IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 06/02/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA,	)	No. 1 CA-CR 10-0642
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
ADRIAN OLDHAM,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-100701-001 DT

The Honorable Cari A. Harrison, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Joel M. Glynn, Deputy Public Defender
Attorneys for Appellant

Adrian Oldham — Phoenix
Appellant

S W A N N, Judge

¶1 Adrian Oldham ("Defendant") timely appeals his conviction for driving with a suspended license while under the

influence of alcohol and driving with a suspended license with a body alcohol concentration of 0.08 or more. *See* A.R.S. §§ 28-1381(A)(1), (2), -1383(A)(1). Pursuant to *Anders v. California,* 386 U.S. 738 (1967), and *State v. Leon,* 104 Ariz. 297, 451 P.2d 878 (1969), defense counsel has advised us that a thorough search of the record has revealed no arguable question of law, and requests that we review the record for fundamental error. *See State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Defendant was given an opportunity to file a supplemental brief *in propria persona* and did so.[1]

FACTS AND PROCEDURAL HISTORY[2]

¶2 In October 2009, the Surprise Police Department tested Defendant's blood alcohol level. An officer informed Defendant that if the test came back demonstrating "he's over .08" that "later the courts will suspend his license" for 90 days or 12 months.

¶3 On January 5, 2010, Surprise Police Officer Kara Tarleton was on duty about 10 p.m. and saw Defendant's car "weaving around the medians" in a shopping center parking lot. She also observed that Defendant alternated speeds as he drove,

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[1] We grant the Motion to Accept Appellant's Supplemental Brief in Propria Persona received by this court April 19, 2011.

[2] "We view the evidence in the light most favorable to sustaining the verdicts and resolve all inferences against appellant." *State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997).

ran through a stop sign, entered a main street without stopping, and stopped "about a half car length past" a stop sign. Tarleton flashed her lights and Defendant parked his car "diagonal across some parking spaces." When she approached Defendant's vehicle, Tarleton saw him "fumbling around trying to get his driver's license and registration." Defendant handed her an Arizona driver's license; she asked him whether "there was any suspension of any kind, anything wrong with his license," and Defendant answered, "I do not know." Tarleton noticed that Defendant "was extremely sweaty," had "bloodshot watery eyes" and "was very nervous." She also smelled an "extremely strong odor of alcohol coming from the vehicle" and saw a "nearly empty" vodka bottle on the passenger-side floorboard. Defendant's speech was "mumbled" and the officer had a difficult time distinguishing his words because they "all just kind of flow[ed] in a monotone, one consistent word." Tarleton performed a Horizontal Gaze Nystagmus field sobriety test ("HGN") and observed that Defendant displayed the "maximum number of cues of impairment," which indicated an alcohol concentration greater than 0.08.

¶4 Tarleton arrested Defendant and transported him to the Surprise Police Department. She issued *Miranda* warnings, which Defendant acknowledged he understood. Defendant told Tarleton that he last ate at 9 a.m. and had been drinking vodka from 10

a.m. until 8 p.m. that day. He confirmed that his license was "suspended" and said he knew this because he had "received something in the mail telling him that." Defendant agreed to take a breathalyzer test and tested 0.297 and 0.294.

¶5 A grand jury indicted Defendant for driving with a suspended license while under the influence of intoxicating liquor (Count 1) and driving with a suspended license with a body alcohol concentration of 0.08 or more (Count 2). A three-day trial was held. At the conclusion of the state's case, Defendant moved for a judgment of acquittal pursuant to Ariz. R. Crim. P. 20, arguing that the state failed to prove that he knew or had reason to know that his driver's license was suspended. The motion was denied. Defendant testified and presented one witness. At the conclusion of Defendant's case, the state put on a rebuttal witness, after which Defendant again moved for a judgment of acquittal contending the state failed to present sufficient evidence for a jury to find Defendant had notice of the license suspension. The court denied his motion. After deliberations, the jury found Defendant guilty of both counts. Defendant was sentenced to serve 120 days incarceration and two years' supervised probation for each count. He was credited for 187 days of presentence incarceration.

¶6 Defendant timely appeals.

DISCUSSION

¶7 We have read and considered the briefs submitted by Defendant and counsel, and have reviewed the entire record. *Leon,* 104 Ariz. at 300, 451 P.2d at 881. We find no fundamental error. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, and the sentence imposed was within the statutory range. Defendant was present at all critical phases of the proceedings and represented by counsel. The jury was properly impaneled and instructed. The jury instructions were consistent with the offenses charged. The record reflects no irregularity in the deliberation process.

I. RULE 20 MOTION

¶8 A judgment of acquittal is appropriate only when there is "no substantial evidence to warrant a conviction." Rule 20. Substantial evidence 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). "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).

¶9 For the jury to find Defendant guilty of Count 1, the state had to prove Defendant was driving a motor vehicle while

under the influence of intoxicating liquor and that his ability to drive was impaired to the slightest degree because of intoxication. A.R.S. § 28-1381(A)(1). For Count 2, the State had to prove that Defendant had an alcohol concentration of 0.08 or more within two hours of driving and that that concentration resulted from alcohol consumed either before or while driving. A.R.S. § 28-1381(A)(2). For both counts, the state also had to prove that Defendant's driver's license was suspended on January 5 and that Defendant knew or should have known that. A.R.S. § 28-1383(A)(1).

¶10 Here, sufficient evidence was presented to support the jury's finding that Defendant was guilty of both counts.

A. Driving a Motor Vehicle While Under the Influence of Intoxicating Liquor

¶11 Defendant admitted he was driving that night. But while he admitted to drinking vodka until a couple of hours before he was stopped, Defendant denied that he was "drunk" when Tarleton stopped him.

¶12 Tarleton testified that Defendant had bloodshot eyes, that there was a "nearly empty" bottle of vodka on the passenger floorboard, that she smelled a "strong odor of alcohol," that the HGN test results indicated Defendant's alcohol content was greater than 0.08, and that the breathalyzer tests performed later that night registered at 0.297 and 0.294.

¶13 A criminalist testified that the breathalyzer used to test Defendant was in "proper working order" that night. She also testified that "[e]verybody is impaired to operate a motor vehicle above a .08 alcohol concentration" and described alcohol's "continuum of effects" on driving to include weaving and alternating speeds. She affirmed she could "calculate the amount of alcohol in a person's system at the time a breath test was taken" if she knew the person's weight, alcohol concentration and gender, and that Defendant "would have to have consumed at least 27 . . . 12 ounce beers or 27 shots of liquor" to "reach a breath alcohol concentration of a .294."

¶14 Although Defendant testified that he was not "drunk," a reasonable juror could have found the testimony of Tarleton and the criminologist more credible and found that Defendant was impaired. *See State v. Cox,* 217 Ariz. 353, 357, ¶ 27, 174 P.3d 265, 269 (2007) ("No rule is better established than that the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury.").

B. Impaired to the Slightest Degree

¶15 Tarleton testified that she saw Defendant's car "weaving" through a parking lot and alternating speeds, which she had been trained to recognize as signs of driver impairment. She also testified that he ran through a stop sign in the

parking lot, entered a main street without stopping first, stopped "ahead" of a stop sign, and parked diagonally across parking spaces when he finally stopped.

¶16 Defendant testified that his driving that night may have looked "erratic" because he was following the road through the empty parking lot rather than ignoring the parking spaces and "zip[ping] straight across." He did not "recall" running through a stop sign but admitted it was "possible" that he failed to stop when leaving the parking lot. He also admitted that he stopped ahead of the stop sign because he could not see on-coming traffic from behind the line, and he parked diagonally across parking spaces when pulled over because he wanted to "stop the car as quickly and safely as possible" in response to the patrol car and "wasn't very picky about lining up."

¶17 Again, the credibility and weight of testimony is for the jury to decide. *Cox,* 217 Ariz. at 357, ¶ 27, 174 P.3d at 269.

C. Alcohol Concentration of 0.08 or More Within Two Hours of Driving Resulting From Alcohol Consumed Either Before or While Driving

¶18 Tarleton saw Defendant's car weaving "after" 10 p.m. January 5. The HGN test results obtained at the scene indicated Defendant had an alcohol content greater than 0.08. Defendant was arrested about 11 p.m. The breathalyzer tests resulted in readings of 0.297 at 11:25 p.m. and 0.294 at 11:31 p.m.

Defendant admitted he had been drinking vodka from the bottle in his car until a couple of hours before he was stopped.

¶19 The jury was instructed that it could not consider Defendant "under the influence" simply because he admitted to drinking, but that a rebuttable presumption existed that he was "under the influence" if he had "0.08 or more concentration of alcohol" within two hours of driving. The jury, however, was also instructed that it was "free to accept or reject" that presumption "after considering all of the facts and circumstances of this case." We presume a jury follows its instructions. *State v. Newell,* 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006).

¶20 From the evidence presented at trial, a reasonable jury could have concluded that Defendant had an alcohol content of 0.08 or more within two hours of driving, resulting from the vodka he admittedly consumed earlier that night.

D. Knew or Should Have Known Driver's License Was Suspended

¶21 The Arizona Motor Vehicle Department (MVD) is required to send a written notice to a driver to the address on record when a license is suspended. A.R.S. § 28-3318(A)(1), (C). "Service of the notice . . . is complete on mailing." A.R.S. § 28-3318(D). "The state is not required to prove actual

receipt of the notice or actual knowledge of the suspension . . . .” A.R.S. § 28-3318(E).

¶22 Here, Defendant’s MVD “face sheet” documented that the December letter had been mailed to Defendant’s address. The letter detailed that Defendant’s license would be suspended from January 4, 2010, until April 4, 2010. Tarleton testified that Defendant told her January 5 that he knew his license was suspended because he had received “something in the mail.” Additionally, a Surprise Police Department officer testified that he told Defendant in October 2009 that his license could be suspended if his blood alcohol test came back showing a level greater than 0.08.

¶23 On cross-examination, the MVD custodian of records acknowledged that the “certified duplicate” of the December letter did not contain “a stamp” indicating it was “actually sent” on a particular day and was not initialed by an MVD employee, even though she had seen such a stamp on copies of MVD letters “in the past.” The custodian also acknowledged that MVD did not have a process to note within its system whether a letter was returned as undeliverable, and that MVD destroys such letters without notation in its records. But the custodian unequivocally testified that the MVD records indicated that the December letter *was* sent, even if she could not say whether Defendant “did or didn’t” receive it.

¶24 Defendant, however, testified that he never received any correspondence from MVD, that the address MVD had was a "temporary living situation," and that he was aware of "one instance" where a letter sent there had been returned to sender because his name was not on the mailbox. Defendant also testified that he agreed with Tarleton that his license had been suspended because he did not want to appear "misinformed" about its status, but that on January 5 he believed his license was valid.[3] Defendant also denied having any knowledge that his license would be suspended because of the October 2009 incident, and that he did not "recall" that the Surprise Police officer informed him it could be.

¶25 As we stated above, the jury weighs the evidence presented and makes a credibility determination. *Cox,* 217 Ariz. at 357, ¶ 27, 174 P.3d at 269. From the evidence presented here, a reasonable jury could have concluded that Defendant knew or had reason to know that his driver's license was suspended.

II. IMPEACHMENT EVIDENCE

¶26 At trial, defense counsel moved to admit "10 motor vehicle records . . . pulled from [his] other cases" to impeach the MVD custodian's testimony. Counsel asserted that his

[3] On cross examination, Defendant clarified that his memory was "a vague recollection of something related to insurance" and not "necessarily even something [he] got in the mail."

documents constituted testimonial evidence for impeachment purposes only that were exempt from disclosure pursuant to Arizona court rules and case law. On the state's objection, the court denied defense counsel's motion, and Defendant now contends the court's action "denied [his] right to put on a proper defense."

¶27 Here, the MVD custodian testified that she was familiar with the "stamp" because she had seen it before. When prompted on cross-examination to explain why the December letter did not have it, the custodian "guess[ed]" that the department may have "discontinued" its use. Defense counsel then requested a break in trial because he had "impeachment evidence that the State has not previously seen." The state objected because the documents had not been previously disclosed. After reviewing legal authority cited by defense counsel, the court precluded admission of the documents due to counsel's failure to disclose them and because they were "prejudicial" because "there's no opportunity to look into any issues of normal practices or the jury is left to speculate as to whether that's a policy that's been violated."

¶28 Ariz. R. Crim. P. 15.2(c) requires a defendant to make available to the prosecutor:

> (1) The names and addresses of all persons, other than that of the defendant, whom the defendant intends to call as witnesses at

> trial, together with their relevant written or recorded statements;
>
> (2) The names and addresses of experts whom the defendant intends to call at trial, together with the results of the defendant's physical examinations and of scientific tests, experiments or comparisons that have been completed; and
>
> (3) A list of all papers, documents, photographs and other tangible objects that the defendant intends to use at trial.

Impeachment evidence "is that which is designed to discredit a witness, i.e., to reduce the effectiveness of his testimony by bringing forth evidence which explains why the jury should not put faith in him or his testimony." *Zimmerman v. Super. Ct. (Stanford),* 98 Ariz. 85, 90, 402 P.2d 212, 215 (1965). "Cross-examiners may not impeach by implying the existence or non-existence of facts they are not prepared to prove." *State v. Nordstrom*, 200 Ariz. 229, 252 n.14, ¶ 75, 25 P.3d 717, 740 n.14 (2001). *See also State v. Hines*, 130 Ariz. 68, 71, 633 P.2d 1384, 1387 (1981) ("Impeachment by insinuation occurs when the cross-examiner asks questions for which there is no basis in fact.").

¶29 Here, defense counsel sought to introduce letters that had the stamp from client files unrelated to Defendant's case, but he never planned to offer testimony about MVD policy -- a fact that was noted in the court's decision to deny admission of

those files.[4] Additionally, although defense counsel asserted that the "only reason" he sought to admit the records was to impeach the MVD custodian, the custodian did not testify regarding the MVD policy; instead, during cross-examination she merely "guess[ed]" why the December letter did not contain the stamp.

¶30 At trial, defense counsel asserted that the documents were "testimonial evidence" for impeachment purposes only, and were therefore exempt from disclosure. *See Osborne v. Super. Ct. (McBryde),* 157 Ariz. 2, 5, 754 P.2d 331, 334 (1988) (finding that disclosure of prior inconsistent statements used for impeachment is governed by Ariz. R. Evid. and that the prosecutor need only be provided an opportunity to review the statement at the time it is used to impeach). Testimonial evidence is a "person's testimony offered to prove the truth of the matter asserted." Black's Law Dictionary 640 (9th ed. 2009). Here, counsel characterized his case documents as "testimonial" because they included "someone's initials saying that this document was sent out on a specific date." While it is true that the documents would have shown when they were mailed, they would not have explained the MVD policy regarding use of the stamp or why the "certified copy" of the Defendant's

[4] The Defendant's Notice of Defenses, Witnesses and Evidence did not identify any MVD witnesses or policy statements to be used in his defense.

letter -- a "duplicate of the information contained in the computer storage devices" –- did not contain the stamp and handwritten initials of a MVD employee noting when it was sent. Neither were the documents evidence of the MVD custodian's prior statement that could be introduced at trial pursuant to the holding in *Osborne.* In fact, the MVD custodian testified that she did not know the MVD policy regarding the use of the stamp. Because this evidence was a document that Defendant intended to use at trial, it should have been disclosed pursuant to Rule 15.2.

¶31 Before restricting introduction of evidence as a sanction for a discovery violation, the court should consider the vitality of the evidence to the proponent's case; the degree to which the evidence or sanctionable conduct has been prejudicial to the opposing party; whether the conduct was willful or motivated by bad faith; and whether a less stringent sanction would suffice. *State v. Mesa,* 203 Ariz. 50, 57, ¶ 32, 50 P.3d 407, 414 (App. 2002). Here, the court concluded that Defendant's failure to disclose the documents was "for the element of taking everybody by surprise." The court also found the documents "prejudicial" to the state's case because no witness was scheduled to testify about MVD policies. Defendant extensively cross-examined the MVD custodian about the stamp, and she admitted both that she had seen it used in the past and

that the December letter did not have it. On this record we find no error, much less fundamental error, in the court's refusal to admit the evidence.

CONCLUSION

¶32 We affirm Defendant's conviction and sentence. Counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do nothing more than inform Defendant of the status of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, Defendant shall have thirty days from the date of this decision to proceed, if he so desires, with an *in propria persona* motion for reconsideration or petition for review.

/s/
_____
PETER B. SWANN, Presiding Judge

CONCURRING:

/s/
_____
PATRICK IRVINE, Judge

/s/
_____
MAURICE PORTLEY, Judge