FILED BY CLERK
DEC 28 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MIGUEL ANGEL ORDAZ, Appellant.	)	2 CA-CR 2010-0339 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20100777001

Honorable Edgar B. Acuña, Judge
Honorable Deborah Bernini, Judge
Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

R. Lamar Couser — Tucson
Attorney for Appellant

K E L L Y, Judge.

¶1 After a jury trial, Miguel Ordaz was convicted of aggravated driving under the influence of liquor (DUI) with a minor present and aggravated driving or actual physical control with an alcohol concentration of .08 or more with a minor present. The trial court suspended imposition of sentence and placed Ordaz on probation for two years. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), stating he has reviewed the record thoroughly and has found no arguable issues to raise on appeal. He has asked us to review the record for fundamental error. Ordaz has filed a supplemental brief in which he asserts several claims of error. For the reasons set forth below, we affirm.

¶2 Viewed in the light most favorable to sustaining the verdicts, *see State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), the evidence was sufficient to prove each of the jury's findings of guilt. And, the term of probation is authorized by law. *See* A.R.S. §§ 13-902(B); 28-1381(J); 28-1383(A)(3)(a), (F). In June 2008, Ordaz was stopped by a Pima County Sheriff's deputy at a "DUI checkpoint" with his fourteen-year-old son in the car. When asked, Ordaz initially denied having been drinking, but the deputy had "noticed . . . the smell of spirituous liquors was coming from his mouth." The deputy asked Ordaz to get out of his car and noticed his speech was "mumbled," his eyes were watery, and he used support in exiting the vehicle. Ordaz refused to submit to breath testing and also refused to perform a one-leg stand or a walk-and-turn test. Ordaz was arrested, and subsequent blood testing showed he had an alcohol concentration of .142.

¶3 In his supplemental brief, Ordaz first maintains the trial court erred in denying his "motion to suppress evidence based on the illegality of the sobriety checkpoint." Before trial, Ordaz moved to suppress the evidence against him, arguing that because the state had not disclosed "data or statistics" to "justif[y] or determine[] the effectiveness of the checkpoint" at which he was stopped, the state had failed to meet its "burden of establishing the lawfulness of the checkpoint and [his] subsequent 'seizure.'" After a hearing, the court denied the motion. On appeal, we review a court's denial of a motion to suppress evidence for an abuse of discretion to the extent it involves a discretionary issue, but we review constitutional and legal issues de novo. *See State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007).

¶4 A stop of a vehicle at a DUI checkpoint is a "seizure" for purposes of the Fourth Amendment. *See Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990). We must therefore determine whether the stop here was "reasonable." *State v. Tykwinski*, 170 Ariz. 365, 367, 824 P.2d 761, 763 (App. 1991).

> The reasonableness of a search or seizure that is less intrusive than an arrest depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." There must be a "weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest and the severity of the interference with individual liberty."

Id. (citation omitted), *quoting Brown v. Texas*, 443 U.S. 47, 50-51 (1979).

¶5 Ordaz does not contest that the public concern addressed by the checkpoint—the danger of DUI—is a grave one, and he essentially concedes that the

interference in a driver's liberty at a checkpoint like the one here is minimal. Indeed, one of the checkpoint officers testified drivers are typically stopped for less than thirty seconds. He contends, however, that in order to establish the stop was reasonable, the state was required to show, "through empirical data or statistics, that the checkpoint was warranted in the first place, and . . . that the checkpoint proved to be more effective in apprehending or deterring impaired drivers than regular patrols," and that the state failed to do so.

¶6 First, even accepting arguendo that the state was required to "demonstrate a legitimate reason for setting up the checkpoint in the first place," we reject Ordaz's assertion that the state failed to do so. At the hearing, a Pima County Sheriff's deputy testified that he proposes checkpoint locations to his commanders based on data relating to "areas of high DUI incidents, high DUI related . . . collisions, and also any alcohol serving establishment violation areas." And the officer affirmed he goes through such a procedure "every time to determine where . . . to have a checkpoint."[1]

¶7 Moreover, although the state did not present evidence that the DUI checkpoint in question here was "effective," a deputy testified it was undertaken for deterrent purposes as well as detection. Our supreme court and the Supreme Court of the United States have stated that seizures at such checkpoints are reasonable and constitutional, so long as they are minimally intrusive and "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown,*

[1]The trial court also ordered the state to provide Ordaz with statistical data used to authorize the checkpoint and instructed Ordaz to request a hearing if further examination of the officers involved was required based on that data. No such request was made.

443 U.S. at 50-51; *see also Sitz*, 496 U.S. at 455; *State v. Superior Court*, 143 Ariz. 45, 48-49, 691 P.2d 1073, 1076-77 (1984). We see no ground to depart from that precedent based solely on an absence of individualized evidence about the "effectiveness" of the specific checkpoint at which Ordaz was stopped.[2] The checkpoint here was conducted in accordance with specific instructions given to officers and involved minimal intrusion into the drivers' privacy. *See State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 9-10, 663 P.2d 992, 1000-01 (1983) (J. Feldman specially concurring). We therefore conclude the seizure of Ordaz was reasonable.

¶8 Next, Ordaz asserts the trial court should have dismissed a previous indictment against him with prejudice. Ordaz originally was indicted in July 2008 on one count of child abuse and one count of aggravated DUI with a minor present. On the first day of trial, when Ordaz's minor son did not appear, the court determined the state had not properly served the minor. The court dismissed the matter without prejudice, giving Ordaz the opportunity to move to dismiss the charges with prejudice. After receiving briefing and holding a hearing, the court denied the motion to dismiss with prejudice. We review a court's ruling on a motion to dismiss charges for an abuse of discretion. *See State v. Sandoval*, 175 Ariz. 343, 347, 857 P.2d 395, 399 (App. 1993); *State v. Gilbert*,

[2]The second "balancing factor" of the test for a reasonable seizure set forth in *Brown*—that a seizure advance the public interest—is not a test for "effectiveness" meant to "transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger." *Sitz*, 496 U.S. at 453. Although the Court in *Sitz* received information about arrest rates at the Michigan checkpoint, *id.* at 448, its analysis of how the test should be applied is equally applicable here.

172 Ariz. 402, 404, 837 P.2d 1137, 1139 (App. 1991) ("The trial court has the discretion to dismiss a case with or without prejudice.").

¶9 Rule 16.6(d), Ariz. R. Crim. P., provides that a dismissal of a prosecution shall be without prejudice to commencement of another prosecution, "unless the court order finds that the interests of justice require that the dismissal be with prejudice." "The rule favors dismissal without prejudice." *Gilbert*, 172 Ariz. at 404, 837 P.2d at 1139. And, "the most important factor to consider in whether a dismissal should be with or without prejudice is whether delay in the prosecution will result in prejudice to the defendant." *Id.*

¶10 Ordaz, however, maintains the trial court should have dismissed the first indictment even in the absence of prejudice because the "state's own ineptness, mismanagement or negligence . . . resulted in its inability to proceed to trial." The cases he cites, however, do not support this contention. *State v. Chichester*, 170 P.3d 583, 588-89 (Wash. Ct. App. 2007), relies on a Washington rule allowing the court to dismiss a "criminal prosecution due to arbitrary action or governmental misconduct," but the rule also requires "prejudice to the rights of the accused which materially affect the accused's right to a fair trial." Wash. Super. Ct. Crim. R. 8.3(b). And *Cornell v. Superior Court*, 160 Ariz. 1, 2-4, 770 P.2d 305, 306-08 (1989), addressed a situation involving repeated violations of a defendant's speedy trial rights by the state. No such violations are alleged here. In sum, under Arizona law a court must determine a defendant will be prejudiced by a dismissal without prejudice before dismissing a prosecution with prejudice. We

cannot say the court here abused its discretion in determining Ordaz would not be prejudiced by permitting the state to refile the charges against him.

¶11 Ordaz further contends the trial court erred in holding a hearing and granting the state's motion to introduce hearsay evidence of Ordaz's son's age after his son failed to appear at trial. Ordaz argues the motion was untimely and his notice of the motion was inadequate. Five days before the start of Ordaz's trial on the second indictment, the state filed a motion in limine asking that, if Ordaz's son failed to appear, it be allowed to present testimony from a law enforcement officer about statements the son had made about his age. When Ordaz's son failed to appear on the first day of trial, despite having been subpoenaed, the court heard testimony as to whether Ordaz had "procured or induced" his son's absence. It found he had and ordered that the state would be allowed to admit the officer's testimony if Ordaz's son did not appear.

¶12 The state's pretrial motion was filed less than twenty days before trial, and so failed to comply with Rule 16.1(b), Ariz. R. Crim. P. Rule 16.1(c) provides that untimely motions "shall be precluded, unless the basis therefor was not then known, and by the exercise of reasonable diligence could not then have been known, and the party raises it promptly upon learning of it." But the preclusion provision of Rule 16.1(c) is not mandatory. Rather, because Rule 16.1(b) permits a trial court to modify the deadline for motions, if it "wishes to entertain a late motion in limine, it may do so" in the exercise of its discretion. *State v. West*, 176 Ariz. 432, 442, 862 P.2d 192, 202 (1993), *overruled on other grounds by State v. Rodriguez*, 192 Ariz. 58, 961 P.2d 1006 (1998); *see also State v. Cramer*, 174 Ariz. 522, 523, 851 P.2d 147, 148 (App. 1992); *State v. Zimmerman*, 166

Ariz. 325, 328, 802 P.2d 1024, 1027 (App. 1990); *State v. Vincent*, 147 Ariz. 6, 8-9, 708 P.2d 97, 99-100 (App. 1985). We conclude the trial court did not abuse its discretion in hearing the motion because its necessity only became clear on the first day of trial when Ordaz's son failed to appear.

¶13 According to Ordaz the trial court also erred in concluding he "had induced or procured his son's absence from trial" and in precluding him "from contesting the credibility or reliability of the hearsay testimony." We review the court's ruling "on the admissibility of evidence under exceptions to the hearsay rule" for an abuse of discretion, but we review de novo whether Ordaz's rights under the Confrontation Clause were violated. *State v. King*, 212 Ariz. 372, ¶ 16, 132 P.3d 311, 314 (App. 2006).

¶14 At the hearing on the state's motion to allow the officer's hearsay testimony, the state's investigator testified she had been assigned to serve a subpoena on Ordaz's son. When she attempted to serve him, she learned the child was "in Texas for the summer." He was visting his grandparents, Ordaz's parents. The child's mother, Ordaz's wife, told the investigator she would provide a telephone number for him in Texas, but failed to do so. When the investigator spoke with another of Ordaz's children, he stated his parents had told him his brother was in Texas with relatives. Ordaz conceded that his son lived with him, but his wife testified that he did not make the decision to allow the child to go to Texas and had not told him "not to show up." She testified she had left the decision to appear in court on the day of trial to Ordaz's son,

then sixteen years old.[3] She acknowledged, however, that Ordaz was "a parent to [his son]" and "an active participant in [his] life." The court stated that in its "unique position to determine the credibility of witnesses," it did not believe Ordaz's wife and granted the state's motion, finding by a preponderance of the evidence that Ordaz had "procured or induced" his son's absence from trial.

¶15 Later, when the court was finalizing jury instructions, defense counsel requested a lesser-included offense instruction for "simple DUI," indicating that he would be asking the jury to discount the officer's testimony about Ordaz's son's age because it was hearsay. The court ruled he could not make such an argument because the "ruling [was] based on [Ordaz]'s conduct in this case, it was his own wrongdoing" and because the jury could not disregard evidence based on the evidentiary rules. The court did, however, instruct the jury on simple DUI.

¶16 Hearsay testimony is generally inadmissible, Ariz. R. Evid. 802, but Rule 804(b)(6), Ariz. R. Evid., provides an exception to that rule when a witness is unavailable and a statement is "offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." And, although testimonial statements by witnesses not available at trial are generally barred under the Confrontation Clause unless the defendant had a prior opportunity to cross-examine them, such statements may be admitted when the defendant caused a witness to be absent from trial with the intent of preventing that witness from testifying.

[3]Ordaz's son apparently had been returned to Tucson by the time of trial and was served with a trial subpoena at his Tucson school approximately a month before trial.

Giles v. California, 554 U.S. 353, 357-58, 361-62 (2008); *cf. State v. Prasertphong*, 210 Ariz. 496, 502, ¶ 24, 114 P.3d 828, 834 (2005). Ordaz argues that there was no "competent evidence" to show that he was responsible for his son's failure to appear at trial and that therefore the exception above did not apply. We disagree.

¶17 The state needed only to show by a preponderance of the evidence that Ordaz had procured his son's absence from trial. *See State v. Valencia*, 186 Ariz. 493, 498, 924 P.2d 497, 502 (App. 1996). A preponderance of the evidence standard requires the party with the burden to establish a fact to show merely that it "is more probably true than not true." *State v. Sierra-Cervantes*, 201 Ariz. 459, ¶ 6, 37 P.3d 432, 433 (App. 2001). As noted above, evidence showed that the child lived with his parents, that he had been out of state with Ordaz's family members, and that Ordaz was a parent with an active role in his child's life. From this the trial court reasonably could infer it was more likely than not Ordaz had acquiesced to or engaged in action that prevented his son from appearing at trial and that he had done so with the intent of preventing the child from testifying. This was particularly so in light of the fact his son had been in Texas and failed to appear at Ordaz's first trial, resulting in the dismissal of the original charges against Ordaz.[4] And, we will not reevaluate on appeal the trial court's finding that

[4]The trial court also noted in a minute entry filed after the jury's verdict was entered that the child appeared in court the day after the verdict requesting that the warrant that had been issued for his arrest be quashed. The court noted this was likely in response to its "message" to Ordaz after the verdict was read that it would "really hate for a [sixteen] year old boy to get arrested and thrown in jail on a warrant" and "if someone wants to bring him down here for me so I can talk to him and take care of th[e] warrant before he gets picked up and held in custody . . . I'd really like to have that happen."

Ordaz's wife's testimony lacked credibility. *See State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995).

¶18 We likewise reject Ordaz's unsupported argument that the trial court erred in prohibiting defense counsel from arguing the jurors should disbelieve the officer's testimony because it was given by him instead of Ordaz's son. First, the court made clear that Ordaz could challenge the credibility of the testimony on other grounds, such as the child's "credibility of telling the officers these things." Thus, contrary to his assertion on appeal, Ordaz was not barred from "contesting the credibility or reliability of the evidence presented against him," he was simply barred from contesting it on the basis that the evidence was hearsay. Precluding Ordaz from arguing that the state should have presented his son's direct testimony, when the court had found Ordaz had caused his son's absence from trial, is entirely consistent with the idea that a defendant should not be allowed to "create the condition of unavailability [of a witness] and then benefit therefrom." *United States v. Kimball*, 15 F.3d 54, 55-56 (5th Cir. 1994). Ordaz cites no authority for a contrary conclusion, and our research has disclosed none.

¶19 Finally, Ordaz maintains the trial court erred in denying his motion for a new trial. That motion was based on the court's ruling relating to Ordaz's son's absence from trial and the state's motion to admit the officer's testimony in lieu of the son's. As outlined above, we find no error in the court's rulings on those points, and we likewise cannot say it abused its discretion in denying Ordaz's motion for new trial. *See State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996) (denial of motion for new trial reviewed for abuse of discretion).

¶20 Pursuant to our obligation under *Anders*, we have searched the record for fundamental, reversible error and have found none. Ordaz's convictions and the probationary term imposed are affirmed.

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

CONCURRING:

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

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge