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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RAMON JOSE HERNANDEZ-HERNANDEZ, Appellant.	2 CA-CR 2012-0254 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20103549001

Honorable Deborah Bernini, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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Tucson
Attorneys for Appellee

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V Á S Q U E Z, Presiding Judge.

¶1 Ramon Hernandez-Hernandez appeals from his convictions of aggravated driving under the influence (DUI) while his driver license was suspended, revoked, or restricted and aggravated DUI having committed or been convicted of two or more DUI offenses within the preceding eighty-four months. He argues the trial court erred by denying his motion for a judgment of acquittal and by precluding him from introducing his medical records at trial as a sanction for his failure to timely disclose them. Finding no error, we affirm.

¶2 We view the evidence in the light most favorable to sustaining the jury's verdicts. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In October 2009, a Pima County Sheriff's deputy saw a car being driven by Hernandez-Hernandez emitting "sparks coming from the passenger side" due to damage to the car. The damage to the car also was causing the roadway to be gouged as Hernandez-Hernandez drove. The deputy stopped the car and noted when he spoke to Hernandez-Hernandez that he had "red, watery, bloodshot eyes" and slightly slurred speech. The deputy then contacted the Tucson Police Department (TPD) and requested that officers respond because "it was their jurisdiction."

¶3 When a responding TPD officer approached the car to speak to Hernandez-Hernandez, he had to "introduce [himself] twice . . . before [he] actually got any type of reaction." He noted that Hernandez-Hernandez seemed "very confused, dazed." The officer conducted a horizontal gaze nystagmus test and Hernandez-Hernandez exhibited

six of six cues "in addition to vertical gaze nystagmus." Those cues indicate neurological dysfunction, which might be caused by alcohol or other drugs, including diazepam.

¶4 Hernandez-Hernandez told the officer that he took several medications for "back pain and for pain to his legs," including morphine, Percocet, Neurontin, and diazepam. Analysis of Hernandez-Hernandez's blood found no alcohol but, consistent with his statement about his medications, showed the presence of diazepam, nordiazepam (a metabolite of diazepam), and morphine. The officer and a criminalist testified those medications affect the central nervous system and cause impairment including drowsiness, poor coordination, and the inability to concentrate. Hernandez-Hernandez testified he had taken the medications for many years and had not been impaired.

¶5 Hernandez-Hernandez told police that a black Jeep had struck his car at a nearby intersection earlier that evening, causing the damage. He stated that he had called police but decided to drive home when they did not respond after approximately ninety minutes. A TPD officer investigated the intersection and found in a dirt lot debris from an apparent collision between a white vehicle like Hernandez-Hernandez's and a blue vehicle, as well as a telephone pole that the officer concluded had been struck by the white vehicle. Hernandez-Hernandez claimed at trial that he had been "struck by another vehicle," black or dark blue in color, and had been "spun out in a parking lot."

¶6 Following a two-day jury trial, Hernandez-Hernandez was convicted of the offenses described above. The trial court sentenced him to concurrent, four-month prison terms and placed him on a three-year term of probation. This appeal followed.

¶7 Hernandez-Hernandez first claims the trial court erred by denying his motion for a judgment of acquittal made pursuant to Rule 20, Ariz. R. Crim. P. A motion for judgment of acquittal shall be granted where "there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). When a trial court denies a Rule 20 motion, the reviewing court must determine de novo "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. West*, 226 Ariz. 559, ¶ 16, 250 P.3d 1188, 1191 (2011), *quoting State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990). "Substantial evidence" includes both direct and circumstantial evidence. *Id.* Further, "'[w]hen reasonable minds may differ on inferences drawn from the facts, the case must be submitted to the jury, and the trial judge has no discretion to enter a judgment of acquittal.'" *Id.* ¶ 18, *quoting State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997) (alteration in *West*).

¶8 Relevant here, to convict Hernandez-Hernandez of aggravated DUI, the state was required to prove that he was driving or in actual physical control of a vehicle while "impaired to the slightest degree" by "the influence of . . . any drug."[1] A.R.S. §§ 28-1381(A)(1); 28-1383(A)(1), (2). Hernandez-Hernandez argues there was insufficient evidence that he was impaired by the drugs found in his blood because the "levels [of those drugs] were not quantified and the witnesses presented no testimony correlating prescription medication levels with impairment." But he cites no authority,

[1]Hernandez-Hernandez does not argue the state's evidence was deficient as to any element of aggravated DUI other than impairment.

and we find none, suggesting such testimony is required when, as here, there is ample other evidence of impairment.

¶9 As we noted above, a police officer and criminalist testified that the medications found in Hernandez-Hernandez's bloodstream could cause impairment. And Hernandez-Hernandez had several outward signs of impairment—most notably slurred speech and confusion—and displayed six out of six cues on the horizontal gaze nystagmus test. Moreover, the evidence established he recently had been involved in a motor vehicle accident, and the jury was free to reject his claim the accident had been caused by another vehicle. *See State v. Lowery*, 230 Ariz. 536, ¶ 6, 287 P.3d 830, 833 (App. 2012) (jury free to discredit defendant's testimony); *see also State v. Clemons*, 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974) ("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."). Finally, Hernandez-Hernandez's decision to drive a vehicle that was so damaged as to be emitting sparks and damaging the roadway, creating an obvious hazard, also supports a finding that he had been impaired. In light of this evidence, the jury readily could conclude Hernandez-Hernandez was impaired and that the drugs found in his blood caused that impairment. *Cf. State ex rel. McDougall v. Albrecht*, 168 Ariz. 128, 132, 811 P.2d 791, 795 (App. 1991) (defendant's "failure to stop at a red light and speeding coupled with his poor performance of the field sobriety tests and physical signs of impairment constituted substantial evidence of impairment").

Accordingly, the trial court did not err in denying Hernandez-Hernandez's Rule 20 motion.[2]

¶10 On the day before trial, Hernandez-Hernandez disclosed approximately four-hundred pages of his medical records, stating those records would bolster his testimony "about why he's taking those medications and what they do for him." The trial court precluded him from introducing the records, rejecting Hernandez-Hernandez's argument that continuing the trial would be a proper remedy. On appeal, Hernandez-Hernandez argues the court's decision "deprived [him] of his right to present a complete defense."

¶11 Pursuant to Rule 15.6(c), Ariz. R. Crim. P., all disclosure "shall be completed at least seven days prior to trial." To present evidence not timely disclosed by this final deadline, a party must obtain leave from the trial court. Ariz. R. Crim. P. 15.6(d). If the court does not find the undisclosed material or information sought to be used could not have been discovered or disclosed in compliance with the rules, "the court may either deny leave or grant a reasonable extension to complete the disclosure and leave to use the material or information." *Id.* A party who does not meet the requisite burden is not subject to "automatic preclusion of the evidence whose admission is being sought." Ariz. R. Crim. P. 15.6 committee cmt. Rather, "the court retains discretion to

[2]Hernandez also suggests that his conviction is "not . . . in the interest of public policy" because he had a prescription for the medication and he should not be required to "disregard [his] doctors' orders and stop taking [his] prescribed medications" in order "to retain [his] license to drive and thereby continue participating fully in society." Whether to punish or provide an exemption for those who drive while impaired by prescription medication is a question properly left to our legislature.

impose at least one of the Rule 15.7[, Ariz. R. Crim. P.,] sanctions," including preclusion. *Id.*; *see also State v. Scott*, 24 Ariz. App. 203, 205, 537 P.2d 40, 42 (1975) (trial court has discretion to determine appropriate relief for Rule 15 violation). "The decision whether to impose sanctions and the choice of sanctions for a discovery violation is within the sound discretion of the trial court." *State v. Delgado*, 174 Ariz. 252, 256, 848 P.2d 337, 341 (1993). And, "[a]bsent a showing of prejudice, the trial court's decision will not be reversed on appeal." *Id.*

¶12 We find no abuse of discretion. There is no question that Hernandez-Hernandez disclosed the medical records well after the deadlines imposed by the rules of criminal procedure. *See* Ariz. R. Crim. P. 15.2(d), 15.6(c). And he did not, as required by Rule 15.6(d), seek leave of the court to disclose and use the additional material. Hernandez-Hernandez offered no reason for the late disclosure, acknowledging he had the records "for some[ ]time." *See State v. Fenton*, 21 Ariz. App. 193, 194, 517 P.2d 1086, 1087 (1974) (reason for late disclosure relevant to sanction). We recognize that preclusion is "rarely an appropriate sanction," *Delgado*, 174 Ariz. at 257, 848 P.2d at 342, and that a continuance would have been a less onerous sanction for Hernandez-Hernandez. But he already had sought and obtained two continuances of the trial. The state has an interest in "the efficient administration of justice," *United States v. Ruiz*, 536 U.S. 622, 631 (2002), and it should not be forced to endure delays occasioned only by the defendant's lack of diligence. Furthermore, any continuance would have placed a significant burden on the state to review voluminous medical records and determine

whether to retain an expert to either review those records before trial or testify about the contents of those records. *See Fenton*, 21 Ariz. App. at 194, 517 P.2d at 1087 (prejudice to opposing party relevant to sanction).

¶13 In any event, Hernandez-Hernandez has not demonstrated resulting prejudice. *See Delgado*, 174 Ariz. at 256, 848 P.2d at 341. Although the medical records would have corroborated his testimony that he had been prescribed the medications for medical conditions and had taken them for many years, those facts were not in dispute. Additionally, he does not suggest those records would have demonstrated he had a tolerance or resistance to the prescribed medications. Thus, as the trial court pointed out, the records would not have meaningfully bolstered his defense.

¶14 Hernandez-Hernandez cites several cases for the proposition that a continuance is the appropriate sanction for his late disclosure. Those cases do not support his argument. Indeed, one of them, *State v. Krone*, 182 Ariz. 319, 897 P.2d 621 (1995), further supports our conclusion that preclusion of the evidence is an appropriate remedy. The court there noted that preclusion is appropriate when the late disclosure "would have caused hardship." *Id.* at 322, 897 P.2d at 624. The remaining cases cited by Hernandez-Hernandez are readily distinguishable. *See State v. Smith*, 140 Ariz. 355, 359, 681 P.2d 1374, 1378 (1984) (continuance appropriate when undisclosed witness "vital to the defendant"; late disclosure occurred because "defendant's attorney honestly believed [witness] was not available and could not be located"); *State v. Castaneda*, 111 Ariz. 264, 266, 528 P.2d 608, 610 (1974) (denial of motion in limine appropriate when "[d]efense

counsel did not allege that [defendant]'s case was prejudiced by granting a continuance rather than precluding the evidence entirely").

¶15 For the reasons stated, Hernandez-Hernandez's convictions and sentences are affirmed.

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

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Michael Miller
MICHAEL MILLER, Judge