IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

SEAN O'SHEA,
Appellant.

No. 2 CA-CR 2012-0431
Filed November 26, 2013

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
Nos. CR20074485 and CR20090767001
The Honorable Deborah Bernini, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Kelly and Judge Espinosa concurred.

E C K E R S T R O M, Judge:

¶1 This consolidated appeal arises from appellant Sean O'Shea's convictions and sentences in two separate cases of driving under the influence of an intoxicant (DUI); one involving DUI offenses that occurred in 2007, and one involving DUI offenses that occurred in 2009. For the following reasons, we affirm O'Shea's convictions and sentences for his 2007 and 2009 offenses, but we vacate the criminal restitution order (CRO) entered at sentencing.

Factual and Procedural Background

2007 Offenses

¶2 "We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions." *State v. Powers*, 200 Ariz. 123, ¶ 2, 23 P.3d 668, 669 (App. 2001). In May 2007, a Tucson police officer stopped O'Shea for speeding and swerving outside of his lane. The officer ran a check on O'Shea's license and found that it was valid. During the stop, the officer noticed O'Shea had bloodshot eyes, a flushed face, and the odor of alcohol on his breath. The officer asked O'Shea if he had been drinking, and O'Shea said that he had. After a DUI investigation, the officer arrested O'Shea.

¶3 On November 26, 2007, O'Shea was indicted for four DUI offenses: aggravated DUI while license is suspended or revoked, A.R.S. § 28-1383(A)(1), aggravated DUI with an alcohol concentration (AC) of .08 or more while license is suspended or revoked, A.R.S. § 28-1383(A)(1), aggravated DUI with two or more prior DUI violations, A.R.S. § 28-1383(A)(2), and aggravated DUI with an AC of .08 or more with two or more prior DUI violations,

A.R.S. § 28-1383(A)(2).[1] A summons to appear was sent to O'Shea's address on November 27, 2007. O'Shea was to be arraigned on December 17, 2007, but he did not appear, and a warrant was issued for his arrest.

¶4 In March 2010, O'Shea was tried in absentia. During that trial, a custodian of records from the department of motor vehicles testified that O'Shea's license had been suspended and revoked at the time of his offenses. After a three-day jury trial, O'Shea was convicted of aggravated DUI with a suspended or revoked license and aggravated DUI with two or more prior DUI convictions.

2009 Offenses

¶5 In February 2009, a Pima County Sheriff's sergeant stopped O'Shea for turning outside of his lane and speeding in a construction zone. The sergeant observed an open can of beer in O'Shea's truck and asked if he had been drinking. O'Shea responded that he had. The sergeant searched O'Shea's truck and found four more empty beer cans in the back seat.

¶6 O'Shea was charged with the same four DUI offenses as in the 2007 case. After a three-day jury trial, he was convicted of only two of the counts, aggravated DUI with a suspended or revoked license and aggravated DUI with two or more prior DUI convictions. The court held a consolidated hearing on the issue of O'Shea's prior convictions and a separate consolidated sentencing hearing. This timely appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033.

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[1]We cite to the versions of the statute in effect when O'Shea committed his 2007 and 2009 offenses, *see* 2006 Ariz. Sess. Laws, ch. 12, § 1; 2006 Ariz. Sess. Laws, ch. 395, § 5; 2008 Ariz. Sess. Laws, ch. 286, § 15, but note that the statute has not changed in any part relevant to this decision. *See* 2011 Ariz. Sess. Laws, ch. 341, § 11.

Double Jeopardy

¶7 O'Shea claims the state charged him with multiplicitous offenses and therefore violated his right to protection from double jeopardy. Although O'Shea did not object on this basis at either trial, a violation of double jeopardy is necessarily fundamental error. *State v. McGill*, 213 Ariz. 147, ¶ 21, 140 P.3d 930, 936 (2006).

¶8 O'Shea has failed to support this claim with meaningful argument on appeal. O'Shea does not clearly state which counts he believes to be multiplicitous. Although he discusses extreme DUI and per se DUI, he was not charged with extreme DUI in either case. And he does not explain why any of the offenses for which he was actually charged should be considered multiplicitous. He has therefore waived this claim, and we do not discuss it further. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's brief must contain "the contentions of the appellant with respect to the issues presented, and the reasons therefor"); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) ("Failure to argue a claim on appeal constitutes waiver of that claim.").

Speedy Trial

¶9 O'Shea next claims the court erred in denying his motion to dismiss the charges in the 2007 case because his right to a speedy trial under Rule 8 of the Arizona Rules of Criminal Procedure was violated. However, O'Shea never moved to dismiss under Rule 8—his only basis for the motion to dismiss was the violation of his right to speedy trial under the United States and Arizona Constitutions. But because O'Shea has articulated a claim under the Sixth Amendment, we will not deem the issue entirely waived. We review de novo a trial court's ruling on whether a defendant's speedy trial rights were violated to the extent it involves constitutional issues, and for an abuse of discretion to the extent it involves factual determinations. *State v. Parker*, 231 Ariz. 391, ¶ 8, 296 P.3d 54, 61 (2013). O'Shea's right to a speedy trial was not violated.

¶10 In determining whether a defendant's right to a speedy trial has been violated, we consider "(1) the length of the delay,

(2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) the prejudice to the defendant." *Id.* ¶ 9. To some extent, the length of the delay is a "triggering mechanism," and "[u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *accord Doggett v. United States*, 505 U.S. 647, 651-52 (1992). Although the length of time necessary to create a presumption of prejudice requires a case-by-case analysis, we believe the twenty-seven-month delay here is sufficient. *See McCutcheon v. Superior Court*, 150 Ariz. 312, 316, 723 P.2d 661, 665 (1986) (nineteen-month delay in armed robbery case sufficient to trigger analysis of *Barker* factors). We therefore consider the other *Barker* factors.

¶11 The second factor in the analysis is the reason for the delay. *Id.* A deliberate attempt to hamper the defense weighs heavily against the state, whereas a more neutral reason weighs less heavily. *Barker*, 407 U.S. at 531. In this case, O'Shea has shown no evidence that the state attempted to harm his defense through the delay. That the state made no further efforts to bring O'Shea to trial after serving him with the indictment and summons is a neutral reason for the delay.

¶12 The third factor is the extent to which the defendant was timely in asserting his right. *McCutcheon*, 150 Ariz. at 316, 723 P.2d at 665. Although this factor will not be counted against a defendant who lacks notice of the charges against him, *id.* at 316-17, 723 P.3d at 665-66, here, the summons was mailed to O'Shea on November 27, 2007. The notice was sent to the address O'Shea admitted was his at the time of the 2007 offense. We therefore conclude O'Shea had notice of the charges and failed to assert his right to a speedy trial, and this factor weighs against him.

¶13 The fourth, and most important factor, is the prejudice resulting from the delay. *State v. Soto*, 117 Ariz. 345, 348, 572 P.2d 1183, 1186 (1977). This factor is mostly concerned with "prejudice in preparing for and conducting the defense," but may also include "interference with liberty, disruption of employment, draining of financial resources, curtailment of association, public obloquy, and anxiety in defendant, his family and friends." *Id.* O'Shea has not

identified any factors that would show prejudice to his ability to defend his case. He has not, for example, identified any witnesses that are no longer available to testify or evidence that has been destroyed through passage of time. *See Parker*, 231 Ariz. 391, ¶ 18, 296 P.3d at 62 (no violation of speedy trial right where trial was delayed four years but defendant asserted no prejudice apart from pre-trial incarceration). Nor can we say the delay interfered with O'Shea's liberty, employment, finances, or lifestyle, as O'Shea was not in custody on the charges during the delay. For these reasons, we find that O'Shea has not established that his Sixth Amendment right to a speedy trial was violated.

Sufficiency of the Evidence

¶14 O'Shea asserts the evidence was insufficient to support his conviction for DUI with a suspended or revoked license in the 2007 case. He argues the evidence was insufficient to show that he received notice of the suspension or revocation of his license. We review de novo whether sufficient evidence supports a verdict. *State v. Borquez*, 232 Ariz. 484, ¶ 9, 307 P.3d 51, 54 (App. 2013). "When considering claims of insufficient evidence, 'we view the evidence in the light most favorable to sustaining the verdict and reverse only if no substantial evidence supports the conviction.'" *State v. Fimbres*, 222 Ariz. 293, ¶ 4, 213 P.3d 1020, 1024 (App. 2009), *quoting State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005). The evidence here was sufficient to support O'Shea's conviction.

¶15 Section 28-3318, A.R.S., states that, when the department of motor vehicles has mailed a letter informing a person that his or her license has been suspended or revoked, that constitutes notice of the suspension or revocation. Once the state proves notice of suspension or revocation was mailed, the burden shifts to the defendant to prove he did not receive the notice. *State v. Jennings*, 150 Ariz. 90, 94, 722 P.2d 258, 262 (1986).

¶16 O'Shea contends that, because the police officer did not find his license was suspended or revoked when he was pulled over, the evidence was insufficient to show he had notice. But what information the police officer had during the stop was not relevant to what O'Shea knew. To the extent this raised an issue of fact as to

whether or not O'Shea's license was actually suspended and revoked at the time of the offense, this was a question of fact for the jury. *See State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987) ("To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury."); *cf. State v. Garcia*, 138 Ariz. 211, 214-15, 673 P.2d 955, 958-59 (App. 1983) ("Where the evidence discloses facts from which the jury could legitimately deduce either of two conclusions, it is sufficient to overcome a motion for acquittal."). Therefore the evidence was sufficient to support O'Shea's conviction.

Twelve-Person Jury

¶17 O'Shea claims he was entitled to a twelve-member jury under article II, § 23 of the Arizona Constitution and A.R.S. § 21-102 because he was sentenced for his 2007 and 2009 offenses at a combined hearing, and therefore exposed to a maximum combined sentence of thirty years. We review de novo whether a defendant is entitled to a twelve-person jury. *State v. Kuck*, 212 Ariz. 232, ¶ 8, 129 P.3d 954, 955 (App. 2006).

¶18 O'Shea acknowledges that the maximum sentence he could have received in each of his cases was fifteen years. Section 21-102 provides a "jury for trial of *a* criminal case in which a sentence of . . . thirty years or more is authorized by law shall consist of twelve persons." (Emphasis added.) In other words, the requirement of a twelve-person jury is not invoked unless the possible punishment for *a single case* is thirty years or greater. Indeed, in *State v. Soliz*, our supreme court observed that a twelve-person jury is not required if, at the time the jury begins deliberations, the defendant is not exposed to a sentence of thirty or more years. 223 Ariz. 116, ¶¶ 13, 16-18, 219 P.3d 1045, 1049 (2009); *see also Kuck*, 212 Ariz. 232, ¶ 11, 129 P.3d at 955. At the time the 2009 case was submitted to the jury, the two cases had not been consolidated, and the maximum punishment that could be imposed was fifteen years. Accordingly, O'Shea was not entitled to a twelve-person jury, and the court did not err in denying it.

Bifurcated Trial

¶19 O'Shea next argues the court should have provided a bifurcated trial on the issue of whether he had two or more prior DUI convictions. However, he never requested bifurcation in the trial court and has therefore forfeited review on this claim absent fundamental, prejudicial error. *See State v. Henderson,* 210 Ariz. 561, ¶¶ 19–20, 115 P.3d 601, 607 (2005). But even if this claim were not forfeited, our supreme court has ruled that prior DUI convictions are an element of aggravated DUI under A.R.S. § 28-1383(A)(2), and therefore a bifurcated trial is not appropriate. *State ex rel. Romley v. Galati*, 193 Ariz. 437, ¶¶ 7-15, 973 P.2d 1198, 1200-01 (App. 1999). "The courts of this state are bound by the decisions of [the Supreme Court] and do not have the authority to modify or disregard [them]." *State v. Smyers*, 207 Ariz. 314, n.4, 86 P.3d 370, 374 n.4 (2004). O'Shea was not entitled to a bifurcated trial on this issue of prior DUI convictions.

***Miranda* Violations**

¶20 O'Shea's final claim of error is that statements he made to officers regarding use of alcohol should have been suppressed in both cases for lack of *Miranda* warnings. O'Shea did not raise this issue in either trial, does not argue on appeal that this was fundamental error, and has therefore waived this claim. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607 (failure to raise claim in trial court forfeits review absent fundamental, prejudicial error); *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived if not asserted on appeal).[2]

[2]In his reply brief, O'Shea notes the state did not respond to his claims regarding a jury trial on the issue of prior convictions and instruction of the jury on reasonable doubt. But the state had no opportunity to respond to those claims, as O'Shea did not raise them in his opening brief. O'Shea does not articulate an argument on either of these issues in his reply brief, but even if he had, "[a]n appellate court can 'disregard substantive issues raised for the first time in the reply brief.'" *State v. Cohen*, 191 Ariz. 471, ¶ 13, 957 P.2d

Criminal Restitution Order

¶21 Finally, although the issue is not raised on appeal, we find fundamental error with regard to the trial court's reduction of "all fines, fees, assessments and/or restitution" imposed during sentencing to a CRO. *See State v. Fernandez,* 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (appellate court will not ignore fundamental error if apparent). Notwithstanding that the court ordered "no interest, penalties or collection fees [are] to accrue while [O'Shea] is in the Department of Corrections," the imposition of such a CRO before a defendant's sentence has expired nonetheless "'constitutes an illegal sentence, which is necessarily fundamental, reversible error.'"[3] *State v. Lopez,* 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski,* 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009).

Conclusion

¶22 Although we vacate the CRO entered at sentencing, O'Shea's convictions and sentences are otherwise affirmed.

1014, 1017 (App. 1998), *quoting State v. Cannon,* 148 Ariz. 72, 79, 713 P.2d 273, 280 (1985).

[3] A.R.S. § 13-805 has been amended since the dates of the offenses. *See* 2011 Ariz. Sess. Laws, ch. 99, § 4; 2011 Ariz. Sess. Laws, ch. 263, § 1; 2012 Ariz. Sess. Laws, ch. 269, § 1. A CRO may now be imposed at sentencing in circumstances not present here.