

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAY 10 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0351
)	DEPARTMENT B
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JESUS MANUEL CLARK,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20110545001

Honorable Deborah Bernini, Judge

AFFIRMED

Lori J. Lefferts, Pima County Public Defender
By Robert J. McWhirter

Tucson
Attorneys for Appellant

K E L L Y, Judge.

¶1 Appellant Jesus Clark was convicted after a jury trial of aggravated driving under the influence of an intoxicant (DUI) while his driver's license was suspended and revoked, aggravated driving with a blood alcohol concentration (BAC) of .08 or greater while his license was suspended and revoked, aggravated DUI based on having committed or been convicted of two or more prior DUI violations, and aggravated driving with a BAC of .08 or more having been convicted of two or more prior DUI violations. The trial court sentenced Clark to concurrent, presumptive prison terms of 4.5 years on each count based on his having been convicted previously of aggravated DUI and having been on probation at the time of the instant offenses, allegations the state proved at a separate bench trial. Counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999).

¶2 As an arguable issue, counsel asks us to consider whether Clark's due process rights were violated when the jury was permitted to hear evidence regarding his prior convictions for DUI because prior DUI convictions were not elements of the offenses alleged in counts one and two. But as counsel concedes, our supreme court and this court have rejected this claim on the ground that having prior DUI convictions is indeed an element of the offense of aggravated DUI. *State ex rel. Romley v. Galati*, 193 Ariz. 437, ¶¶ 1-2, 12-15, 973 P.2d 1198, 1199, 1201 (App. 1998) (vacating trial court's order bifurcating aggravated DUI trial to allow defendant to admit aggravating element of prior convictions outside jury's presence), *approved*, 195 Ariz. 9, 985 P.2d 494 (1999);

State v. Brito, 183 Ariz. 535, 538, 905 P.2d 544, 547 (App. 1995) (where limiting instruction given, no error or “unfair prejudice” in denying bifurcated trial to avoid introducing evidence of prior DUI conviction in aggravated DUI trial). These decisions are not distinguishable, as counsel suggests, on the ground that the elements of the charges considered in those cases included prior DUI convictions. In *Galati*, one of the charges of aggravated DUI was based on the defendant having committed the offense while his license was “suspended, canceled, revoked, refused, or restricted.” 193 Ariz. 437, ¶ 1, 973 P.2d at 1199.

¶3 We note, moreover, that Clark did not ask that the counts be severed and did not object to the evidence regarding the prior convictions when it was introduced or to the jury instructions; therefore, he has forfeited the right to seek relief for all but fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). We see no error, much less error that could be so characterized. The court instructed the jury it was not to consider the evidence that Clark had been convicted of DUI on two prior occasions “to prove the character of the Defendant or to show he was under the influence at the time of this incident.” The court also cautioned the jury not to “assume” Clark was guilty of DUI because of the prior offenses, specifying it could consider the evidence only “for purposes of deciding whether the State has proved . . . beyond a reasonable doubt that there were two prior DUI convictions within the seven years preceding the offense.” The court further instructed the jury that “[e]ach count charges a separate and distinct offense,” requiring the jury to “decide each count

separately on the evidence with the law applicable to it uninfluenced by your decision as to any other count.”

¶4 We have reviewed the entire record for reversible error and have found none. Therefore, the convictions and the sentences imposed 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