IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

TANIA KAY LYDY, *Appellant*.

No. 1 CA-CR 16-0692
FILED 11-28-2017

Appeal from the Superior Court in Maricopa County
No. CR2014-141243-001
The Honorable Annielaurie Van Wie, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Robert A. Walsh
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Edward F. McGee
Counsel for Appellant

MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge John C. Gemmill joined.[1]

T H O M P S O N, Judge:

¶1 Tania Kay Lydy (defendant) appeals her convictions and sentences for three counts of aggravated driving under the influence of alcohol. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Mesa police stopped a small truck driven by Lydy for erratic driving on May 4, 2014. [2] The driver told the officer she did not have a driver's license because it had been suspended for a prior DUI. The officer arrested her for DUI after observing numerous signs of impairment.

¶3 Blood drawn from Lydy revealed that her blood alcohol concentration was .220, and would have been .221 to .224 ten minutes earlier, within two hours of driving. A custodian of records for the Motor Vehicle Division testified her license was revoked and suspended on the date of her arrest, and the records showed she had been convicted for a DUI committed March 8, 2006, and an aggravated DUI committed March 3, 2007. He testified that a certified copy of Department of Corrections records showed Lydy was incarcerated from October 16, 2007 to May 5, 2009 for the latter DUI.

¶4 The jury convicted Lydy of four counts of aggravated DUI, but the court dismissed count 4 because the charged offense was identical to that in count 3. The court sentenced Lydy to concurrent terms of fifteen years. Lydy filed a timely notice of appeal. This court has jurisdiction

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[1] The Honorable John C. Gemmill, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

[2] We view the evidence in the light most favorable to supporting the conviction. *State v. Boozer*, 221 Ariz. 601, 601, ¶ 2 (App. 2009).

pursuant to Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1) (2016), 13-4031 (2010), and 13-4033(A) (2010).

DISCUSSION

A. Purported Prosecutorial Misconduct

¶5 Lydy argues the prosecutor committed misconduct and shifted the burden of proof by arguing in rebuttal closing that the defense could have subpoenaed a witness from the Department of Corrections if it believed the DOC document contained errors, and the court erred in overruling his objection to the argument. The certified DOC document showed Lydy's incarceration for purposes of A.R.S. § 28-1383(B) (2012), necessary for proof that she had two prior convictions for DUI within 84 months of the instant offense under A.R.S. § 28-1383(A)(2).[3]

¶6 We will reverse a conviction for prosecutorial misconduct only when "(1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying [the] defendant a fair trial." *State v. Martinez*, 218 Ariz. 421, 426, ¶ 15 (2008) (citation omitted). "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Morris*, 215 Ariz. 324, 335, ¶ 46 (2007) (citation and internal punctuation omitted). "The misconduct must be so pronounced and persistent that it permeates the entire atmosphere of the trial." *Id.* (citation and internal punctuation omitted).

¶7 The prosecutor did not engage in misconduct or shift the burden of proof by his single, brief comment. "When a prosecutor comments on a defendant's failure to present evidence to support his or her theory of the case, it is neither improper nor shifts the burden of proof to the defendant so long as such comments are not intended to direct the jury's attention to the defendant's failure to testify." *State v. Sarullo*, 219 Ariz. 431, 437, ¶ 24 (App. 2008) (holding that prosecutor did not shift the burden of proof to defendant by arguing that he had failed to call expert witnesses to support his theory of defense). "Such comment is permitted by the well-recognized principle that the nonproduction of evidence may give rise to the inference that it would have been adverse to the party who could have produced it." *State ex rel. McDougall v. Corcoran,* 153 Ariz. 157, 160 (1987)

[3] We cite to the current versions of the statutes cited herein, as they have not been amended in material part since the date of this offense.

(holding that it was not improper to ask DUI defendant if he had received breath sample and to argue in closing that had the results been favorable, defendant would have offered it as evidence).

¶8 The case on which defendant relies, *State v. Suarez*, 137 Ariz. 368 (App. 1983), does not undermine the rule set forth in *Sarullo* and *Corcoran*. Rather, *Suarez* focuses on when it is permissible for the prosecutor to assert that an absent witness's testimony would have been favorable to the state. In *Suarez*, the court held it was prosecutorial misconduct for the state to raise this inference because defense counsel never argued the absent witnesses were favorable to the defendant's case, and therefore the state's argument constituted improper rebuttal. *See Suarez*, 137 Ariz. at 376-77.

¶9 In this case, defense counsel had argued at length by way of personal anecdote that the Department of Corrections makes mistakes, and he "found it funny" that an MVD official testified about the DOC document when the state could have subpoenaed a DOC official to testify about its own document. By these comments, defense counsel implied that the DOC official's testimony would have been favorable to defendant. The prosecutor's argument that Lydy could have subpoenaed a witness from the DOC if she believed the DOC document contained errors was proper rebuttal to defense counsel's argument. *See Sarullo*, 219 Ariz. at 437, ¶ 24.

¶10 Moreover, even if the prosecutor's reference to defendant's subpoena power was improper, this single brief remark did not deny Lydy a fair trial. The state reiterated immediately before and after the remark that the state has the burden of proof. The court repeatedly instructed the jury that the state had the burden of proof and defendant was not required to produce any evidence. On this record, this single remark, even if improper, could not have affected the jury's verdict.

B. Insufficiency of the Evidence

¶11 Lydy argues the evidence was insufficient to establish that she had two prior DUI convictions for offenses within 84 months of the instant offense as required for a conviction under A.R.S. § 28-1383(A)(2), because the state failed to supply a certified copy of the judgment of guilt from Scottsdale City Court proving her DUI conviction for an offense occurring March 8, 2006.

¶12 Lydy did not object to testimony that a certified copy of the MVD records showed that she had been convicted of a misdemeanor DUI

in Scottsdale City Court for an offense committed March 8, 2006, or to admission of the records as an exhibit at trial.[4]

¶13 On appeal, Lydy relies on *State v. Hauss*, 140 Ariz. 230 (1984) for the proposition that in order for the state to prove a prior conviction, at least in the sentence-enhancement context, it must offer into evidence a certified copy of the judgment of conviction and establish that the defendant is the person to whom the document refers. *See Hauss*, 140 Ariz. at 231. The *Hauss* court, however, allowed for two exceptions: 1) if defendant admits the conviction while testifying in court; or 2) if the prosecutor demonstrates "that its earnest and diligent attempts to procure the necessary documentation were unsuccessful for reasons beyond its control and that the evidence introduced in its stead is highly reliable." *Hauss*, 140 Ariz. at 231.

¶14 Because Lydy did not object at trial to the use of the MVD records to establish her 2006 conviction in Scottsdale City Court, it was not strictly necessary for the prosecution to either obtain a certified copy of the judgment of conviction or to demonstrate unsuccessful but earnest and diligent attempts to obtain the judgment, and that the MVD records were highly reliable. *See Hauss*, 140 Ariz. at 231. We accordingly review the use of the MVD records to support the prior conviction for fundamental error only. *See State v. Henderson*, 210 Ariz. 561, 568, ¶ 22 (2005).

¶15 The court did not err, much less fundamentally err, in allowing the use of a certified copy of the MVD record to demonstrate that Lydy had been convicted in Scottsdale City Court of extreme DUI committed on March 8, 2006. Since the *Hauss* decision, the Arizona Supreme Court has held that the use of documentary evidence other than the certified judgment of conviction is permissible to prove prior convictions. *See State v. White,* 160 Ariz. 24, 28 (1989) (finding a certified copy of an out-of-state probation order, along with other documents, provided sufficient evidence to prove the defendant had a prior conviction); *State v. Nash*, 143 Ariz. 392, 403 (1985) (holding that the state had adequately proved a defendant's out-of-state prior conviction using certified copies of the defendant's photographs and a commitment record stating the crime and sentence). This court has explained this expansion of the rule by noting that "the purpose of the court's holding in *Hauss* . . . was to avoid credibility contests and unfairness to defendants resulting from purely testimonial evidence." *State v. Miller,* 215 Ariz. 40, 44, ¶ 12 (App. 2007) (internal

[4] We also note that Lydy has not asserted, in the trial court or on appeal, that she was not, in fact, convicted of the cited DUI.

punctuation and citation omitted). Thus, as the law stands now, "[a]lthough the preferred method of proving prior convictions for sentence-enhancement purposes is submission of certified conviction documents bearing the defendant's fingerprints, courts may consider other kinds of evidence as well." *State v. Robles*, 213 Ariz. 268, 273, ¶ 16 (App. 2006) (citation omitted); *Nash*, 143 Ariz. at 403.

¶16 The MVD custodian of records testified that the certified record itemized the convictions, suspensions, and revocations of Tania Kay Lydy, whom he identified in court from a photograph included in the MVD record as the defendant. He testified that the court sends the MVD an abstract of the conviction, and the MVD enters it into the record. He further testified that this record showed she had been convicted in Scottsdale City Court of DUI committed on March 8, 2006. This evidence was more than sufficient to prove beyond a reasonable doubt that Lydy was convicted of extreme DUI committed on March 8, 2006, as necessary for her conviction on Count 3. *See State v. Arredondo*, 155 Ariz. 314, 316 (1987) ("To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury.")

CONCLUSION

¶17 For the foregoing reasons, we affirm Lydy's convictions and sentences.

AMY M. WOOD • Clerk of the Court
FILED: AA