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.

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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THE STATE OF ARIZONA, Appellee, v. JUAN CARLOS ALVAREZ, Appellant.	2 CA-CR 2010-0343 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20092266001

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Juan Alvarez was convicted of four counts of aggravated driving under the influence of an intoxicant (DUI). The trial court sentenced him to presumptive, concurrent terms of imprisonment totaling 4.5 years with consecutive community supervision. On appeal, Alvarez argues the jury's verdicts were not supported by sufficient evidence. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the convictions. *State v. Slover*, 220 Ariz. 239, ¶ 2, 204 P.3d 1088, 1091 (App. 2009). On June 8, 2009, Tucson Police Department (TPD) Officer Rudy Rodriguez was dispatched to the scene of a single-car accident. He found a van facing northeast in the southbound lane of Palo Verde Road in front of a church driveway, with its horn sounding continuously. The vehicle appeared to have collided with something. Alvarez was sitting in the driver's seat, unsuccessfully attempting to start the vehicle. Rodriguez saw no one else inside the vehicle or in the area. When the two made eye contact, Alvarez removed the key from the ignition, got out of the van, and started to walk away. Alvarez stumbled and almost fell, and, after Rodriguez shouted to him, he walked back to the vehicle.

¶3 Rodriguez observed a strong odor of alcohol on Alvarez's breath and noted his face was flushed, and his eyes were watery and bloodshot. When Rodriguez asked him to provide his address, Alvarez repeatedly responded by giving his date of birth. After Alvarez performed poorly on field sobriety tests, Rodriguez gave him the *Miranda*

warnings.[1] Alvarez agreed to answer Rodriguez's questions, initially denied he had been driving, but later stated he had been "driving down the street" prior to the collision. Rodriguez then arrested Alvarez for driving under the influence. TPD Officer Jose Olivares, a DUI squad officer, arrived at the scene and administered two breathalyzer tests that indicated Alvarez's blood alcohol concentration (AC) was 0.252 and 0.254.

¶4 Alvarez was charged with two counts of aggravated DUI and two counts of aggravated DUI with an alcohol concentration of 0.08 or more. A jury found Alvarez guilty of all four charges. This appeal followed.

Discussion

¶5 Alvarez's sole argument on appeal is that the state presented insufficient evidence that he was in "actual physical control" of the vehicle. We review the sufficiency of the evidence de novo. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). "A conviction must be supported by substantial evidence of guilt." *State v. Martinez*, 226 Ariz. 221, ¶ 12, 245 P.3d 906, 908 (App. 2011). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). The substantial evidence "required for conviction may be either circumstantial or direct." *State v. Anaya*, 165 Ariz. 535, 543, 799 P.2d 876, 884 (1990). And, "[t]o set aside a jury verdict based on insufficient evidence, it must clearly appear that, on any hypothesis, there is no sufficient evidence to

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

support the conclusion reached by the jury." *Martinez*, 226 Ariz. 221, ¶ 12, 245 P.3d at 908.

¶6 To support a conviction for driving under the influence, the state had to prove that Alvarez had been driving or had been in actual physical control of a vehicle "while under the influence of intoxicating liquor" or with "an alcohol concentration of 0.08 or more." A.R.S. § 28-1381(A)(1), (2). Alvarez does not dispute he was under the influence or that his AC exceeded 0.08. Rather, he contends the state did not prove he was the one driving the vehicle at the time of the accident or that his attempts to start a "mechanically disabled" vehicle constituted "actual physical control." We need not decide whether Alvarez's attempts to start the disabled vehicle constituted "actual physical control" because we conclude the state presented sufficient evidence that Alvarez had been driving at the time of the collision.[2]

¶7 At trial, Officer Rodriguez testified that when he had arrived at the scene it appeared the van had collided with something. Alvarez was sitting in the driver's seat with the key in the ignition attempting to start the vehicle. Rodriguez stated no one else had been in the vehicle and he had not seen another person in the area. The state thus presented evidence which "'reasonable persons could accept as adequate and sufficient to

[2]Alvarez urges us to apply the factors considered by this court in *State v. Larriva*, 178 Ariz. 64, 870 P.2d 1160 (App. 1993), in determining whether he had exerted "actual physical control" over the vehicle. Although we do not address the merits of this argument, we point out that our supreme court has rejected the type of "rigid, mechanistic analysis" in *Larriva* in favor of one that permits "the trier of fact to consider the totality of the circumstances in determining whether defendant was in actual physical control of his vehicle." *State v. Love*, 182 Ariz. 324, 326, 897 P.2d 626, 628 (1995).

support a conclusion of defendant's guilt beyond a reasonable doubt.'" *Mathers*, 165 Ariz. at 67, 796 P.2d at 869, *quoting Jones*, 125 Ariz. at 419, 610 P.2d at 53.

¶8 Nevertheless, Alvarez contends the physical evidence supports his contention that someone else had been driving. He asserts the presence of two deployed airbags in the van suggested two individuals had been present in the vehicle. Additionally, he maintains that the cracked windshield and lack of blood on Alvarez's head indicated someone else had been driving, and the other person had hit his or her head on the windshield. Although the record contains some conflicting evidence, "[t]he jury was not required to accept [Alvarez]'s theory of the case." *State v. Marchesano*, 162 Ariz. 308, 312, 783 P.2d 247, 251 (App. 1989). And the state is not "required in a case based wholly upon circumstantial evidence to negate every conceivable hypothesis of innocence." *State v. Olivas*, 119 Ariz. 22, 23, 579 P.2d 60, 61 (App. 1978). "If conflicts in evidence exist, the appellate court must resolve such conflicts in favor of sustaining the verdict and against the defendant." *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). Viewing the evidence in the light most favorable to sustaining the jury's verdict, the state presented sufficient evidence that Alvarez had been driving the vehicle. *See Slover*, 220 Ariz. 239, ¶ 2, 204 P.3d at 1091.

Disposition

¶9 For the reasons stated, we affirm Alvarez's convictions and sentences.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

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

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge