ¶ 17, 196 P.3d at 848, *quoting State v. Counterman*, 8 Ariz. App. 526, 531, 448 P.2d 96, 101 (1968). We also consider the defense presented by the defendant to ascertain whether different defenses were urged as to the separate acts such that the jury might have applied a defense to one act but not the other, and vice versa, thereby creating the possibility of a nonunanimous jury verdict. *Id.* ¶¶ 24-30. "[I]f a defendant offers different defenses to each act or there

is otherwise a reasonable basis for distinguishing between them," the acts may not be considered part of the same criminal transaction. *Id.* ¶ 32.

¶10 In this case, the jury was instructed that to find McCall guilty of the BAC-related DUI charge, it would have to find that he had a BAC over the legal limit within two hours of driving. And, the prosecutor emphasized this "two-hour window" in his closing argument. McCall's blood was drawn at 2:35 p.m., leaving only about half an hour between the start of the two-hour window and the time at which Salmon found McCall. Even in relation to the charge that McCall had driven while impaired to the slightest degree, which arguably was not circumscribed by the two-hour limit, the time period the jury could consider would have been relatively short. A defense witness indicated the truck had broken down around 10:00 or 10:30 a.m. and that McCall had not appeared drunk at that time and that McCall had not had anything to drink while he was with him. And there was no evidence presented that McCall had taken the truck out of the parking lot. Thus, the evidence at trial suggested that any acts McCall committed took place in a relatively small amount of time in the same location where Salmon ultimately found him. Additionally, the state did not argue that McCall had driven before he arrived in the parking lot or at any time before 12:35 p.m., the start of the two-hour window. Indeed the prosecutor's argument focused on the theory that McCall had moved the truck immediately before he had passed out.

¶11 Furthermore, and perhaps more tellingly, McCall's entire defense was that the truck was inoperable. This defense was equally applicable to a charge based on his

having driven the truck in the parking lot between 12:35 and 1:00 p.m. or his having been in actual physical control of the truck at 1:00 p.m. And we see no other reasonable basis for distinguishing between McCall's activity before and after 1:00 p.m., when Salmon found him in the parking lot. Because the acts charged therefore arose from the same transaction and because the evidence reasonably supported an instruction on driving, *see State v. Shumway*, 137 Ariz. 585, 588, 672 P.2d 929, 932 (1983), McCall has not established the trial court erred, let alone fundamentally, in instructing the jury on driving under the influence.

¶12 We also reject McCall's apparent assertion that he was convicted of an uncharged offense because the grand jury did not consider the "temporally discrete facts" presented by the defense witness who testified about the events before 1:00 p.m. He maintains he did not have adequate "notice that the State would be proceeding on the[] separate facts that [he] was driving the vehicle" before 1:00 p.m. But the indictment in this matter charged McCall with driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor and/or with a BAC of .08 or more "[o]n or about the 1st day of January, 2011." And in light of our conclusion that McCall's actions before and after 1:00 p.m. were part of a single transaction, this is not a situation in which an amendment to the indictment "changes the nature of the offense," as occurred in *State v. Sanders*, 205 Ariz. 208, ¶¶ 20, 33, 68 P.3d 434, 440, 442-43 (App. 2003), on which McCall relies. Nor can we say McCall lacked notice of the crime with which he was charged. *See State v. Martin*, 139 Ariz. 466, 471, 679 P.2d 489, 494 (1984)

(defendant must be informed of crimes of which he could be convicted by indictment containing "plain, concise statement of the facts"), *quoting* Ariz. R. Crim. P. 13.2(a).

Disposition

¶13 For the reasons explained above, McCall'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