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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. STEVEN LEE MCCLAIN, Appellant.	)	2 CA-CR 2012-0304 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20113209001

Honorable Javier Chon-Lopez, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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H O W A R D, Chief Judge.

¶1 Appellant Steven McClain appeals from his convictions on two counts of aggravated driving with an alcohol concentration (AC) of .08 or more, one while his

license was suspended and one after having been convicted of two or more convictions for driving under the influence of an intoxicating substance (DUI) within eighty-four months. He maintains the trial court erred in denying his motion for a judgment of acquittal, made pursuant to Rule 20, Ariz. R. Crim. P. Finding no error, we affirm.

Background

¶2 When reviewing the denial of a Rule 20 motion, we view the evidence "in the light most favorable to upholding the ruling." *State v. Cota*, 229 Ariz. 136, ¶ 63, 272 P.3d 1027, 1040, *cert. denied*, ___ U.S. ___, 133 S. Ct. 107 (2012). A Tucson Police officer on a night patrol in September 2011 found McClain with a tipped-over motorcycle in the roadway. The officer noticed the odor of alcohol coming from McClain and observed that his eyes were watery and bloodshot, but McClain denied having been drinking. A records check showed that McClain's driver license had been revoked. McClain declined to submit to a horizontal gaze nystagmus (HGN) test or other field sobriety tests. The officer arrested McClain and took him to a police substation where, after initially refusing, he ultimately submitted to breath testing. Those tests showed McClain had an AC of .088 and .086.

¶3 The state charged McClain with aggravated DUI while his license was revoked, aggravated driving with an AC of .08 or more while his license was revoked, aggravated DUI with two or more prior DUI convictions within eighty-four months, and aggravated driving with an AC of .08 or more with two or more prior DUI convictions within eighty-four months. After the state presented its evidence, McClain moved for a judgment of acquittal pursuant to Rule 20, but the court denied the motion. The jury

found McClain not guilty of the DUI charges, but guilty of both counts of driving with an AC of .08 or more. The trial court sentenced him to enhanced, minimum, three-year terms of imprisonment, to be served concurrently. This appeal followed.

Discussion

¶4 McClain contends the trial court erred in denying his Rule 20, Ariz. R. Crim. P. motion because "the evidence that [his AC] was above a .08 or more within two hours of driving was insufficient to sustain his convictions." He bases his argument on evidence presented that the Intoxylizer used to perform the breath testing has an error rate of ten percent and the state criminalist's testimony that it was "equally likely that a test result could be above or below the one that is reported."

¶5 We review the trial court's ruling on McClain's Rule 20 motion de novo. *See State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). In so doing, we view the evidence in the light most favorable to sustaining the convictions and determine whether "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* ¶ 16 (emphasis omitted), *quoting State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990). "[T]he controlling question is solely whether the record contains 'substantial evidence to warrant a conviction.'" *Id.* ¶ 14, *quoting* Ariz. R. Crim. P. 20(a). Substantial evidence is evidence that "reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997).

¶6 In *State ex rel. McDougall v. Superior Court*, 178 Ariz. 544, 875 P.2d 203 (App. 1994), Division One of this court rejected essentially the same argument presented

here. The *McDougall* court determined that "the effect of the inherent margin of error of a breath testing device is a question of fact for the fact finder." *Id.* at 546, 875 P.2d at 205. Thus, it concluded, it is for the jury to decide, considering "the test result combined with the other evidence," "[w]hether the inherent margin of error brought Defendant's []AC below" the statutory limit. *Id.*

¶7 In this case, contrary to McClain's assertion that "there was no other evidence of bad driving or of impairment," the arresting officer and two other officers who interacted with McClain testified that he smelled of alcohol and exhibited other signs of intoxication. And when the arresting officer arrived at the scene, McClain had already fallen with his motorcycle. McClain also told the officers he would not submit to testing because "he knew he was in trouble" and "was not going to allow [officers] to do the test and give [them] more evidence to use against him, because this DUI, he would be going to prison for a long time." *See State ex rel. Verburg v. Jones*, 211 Ariz. 413, ¶ 6, 121 P.3d 1283, 1285 (App. 2005) ("[A] defendant's refusal to submit to field sobriety tests can be admitted into evidence in a DUI trial."). Additionally, the criminalist testified that the breath test underestimates AC compared to a blood test.

¶8 Thus, this case is distinguishable from *State v. Gallow*, 185 Ariz. 219, 914 P.2d 1311 (App. 1995), on which McClain relies, because in that case "there was no evidence from which the jury could infer the defendant's []AC." *State v. Panveno*, 196 Ariz. 332, ¶ 29, 996 P.2d 741, 745 (App. 1999). McClain's reliance on *State v. Cannon*, 192 Ariz. 236, ¶ 13, 963 P.2d 315, 318 (App. 1998), is misplaced for the same reason—in that case the state had not presented any relation-back evidence to establish Cannon's AC

at the time of driving. In view of the additional evidence in the record here, we cannot say there was a lack of substantial evidence from which the jury could find McClain guilty.

Disposition

¶9 McClain's convictions and sentences are affirmed.

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

CONCURRING:

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

/s/ Michael Miller
MICHAEL MILLER, Judge