DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 08-0708
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	
MICHAEL WAYNE WARNOCK,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Mohave County

Cause No. CR 2007-1345

The Honorable Lee Frank Jantzen, Judge

REVERSED AND REMANDED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
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Attorneys for Appellee

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Attorneys for Appellant

T H O M P S O N, Judge

¶1 Michael Wayne Warnock appeals his convictions and sentences on two counts of aggravated driving under the

influence of alcohol on grounds of improper jury instruction and insufficiency of evidence. For the reasons that follow, we reverse and remand for a new trial.

FACTUAL AND PROCEDURAL HISTORY

¶2 Warnock was arrested and charged with aggravated driving under the influence of alcohol ("DUI") after a deputy sheriff observed him exceeding the speed limit and making an erratic turn onto a dirt road in Dolan Springs at about 9 p.m. on August 18, 2007 without any tail lights. The deputy sheriff testified that he smelled a strong odor of alcohol on Warnock's breath, and Warnock admitted having been at a friend's house drinking, and told the deputy sheriff that he had consumed his last beer about ten minutes earlier. Warnock was unable to successfully complete a series of field sobriety tests. The deputy testified Warnock told him his driver's licenses "were suspended, but they shouldn't be, they should only be expired."[1] He testified that a check of records confirmed that Warnock's license was under suspension. The deputy sheriff administered two breath tests, which revealed a blood alcohol concentration of .120 and .119.

¶3 The Motor Vehicle Division ("MVD") record admitted at trial showed that Warnock pled guilty in 1996 and again in 1997

[1]The deputy testified that he had been mistaken when he wrote in his report that Warnock told him "that he had no driver's license. They were expired, but not suspended."

to charges of driving on a suspended license. The MVD record shows that in 1999, his license was suspended indefinitely for failure to appear on a traffic complaint that was issued for failure to produce evidence of motor vehicle financial responsibility. The MVD mailed notice of this indefinite suspension to Warnock's address of record in 1999. The MVD record shows that he was cited once in 2001 and again in 2006, not for driving on a suspended license, but for driving without a license and proper endorsements.

¶4 Warnock testified he did not know his Arizona license was suspended. He testified he never received the 1999 notice mailed from the MVD that his license was suspended. He acknowledged MVD records showed that the notice of suspension was sent to his post office box, but he testified that delivery was not always reliable and his common law wife sometimes did not bring him the mail. He testified, "I knew I had a California license and it was suspended, and was under the assumption my Arizona license was never suspended." He testified that he paid $55 to reinstate his California driving privileges in 2006, but he did not have the $105 required to obtain his Arizona license. "It was never put to me it was a suspension. It was for a civil ticket," he testified. He further testified that after the August 2007 incident, he paid the $105 and had his Arizona driver's license reinstated. He

testified that he had been stopped by deputy sheriffs several times since 1999, and his Arizona driver's license "came back not suspended."

¶5 The jury convicted Warnock of two counts of aggravated DUI, and the judge suspended sentence, ordered four years' probation, and imposed four months' imprisonment as a condition of probation. Warnock timely appealed. We have jurisdiction pursuant to the Arizona Constitution, Article VI section 9, and Arizona Revised Statutes ("A.R.S.") §§ 12-120.21(A)(1)(2003), 13-4031 (2001), and -4033 (Supp. 2008).

DISCUSSION

¶6 Warnock first argues that the trial judge deprived him of his due process rights by improperly instructing the jury on the rebuttable presumption of knowledge of a suspension that arises from MVD's mailing of a notice of suspension. The judge instructed the jury in pertinent part as follows:

> "Knew or had reason to know" means either the defendant had actual notice of the suspension of the defendant's driver's license by MVD or that MVD had mailed notice of the suspension to the address provided by the defendant.
>
> The State is not required to prove actual receipt of the notice or actual knowledge of the suspension. Knowledge of suspension or revocation may be presumed if written notice was mailed to the address provided by the defendant. The defendant may rebut this presumption with evidence that he did not receive the notice or have actual knowledge of suspension or revocation.

> **If you are convinced beyond a reasonable doubt that MVD properly mailed notice of the suspension, then the defendant has the burden of proving it is more likely true than not true that the defendant did not receive the notice or have actual knowledge of the suspension.**

(Emphasis added.) Warnock argues on appeal, as he did at trial, that the final paragraph of this instruction improperly shifted the burden of proof of the element of knowledge of the license suspension to him. The trial court overruled Warnock's objection, reasoning that "it certainly doesn't shift the burden on the defense to prove anything other than to kind of disprove what the State has to prove first."

¶7 To prove Warnock guilty of aggravated DUI based on a suspended license, the State was required to prove that he was driving under the influence of alcohol on a suspended license, and that he "knew or should have known" that his license was suspended. *See State v. Williams*, 144 Ariz. 487, 489, 698 P.2d 732, 734 (1985). Due process requires the State to prove every element of the offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); *see Mullaney v. Wilbur*, 421 U.S. 684, 703-04 (1975) (condemning jury instruction that shifted burden of proof to defendant). Under Arizona law, a rebuttable presumption of notice, and, accordingly, knowledge, arises from mailing of the notice of suspension to the driver's

address of record. *See* A.R.S. § 28-3318(E) (2004) (providing that compliance with mailing provisions constitutes notice, and state is not required to prove actual receipt or actual knowledge in prosecution for aggravated DUI); A.R.S. § 28-3318(C) (2004) (providing that the notice shall be mailed to the address of record); *see State v. Cifelli*, 214 Ariz. 524, 527, ¶¶ 12-13, 155 P.3d 363, 366 (App. 2007). Once the State proves the notice was mailed to the address of record, the burden shifts to a defendant to rebut the presumption by showing that he did not receive the notice. *Cifelli*, 214 Ariz. at 527, ¶ 13, 155 P.3d at 366.

¶8 We review the legal adequacy of a jury instruction de novo. *State v. Martinez*, 218 Ariz. 421, 432, ¶ 49, 189 P.3d 348, 359, *cert. denied*, 129 S. Ct. 494 (2008). Only when the instructions taken as a whole may have misled the jury, will we find reversible error. *State v. Sucharew*, 205 Ariz. 16, 26, ¶ 33, 66 P.3d 59, 69 (2003). "Closing arguments of counsel may be taken into account when assessing the adequacy of jury instructions." *State v. Bruggeman,* 161 Ariz. 508, 510, 779 P.2d 823, 825 (App. 1989).

¶9 The instruction properly informed the jury that if it was convinced that the MVD had properly mailed the notice of the suspension, a presumption of knowledge arises, but that Warnock might rebut the presumption by showing that he did not receive

the notice. *See Cifelli*, 214 Ariz. at 527, ¶ 13, 155 P.3d at 366. The final paragraph of this instruction, however, erroneously informed the jury that once the State proved the notice was mailed, the burden of proof of this element of the offense, knowledge, shifted to defendant, who was required to prove by a preponderance of the evidence not only that he had not received the notice, but that he had no actual knowledge of the suspension. This is an incorrect statement of the law: the rebuttable presumption of knowledge arising from mailing of the notice vanishes if defendant successfully rebuts the presumption by offering proof he never received it. *Cf. Lee v. State*, 218 Ariz. 235, 237, ¶ 8, 182 P.3d 1169, 1171 (2008) (explaining that the "mail delivery rule" creates a presumption of delivery that "disappears" if the addressee denies receipt). The burden of proving knowledge of the suspension, however, never shifts from the State to the defendant; the State simply is accorded the benefit of a presumption of knowledge arising from mailing, which disappears once the defendant successfully rebuts it with evidence that he never received the notice. *See State v. Agee,* 181 Ariz. 58, 61, 887 P.2d 588, 591 (App. 1995) (holding that failure to instruct on element of knowledge was reversible error where issue was in dispute); *cf.* A.R.S. § 13-205(A) (2010) (imposing burden on defendant to prove affirmative defenses by preponderance of evidence).

¶10 The court properly advised the jury elsewhere in the instructions that the State had the burden of proving "each element of each charge beyond a reasonable doubt" and Warnock emphasized in his closing argument that the burden of proof of each element of the offense "never shifts" from the State. The State, however, argued that because the State had proved beyond any doubt that the MVD had mailed the notice to Warnock, the instruction shifted the burden to Warnock to prove it was "more likely true than not true that [Warnock] did not receive the notice or have actual knowledge of the suspension." In light of counsel's closing arguments, we find the jury instructions taken as a whole were inadequate and may have misled the jury. *Sucharew,* 205 Ariz. at 26, ¶ 33, 66 P.3d at 69.

¶11 To demonstrate that an objected-to error was harmless, the State must prove beyond a reasonable doubt that the error "did not contribute to or affect the verdict or sentence." *State v. Henderson,* 210 Ariz. 561, 567, ¶ 18, 115 P.3d 601, 607 (2005) (citing *State v. Bible,* 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993)). The State has failed to meet its burden in this case. Warnock testified that he neither received the notice nor actually knew that his license was under suspension. Under these circumstances, we do not know whether the improper instruction contributed to the jury's verdict. It is possible that without the improper burden-shifting instruction, the jury

might have had reasonable doubt and could have found Warnock not guilty. *Cf. Agee,* 181 Ariz. at 61, 887 P.2d at 591 (holding that failure to instruct on element of knowledge was not harmless error in light of the defendant's claim that he had not known the suspension was in effect on the date at issue). We are not convinced beyond a reasonable doubt that the error was harmless in this instance.

¶12 Warnock also argues that the evidence was insufficient to show that he knew or should have known that his driver's license was suspended, as necessary for his conviction. In reviewing the sufficiency of evidence, we view the facts in the light most favorable to upholding the jury's verdict, and resolve all conflicts in the evidence against Warnock. *State v. Girdler,* 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). "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." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987) (citation omitted).

¶13 Although we hold that the jury instruction on rebuttable presumption was fatally flawed and reverse on that basis, we conclude the State offered sufficient evidence supporting the convictions that Warnock knew or should have known that his license was under suspension. "Reversible error

based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (citation omitted). Here, the State presented probative facts to support the convictions: MVD records show that the notice of license suspension was mailed to Warnock's address of record seven years earlier, and the deputy sheriff who stopped him on the instant occasion testified that Warnock told him that his license was under suspension. Although Warnock denied knowing that his license was under suspension, credibility determinations are for the fact finder, not this court. *See id.* On this record, the State presented sufficient evidence to support the convictions.

CONCLUSION

¶14 For the foregoing reasons, we reverse Warnock's convictions and remand for a new trial.

/s/
_____
JON W. THOMPSON, Judge

CONCURRING:

/s/
_____
PATRICIA A. OROZCO, Presiding Judge

/s/
_____
DIANE M. JOHNSEN, Judge