

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

SEP 16 2013

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2012-0356
	)	DEPARTMENT B
Appellee,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
MICHAEL JOSEPH NELSON,	)	the Supreme Court
	)	
Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20101334001

Honorable Michael O. Miller, Judge  
Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General  
By Joseph T. Maziarz and Diane Leigh Hunt

Tucson  
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender  
By Robb P. Holmes

Tucson  
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ECKERSTROM, Judge.

¶1 Appellant Michael Nelson was convicted after a jury trial of two counts of aggravated driving while under the influence of an intoxicant (DUI), both of which were

based on his having two or more DUI convictions for offenses committed within eighty-four months of the instant offenses. He contends on appeal that because he offered to stipulate that he had been convicted of two DUI offenses within the statutorily prescribed period, the trial court erred in denying his motion to preclude the state from introducing evidence of his prior DUI convictions. We affirm for the reasons stated below.

¶2 Nelson was charged with violating A.R.S. § 28-1383(A)(2),<sup>1</sup> which provides that a person is guilty of aggravated DUI if “[w]ithin a period of eighty-four months [the person] commits a third or subsequent” DUI violation. Before trial, Nelson filed a motion to preclude the state from introducing evidence regarding the prior DUI convictions “upon [his] admission of guilt to that portion of the indictment.” He contended admission of such evidence would violate his due process rights and would cause him to be “severely prejudiced,” as contemplated by Rule 403, Ariz. R. Evid. He also argued the supreme court’s decision in *State ex rel. Romley v. Galati*, 195 Ariz. 9, 985 P.2d 494 (1999), is distinguishable on the ground that the defendants had requested bifurcated trials in that case so that the element of prior DUI convictions could be decided in a separate trial; he asserted that he, however, was only requesting that the court accept the stipulation in lieu of requiring the state to prove this element of the offense, keeping the issue from the jury. Acknowledging *Galati* and the Supreme Court’s decision in *Old Chief v. United States*, 519 U.S. 172 (1997), which Nelson also had relied on, the court denied the motion after a hearing.

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<sup>1</sup>Although he committed the present offenses on March 27, 2010, we cite the current version of the statute, as its relevant provisions have not changed.

¶3 Nelson contends that by refusing to accept his stipulation, the trial court “unnecessarily brought extremely prejudicial information before the jury, which deprived [him] of his right to a fair trial.” As he did below, Nelson attempts to distinguish *Galati* based on the request for a bifurcated trial, arguing that if the supreme court’s decision in *Galati* “precludes a stipulation, then the decision conflicts with his right to a fair trial under *Old Chief* . . . and Rule 403, Arizona Rules of Evidence, and should be reconsidered.” He cites a number of cases from other jurisdictions interpreting *Old Chief* as allowing a defendant to stipulate to a prior conviction when it is an element of the offense, and he notes that this court had relied on *Old Chief* in *State v. Root*, 193 Ariz. 442, 973 P.2d 1203 (App. 1998), the companion case the supreme court vacated in *Galati*, 195 Ariz. 9, ¶¶ 1, 17, 985 P.2d at 495, 497.

¶4 We review a trial court’s ruling on the admissibility of evidence for an abuse of discretion. *State v. Dann*, 220 Ariz. 351, ¶ 66, 207 P.3d 604, 618 (2009). Similarly, we will not disturb a court’s ruling on whether evidence is unfairly prejudicial unless the court has abused its discretion, “[b]ecause the trial court is best situated to conduct the Rule 403 balance.” *State v. Cañez*, 202 Ariz. 133, ¶ 61, 42 P.3d 564, 584 (2002).

¶5 Given the supreme court’s decision in *Galati*, the trial court did not abuse its discretion by refusing to accept Nelson’s stipulation over the state’s objection. The court did not err in rejecting Nelson’s contention that *Galati* is distinguishable, nor in finding unavailing his reliance on the special concurrence in *Galati* in support of that argument. *See* 195 Ariz. 9, ¶¶ 18-22, 985 P.2d at 497-98 (Feldman, J., specially

concurring). The reasoning and language of the majority's opinion in *Galati* was broad enough to apply here. *See State v. Newnom*, 208 Ariz. 507, ¶ 6, 95 P.3d 950, 951 (App. 2004) (“reasoning of the majority opinion was much broader than the concurring opinion would suggest,” and decision not limited to situations in which defendant requests bifurcated trial). Notably, the court stated, “[W]hen a prior conviction is an element of the present charge, the trial court cannot preclude the jury from hearing evidence of that conviction.” *Galati*, 195 Ariz. 9, ¶ 13, 985 P.2d at 496. In decisions by this court subsequent to and relying on *Galati* in analogous contexts, we have reached similar conclusions. *See, e.g., State v. Lopez*, 209 Ariz. 58, ¶ 8, 97 P.3d 883, 855 (App. 2004) (finding court did not abuse discretion in refusing to compel state to accept stipulation that defendant was a prohibited possessor, element of weapons misconduct); *Newnom*, 208 Ariz. 507, ¶¶ 3-5, 95 P.3d at 950-51 (finding court did not abuse discretion in refusing to compel state to accept stipulation on defendant's prior convictions, element of aggravated domestic violence).

¶6 Whether the finding of prior DUI convictions is kept from the jury because the issue has been bifurcated from the other issues or because it is precluded after the defendant admits to them by stipulation is a distinction without a difference. The ultimate outcome is essentially the same; the issue of the defendant's prior DUI convictions, an element of the offense, is concealed from the jury. The court in *Galati* made clear that this was the gravamen of the issue, not the method by which the suppression was accomplished. *See* 195 Ariz. 9, ¶¶ 4, 8, 15, 985 P.2d at 495, 496, 497. It distinguished *Old Chief* because the defendant there had stipulated to the elements of the

offense and agreed that the stipulation could be submitted to the jury. *Galati*, 195 Ariz. 9, ¶ 15, 985 P.2d at 497. Here, Nelson wished to stipulate to the prior DUI convictions and keep that stipulation from the jury. As *Galati* made clear, the obligation to determine whether the state has proven elements of the offense “cannot be delegated, in part, to the trial judge.” *Id.* ¶ 12.

¶7 Nor did the trial court abuse its discretion in rejecting Nelson’s contention that the evidence was unfairly prejudicial in light of case law to the contrary. In *State v. Geschwind*, for example, which the court relied on in *Galati*, 195 Ariz. 9, ¶ 13, 985 P.2d at 496, the supreme court concluded that evidence of conduct that forms an element of the offense “cannot be precluded as irrelevant or unfairly prejudicial,” because ““it is an integral part of the crime with which appellant was charged.”” 136 Ariz. 360, 363, 666 P.2d 460, 463 (1983), quoting *State v. Greenawalt*, 128 Ariz. 150, 166, 624 P.2d 828, 844 (1981). Given the existing authority, the trial court did not abuse its discretion here.

¶8 For the reasons stated, we affirm the convictions and the sentences imposed.

/s/ Peter J. Eckerstrom  
PETER J. ECKERSTROM, Judge

CONCURRING:

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

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