FILED BY CLERK
JUN 29 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. STEVEN ANTHONY BONIN, Appellant.	)	2 CA-CR 2011-0400 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20080876

Honorable Clark W. Munger, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz,
and Nicholas Klingerman — Tucson
Attorneys for Appellee

Sidney F. Wolitzky — Tucson
Attorney for Appellant

B R A M M E R, Judge.

¶1 Steven Bonin appeals from his convictions and sentences for aggravated driving under the influence (DUI). He argues the trial court erred by giving the jury a supplemental instruction during closing arguments and an erroneous instruction on lesser-

included offenses. He also contends conflicting expert testimony precluded the jury from finding him guilty and there was insufficient evidence of the length of time he had been incarcerated for the predicate prior DUI offenses. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding Bonin's convictions and sentences. *See State v. Bigger*, 227 Ariz. 196, ¶ 2, 254 P.3d 1142, 1145 (App. 2011). On February 27, 2008, an officer stopped Bonin for speeding. One other adult and a five-year-old child were passengers in the vehicle Bonin was driving. After the officer smelled alcohol and noticed Bonin had "watery, bloodshot eyes," a flushed appearance, and slurred speech, he administered a horizontal gaze nystagmus test, and Bonin displayed six out of six cues for alcohol impairment. Bonin was administered two breath tests using an Intoxilyzer 8000 machine and the results showed his blood alcohol concentration (BAC) was .151 and .148 just over an hour after he had been stopped.

¶3 Bonin was charged with aggravated DUI for being impaired to the slightest degree with at least two prior DUI violations within eighty-four months; aggravated DUI with a BAC of .08 or more with at least two prior DUIs within eighty-four months; and aggravated DUI while a minor is present. After a three-day jury trial, he was convicted as charged. After the close of the state's case, Bonin made a Rule 20, Ariz. R. Crim. P., motion for a judgment of acquittal, which he renewed following the jury's verdicts. The trial court denied the motion and sentenced Bonin to two terms of eight years' imprisonment and one term of three years' imprisonment, all to be served concurrently. This appeal followed.

Discussion

Evidence of Incarceration

¶4 Bonin argues the trial court erred when it denied his motion for a judgment of acquittal made pursuant to Rule 20 on the basis that insufficient evidence established he had two prior DUI convictions within eighty-four months of the current offense. A judgment of acquittal should be granted only when "there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a); *see also State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). "'Substantial evidence' is evidence that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). We review a trial court's denial of a Rule 20 motion de novo. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). On appeal, we will not set aside a verdict for insufficient evidence unless it "clearly appear[s] that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury," viewing the evidence in the light most favorable to sustaining the verdict. *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶5 For Bonin to have been convicted as charged, the jury must have found that he had been convicted of two or more DUI violations within the preceding eighty-four-month period, pursuant to A.R.S. §§ 28-1381(A)(1) and (2), and 28-1383(A)(2). Section 28-1383(A)(2) provides a person is guilty of aggravated DUI if the person commits a third or subsequent DUI violation within a period of eighty-four months. Time spent incarcerated is excluded from calculating the eighty-four-month period. § 28-1383(B).

¶6 Bonin argues the state failed to present sufficient evidence of the amount of time he had been incarcerated for the jury to have concluded as it did. He contends the documentary evidence of his incarceration admitted at trial was "highly misleading and confusing" and the state "offered no testimony explaining [the] document." Consequently, Bonin asserts there was insufficient evidence for the jury to find he had two prior DUI convictions within eighty-four months of the current offense.[1]

¶7 The trial court admitted into evidence two minute entries showing Bonin had been convicted for DUI offenses committed on January 5, 1997 and March 2, 1997. The minute entries also showed Bonin had been sentenced to terms of imprisonment for each offense and that the sentencing courts had ordered him committed to the Arizona Department of Corrections. The court also admitted into evidence a Department of Corrections report for Bonin. The report contains a column titled "movement" with a list of dates. The first date in the column, May 15, 1997, follows the date on the minute entry when Bonin first was sentenced and ordered incarcerated for his January 5 offense. The last date in the column, December 27, 2002, has the notation "COM SUPERV RLSE." From this evidence the jury reasonably could have inferred Bonin had been incarcerated

[1]Bonin also argues the state did not present evidence of "the method by which time is to be calculated" or evidence "that the jury was to exclude . . . time [incarcerated] from their calculations of the prior offenses." He contends the state "needed to call a witness to explain the calculation." The method for calculating the eighty-four-month period is provided clearly in § 28-1383(B). The trial court instructed the jury on that statute. Bonin has cited no authority to support his proposition that an expert witness was necessary and permissible to explain the law to the jury and thus we will not address his argument further. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (briefs must contain argument and supporting authority); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on review).

from May 15, 1997 to his release on December 27, 2002, approximately sixty-seven months. And although Bonin contends the other dates and notations listed in the report are confusing, we agree with the court that any confusion was clarified by the minute entries. Therefore, reasonable jurors could find beyond a reasonable doubt that Bonin's commission of the current offense on February 27, 2008 occurred within an eighty-four-month period of those two prior DUI offenses, excluding the sixty-seven months he spent incarcerated. Thus, the court did not err in denying Bonin's Rule 20 motion.

Jury Instructions

¶8 Bonin also contends the trial court erred by instructing the jury it could consider the lesser offense of driving under the influence if it found Bonin not guilty, or could not agree whether he was guilty, of aggravated DUI "having committed or been convicted of two or more prior DUI violations," without including the requirement that those violations needed to have occurred within the eighty-four months preceding the current offense. We review a court's decision to give a particular instruction for an abuse of discretion, *see State v. Lopez*, 209 Ariz. 58, ¶ 10, 97 P.3d 883, 885 (App. 2004), but we review de novo whether the instruction properly stated the law, *see State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997). In making the latter determination, we review the instructions the court gave as a whole. *See State v. Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d 265, 268 (2007). Thus, "[a] case will not be reversed because some isolated portion of an instruction might be misleading." *State v. Guerra*, 161 Ariz. 289, 294, 778 P.2d 1185, 1190 (1989).

¶9 Bonin argues that, by failing to specify the convictions needed to have occurred within eighty-four months of the current offense, the instruction was misleading and reasonable jurors would have believed they "only need[ed] to find the presence of two priors, without a time requirement." However, the jury also had been instructed that "the crime of aggravated DUI having committed or been convicted of two or more prior DUI violations requires proof . . . the defendant has been convicted, within a period of eighty-four months of at least two violations." And the jury also had been instructed on how to make that calculation. Further, both Bonin and the state explained during their closing arguments that the convictions must have occurred within seven years of the current offense. The state specifically explained, "You will notice that you have an option for lesser-included offenses in your verdict forms. The only way you get to the lessers . . . is if you disagree that he had two priors within seven years." Taking the instructions as a whole together with the parties' closing arguments, a reasonable jury would not have been misled and the trial court did not err. *See Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d at 268.

¶10 Bonin additionally argues the trial court erred in providing during closing argument a supplemental instruction to the jury on calculating the eighty-four-month period. He does not contend the instruction was erroneous, only that "the timing of the instruction was inappropriate." In general, the court instructs the jury following closing argument, "unless otherwise directed by the court." Ariz. R. Crim. P. 19.1(a). And the court, "at its election, may instruct the jury before or after argument, or both." Ariz. R. Civ. P. 51(a); *see* Ariz. R. Crim. P. 21.1 ("The law relating to instructions to the jury in

civil actions shall apply to criminal actions, except as otherwise provided."). Moreover, "[t]he order of conduct of the trial is up to the sound discretion of the trial court." *State v. Spratt*, 126 Ariz. 184, 187, 613 P.2d 848, 851 (App. 1980). The Rules explicitly allow the court flexibility in the timing of when it gives jury instructions, and we find no abuse here of the court's discretion in its decision to provide a supplemental jury instruction during closing argument.

Conflicting Expert Testimony

¶11 Bonin also argues the "jury erred in finding [him] guilty in view of the testimony of Chester Flaxmayer." Flaxmayer, called by Bonin to testify as an expert witness, had testified that Intoxilyzer 8000 blood alcohol test results could be influenced by mouthwash, body temperature, breathing patterns, and hematocrit. Bonin argues Flaxmayer "provided the jury with sufficient doubt about [Bonin]'s blood alcohol content" at the time he drove and the jury could have made a "reasonable inference" the test results were unreliable. However, the relevant inquiry is whether the evidence supported the jury's determination, not whether it would have supported a different one. *Bigger*, 227 Ariz. 196, ¶ 2, 254 P.3d at 1145. And "'[n]o rule is better established than that the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury.'" *Cox*, 217 Ariz. 353, ¶ 27, 174 P.3d at 269, *quoting State v. Clemons*, 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974).

¶12 Bonin disputes neither that the state presented evidence of Bonin's BAC-test results, nor that the state's expert witness contradicted Flaxmayer's opinions about the reliability of those results. *See State v. Bustamante*, 229 Ariz. 256, ¶ 5, 274 P.3d 526,

528 (App. 2012) (we will set aside jury verdict only where evidence insufficient to support jury's conclusion upon any hypothesis, resolving conflicts in evidence against defendant). The jury was not required to credit Flaxmayer's testimony in the face of conflicting evidence. *See Cox*, 217 Ariz. 353, ¶ 27, 174 P.3d at 269. Therefore, the evidence Flaxmayer provided did not preclude the jury from finding Bonin guilty of the charged offenses.

Disposition

¶13 For the foregoing reasons, we affirm Bonin's convictions and sentences.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge