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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. STEVEN ANTHONY SOTO, Appellant.	)	2 CA-CR 2012-0410 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20111498001

Honorable Deborah Bernini, Judge

AFFIRMED

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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Steven Soto was convicted of four counts of aggravated driving under the influence of an intoxicant (DUI). The trial court sentenced him to concurrent, four-month prison terms followed by three years' probation. On appeal, Soto argues the court erred by ordering additional closing arguments in response to a jury question during deliberations. For the reasons stated below, we affirm.

Factual Background and Procedural History

¶2 We view the facts in the light most favorable to sustaining Soto's convictions. *See State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). On an early morning in December 2010, a Pima County Sheriff's deputy stopped the truck Soto was driving after observing it traveling at almost twice the posted speed limit in a construction zone. The deputy smelled a "strong odor of intoxicants coming from [Soto's] breath" and "observed he had red, watery, bloodshot eyes." Soto admitted he had been drinking. The deputy administered the horizontal gaze nystagmus (HGN) test, and Soto displayed six out of six possible cues of impairment. Soto showed additional signs of impairment while performing two other field-sobriety tests. The deputy testified he had asked Soto if he remembered how to perform the tests from an earlier DUI investigation and Soto had responded "that he remembered doing those tests in the prior investigation that [the deputy] had with him and that he remembered how to do them." Soto consented to a blood draw, which revealed an alcohol concentration of .182. Although Soto could not provide a driver's license, the deputy checked the electronic Motor Vehicle Division (MVD) records and determined that he "ha[d] a valid license."

However, a subsequent records check revealed that Soto's license was suspended at the time of the stop.

¶3 Soto was charged with aggravated DUI while his license was suspended, revoked, or in violation of a restriction; aggravated DUI having two or more prior DUI convictions; aggravated DUI with an alcohol concentration of .08 or more, having two or more prior DUI convictions; and aggravated DUI with an alcohol concentration of .08 or more while his license was suspended, revoked, or in violation of a restriction. At trial, a custodian of records for the MVD testified that Soto had "multiple suspensions" based on prior DUI convictions stemming from incidents in 2008 and 2009. When asked to explain the discrepancy between her findings and the deputy's conclusion that Soto "ha[d] a valid license," she stated that the MVD relies on information from the courts and administrative agencies and that the paperwork regarding Soto's latest suspension had not been transmitted to the MVD as of the date of his arrest.

¶4 While deliberating, the jury submitted a question about an MVD record, admitted as a trial exhibit, relating to Soto's license. The question was as follows: "[The exhibit] shows issuance of [a] class I license dates: 6/21/10-12/18/10[.] (1) Was this license actually issued subject to conditions being met? (2) Were there any restrictions if issued?" Outside the presence of the jury, the trial court informed the parties:

> The Court doesn't want to interpret the document, although it's pretty obvious what it is. And I'd like to give counsel a chance to make arguments [to the jury], but based on that, not adding any information or opening up the evidence but argue in a way that answers their questions about is this a license actually issued.

Soto objected, arguing that "the document . . . should stand on its own and the jury should be free to interpret [it]." He added that any argument "is just argument and not evidence" and would not be "helpful in this instance." The court overruled the objection. During its argument, the state maintained that the "class I license" referred to in the MVD record was an identification card and not a driver's license.

¶5 The jury found Soto guilty as charged, and the trial court sentenced him as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶6 Soto argues the trial court erred by ordering supplemental closing arguments in response to the jury question during deliberations. "We review a trial court's rulings with respect to answering jury questions for an abuse of discretion." *State v. Manuel*, 229 Ariz. 1, ¶ 35, 270 P.3d 828, 835 (2011). Citing Rule 22.4, Ariz. R. Crim. P., Soto maintains that a court may order additional argument only when the jury is at an impasse, which was not the case here. And, Soto contends that he was prejudiced because "[a] material issue of fact had been raised during the trial about the status of [his] driver's license."

¶7 Rule 22.4 provides in relevant part: "If the jury advises the court that it has reached an impasse in its deliberations, the court may, in the presence of counsel, inquire of the jurors to determine whether and how court and counsel can assist them in their deliberative process." "Although the rule gives a trial judge broad discretion in dealing with juries at an impasse, the rule requires an affirmative indication from the jury it is in

need of help before assistance may be offered." *State v. Huerstel*, 206 Ariz. 93, ¶ 17, 75 P.3d 698, 704 (2003). Such assistance may include "directing the attorneys to make additional closing argument." Ariz. R. Crim. P. 22.4 cmt. to 1995 amend. However, the court should only assist the jury when it is "legally and practically possible" and should not be "coercive, suggestive or unduly intrusive" when doing so. *Id.*

¶8 Here, the jury asked for assistance from the trial court, but nothing in the record indicates the jury was at an impasse in its deliberations. Nevertheless, "the same considerations [under Rule 22.4] of appropriately assisting a jury—without prejudicing the rights of the parties—are applicable" when the jury is not at an impasse. *State v. Patterson*, 203 Ariz. 513, ¶ 10, 56 P.3d 1097, 1099 (App. 2002). For example, in *Patterson*, we concluded the trial court had not erred in reopening the case during deliberations to admit a map in response to the jury's request, even though the jury was not at an impasse. *Id.* ¶ 12. Soto contends the reasoning of *Patterson* is "inapt" because our supreme court intended to limit Rule 22.4 to "deadlocked juries" and the remedy in *Patterson* is not in line with the "general rule" that "courts are very cautious about responding to jurors' questions regarding the facts of the case." We are not persuaded by his argument.

¶9 In *Huerstel*, the court found that "[t]he [trial] court violated Rule 22.4 when it gave the jury the impasse instruction without any clear evidence the jury needed help." 206 Ariz. 93, ¶ 17, 75 P.3d at 704. But, in response to Huerstel's argument that the trial court also "should not have offered to allow counsel to reargue portions of the case for the jury," the court stated "the comments to Rule 22.4 clearly contemplate allowing

judges to do exactly that."[1] *Huerstel*, 206 Ariz. 93, n.3, 75 P.3d at 99 n.3; *see also* Ariz. R. Crim. P. 22.4 cmt. to 1995 amend. Similarly, in *State v. Fernandez*, the jury sent a question to the trial court during its deliberations requesting additional information on the definition of premeditation. 216 Ariz. 545, ¶ 9, 169 P.3d 641, 644 (App. 2007). Although the jury had not indicated it was at an impasse, the court ordered supplemental closing arguments over the defendant's objection. *Id.* ¶¶ 12, 14. On appeal, this court concluded that "the rationale behind the comment to Rule 22.4, permitting additional closing arguments, support[ed] the trial court's decision." *Id.* ¶ 15. We noted "Rule 22.4 was adopted so juries could function more effectively." *Id.* And, we further explained the rule "was based in part on the recommendation that '[t]he trial judge should fully and fairly respond to all questions asked and requests made by deliberating jurors concerning the instructions and the evidence.'" *Id.*, *quoting Patterson*, 203 Ariz. 513, n.3, 56 P.3d at 1099 n.3 (alteration in *Patterson*).

¶10 In this case, we conclude the trial court did not abuse its discretion by ordering supplemental closing arguments in response to the jury's questions. The court conveyed its order in a neutral manner, did not single out any jurors, did not give the impression that the jury should reach a particular verdict, and gave each side equal

[1]Soto also cites two federal cases in support of his argument. However, those cases are distinguishable because the juries were at an impasse in their deliberations and there is no federal corollary to Rule 22.4's comment which expressly authorizes supplemental argument in such instances. *See United States v. Evanston*, 651 F.3d 1080, 1082-83 (9th Cir. 2011); *United States v. Della Porta*, 653 F.3d 1043, 1046-47 (9th Cir. 2011). Moreover, we are not bound by the decisions of the federal circuit courts, *see State v. Montano*, 206 Ariz. 296, n.1, 77 P.3d 1246, 1247 n.1 (2003), and instead rely on our own state's case law to resolve this matter.

time—two minutes—to make its presentation. The court's order thus was "consistent with more general rules governing the conduct of a trial and assistance to the jury during deliberations." *Fernandez*, 216 Ariz. 545, ¶ 16, 169 P.3d at 647; *see also* Ariz. R. Crim. P. 22.3 (permitting court to respond to jury requests during deliberations for additional instruction or review of evidence).

Disposition

¶11 For the foregoing reasons, we affirm Soto's convictions and sentences.

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

CONCURRING:

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

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Administrative Order No. 2012-101 filed December 12, 2012.