

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

MICHAEL SAUCEDO, JR., *Appellant*.

No. 1 CA-CR 15-0383

FILED 03-22-2016

Appeal from the Superior Court in Maricopa County

No. CR2014-105970-001

The Honorable Brian Kaiser, Judge Pro Tempore

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix

By Adele G. Ponce

Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix

By Paul J. Prato

Counsel for Appellant

MEMORANDUM DECISION

Judge Maurice Portley delivered the decision of the Court, in which Presiding Judge Jon W. Thompson and Judge Patricia K. Norris joined.

P O R T L E Y, Judge:

¶1 Defendant Michael Saucedo, Jr., challenges his convictions and sentences for aggravated driving. Citing *State v. Love*, 182 Ariz. 324, 897 P.2d 626 (1995), he argues there was insufficient evidence to support the jury's determination that he posed a threat to the public by the exercise of present or imminent control over a vehicle while impaired. For the following reasons, we affirm.

FACTS¹ AND PROCEDURAL BACKGROUND

¶2 Late one night, Officer Ojeda responded to an emergency call reporting a body lying on the ground² near an SUV. When the officer arrived, he saw an SUV parked along the south curb, facing eastbound, with the engine running, and a person, who he later identified as Saucedo, sitting in the driver's seat. Officer Ojeda did not see a body near the SUV,³ but tapped on the window, and asked Saucedo to turn off the engine and step out of the SUV. Saucedo did not immediately turn off the engine, and refused to get out until his mother arrived and unlocked the SUV from the outside. Because Saucedo smelled of alcohol, had slurred speech and bloodshot, watery eyes, he was arrested. Subsequent blood tests revealed that his blood alcohol content was .237.

¶3 Saucedo was indicted for four counts of aggravated driving while under the influence of alcohol ("DUI"). After a trial, the jury found him guilty on all counts. Saucedo's sentence was suspended and he was

¹ We view the facts "in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998) (citation omitted).

² Saucedo and his brother had a fight; Saucedo won and his brother lay unconscious on the ground.

³ By the time Officer Ojeda arrived, Saucedo's brother had regained consciousness and walked away from the scene.

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sent to prison for four months (with 34 days of presentence incarceration credit), and placed on four years' standard probation, all concurrent, upon his release. He appealed, and we have jurisdiction over this appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and -4033(A).⁴

DISCUSSION

¶4 Saucedo argues the evidence is insufficient to establish that he placed himself, or the public, in danger by controlling the SUV while impaired because "[t]he uncontested evidence is consistent with the conclusion that [he] was using the SUV as a temporary shelter from the cold." We disagree.

¶5 We review a challenge based on the sufficiency of the evidence de novo, *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011) (citation omitted), and will only reverse if "no substantial evidence supports the convictions," *State v. Snider*, 233 Ariz. 243, 245, ¶ 4, 311 P.3d 656, 658 (App. 2013) (citation omitted). 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) (internal quotes and citation omitted), and may be either circumstantial or direct evidence, *State v. Pena*, 209 Ariz. 503, 505, ¶ 7, 104 P.3d 873, 875 (App. 2005). We review the evidence, but will not reweigh it. *State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997).

¶6 A person commits an aggravated DUI by either driving or being in "actual physical control" of a vehicle while under the influence of intoxicating liquor or drugs, if their license is suspended. See A.R.S. § 28-1383(A). Although there is no "bright line test" for when a person is in actual physical control of a vehicle, *Love*, 182 Ariz. at 327, 897 P.2d at 629, we have followed the supreme court's direction in *Love* to review the totality of the circumstances to determine whether the evidence demonstrates that a driver's "potential use of the vehicle presented a real danger to himself or others." *State v. Dawley*, 201 Ariz. 285, 288-89, ¶ 9, 34 P.3d 394, 397-98 (App. 2001).

⁴ We cite the current version of the applicable statutes unless otherwise noted.

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¶7 We are mindful that an intoxicated person may use a vehicle as a stationary shelter and not be considered to be in actual physical control for DUI purposes. See *State v. Tarr*, 235 Ariz. 288, 292, ¶ 11, 331 P.3d 423, 427 (App. 2014). However, a jury must consider all of the evidence to determine whether a defendant actually exercised control over a vehicle, or was using it as a shelter. *Id.* Relevant factors include:

whether the vehicle was running or the ignition was on; where the key was located; where and in what position the driver was found in the vehicle; whether the person was awake or asleep; if the vehicle's headlights were on; where the vehicle was stopped (in the road or legally parked); whether the driver had voluntarily pulled off the road; time of day and weather conditions; if the heater or air conditioner was on; whether the windows were up or down; and any explanation of the circumstances advanced by the defense.

Love, 182 Ariz. at 326, 897 P.2d at 628.

¶8 Saucedo does not contest that he was intoxicated, that his license was suspended, or that he had two prior DUI convictions. Instead, he claims that uncontested evidence supports his theory that he was using the SUV for shelter. We will not, however, re-weigh the evidence given that the jury had to determine the credibility of the witnesses, find the facts from the evidence presented, and determine whether the State had proved its case beyond a reasonable doubt. *State v. Piatt*, 132 Ariz. 145, 150, 644 P.2d 881, 886 (1981).

¶9 Saucedo was found in the driver's seat of the SUV, alone, sitting up and awake. Despite his contention that he did not drive the vehicle, there was contrary evidence. For example, his brother testified he turned the engine off before getting out of the SUV. By the time the police arrived, the keys were in the ignition and the engine was running. Moreover, the eyewitness, who called 9-1-1, testified that he first saw the SUV northbound and stopped in the middle of the left-hand lane of the road, but, by the time the police arrived and he returned to the scene, the car had been moved. Given that the jury had to determine credibility and the facts, the evidence was sufficient to demonstrate that Saucedo had moved the car from where the witness originally saw it with the body lying nearby, and, as a result, was in actual physical control of the SUV at the time the police arrived. See *State v. Rivera*, 207 Ariz. 69, 73, ¶ 11, 83 P.3d 69, 73 (App. 2004) (noting that "driving is a subset of actual physical control"); see also *Love*, 182 Ariz. at 327-28, 897 P.2d at 629-30 (stating that even if

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defendant has relinquished actual physical control, “if it can be shown that such person drove while intoxicated to reach the place where he or she was found, the evidence will support a judgment of guilt”); *Tarr*, 235 Ariz. at 294, ¶ 16, 331 P.3d at 429 (stating that evidence that defendant could have “driven off at any moment” is sufficient to support finding of actual physical control); *State v. Vermuele*, 160 Ariz. 295, 297, 772 P.2d 1148, 1150 (App. 1989) (holding that evidence that defendant was awake, had placed keys in ignition, and turned car on to charge mobile phone showed he was “readily capable of placing his vehicle into the stream of traffic,” and was thus in actual physical control). Thus, we find no error.

CONCLUSION

¶10 Based on the foregoing, we affirm Saucedo’s convictions and sentences.



Ruth A. Willingham - Clerk of the Court
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