IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MICHAEL JOHN GRIJALVA,
Appellant.

No. 2 CA-CR 2014-0051
Filed February 17, 2015

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Santa Cruz County
No. CR11154
The Honorable Anna Montoya-Paez, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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MEMORANDUM DECISION

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

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

¶1 Appellant Michael Grijalva asserts several challenges to his convictions and sentences for three counts of aggravated driving under the influence of an intoxicant (DUI). For the following reasons, we affirm in part and vacate in part.

Factual and Procedural Background

¶2 In December 2009, Grijalva's vehicle was stopped at a United States Border Patrol checkpoint. When a Border Patrol agent asked Grijalva's citizenship, he replied, "A United States citizen, homie." The agent noticed an open beer can in the center console of Grijalva's car and likewise noticed Grijalva's eyes were bloodshot, his speech was slurred, and he sat slumped over, leaning against the door. The agent directed Grijalva to a secondary inspection point. While moving his car, Grijalva nearly collided with parked Border Patrol vehicles. About forty-five minutes later, a deputy from the Santa Cruz County Sheriff's Office arrived at the checkpoint to investigate Grijalva for DUI.

¶3 The deputy observed a strong odor of alcohol, the open beer container in the car, and Grijalva's watery, bloodshot eyes. She asked Grijalva to participate in field sobriety tests, and Grijalva declined, saying, "Just take me to jail; I'm drunk." The deputy transported Grijalva to a hospital, where he consented to a blood draw. The blood was later tested and showed a blood alcohol concentration (BAC) of .238. At the time of the incident, Grijalva's license had been suspended since 2008.

¶4 Grijalva was tried in absentia and convicted of aggravated DUI, based on his driving while impaired to the slightest degree with a suspended license, A.R.S. §§ 28-1381(A)(1), 28-

1383(A)(1); aggravated DUI with a BAC of .08 or more with a suspended license, §§ 28-1381(A)(2), 28-1383(A)(1); and aggravated DUI with a BAC of .20 or more with a suspended license, A.R.S. §§ 28-1382(A)(2), 28-1383(A)(1).[1] He was sentenced to enhanced, presumptive, concurrent prison terms of ten years. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1) and (4).[2] For the following reasons, although we affirm his convictions and sentences for aggravated DUI while impaired to the slightest degree and aggravated DUI with a BAC of .20 or more, we vacate his conviction and sentence for aggravated DUI with a BAC of .08 or more.

Motion to Suppress

¶5 Grijalva first claims the trial court erred in denying his motion to suppress "all evidence" because it was the result of an illegal seizure. In reviewing a motion to suppress, we consider only the evidence presented at the suppression hearing, and we view that evidence in the light most favorable to upholding the trial court's ruling. *State v. Wyman*, 197 Ariz. 10, ¶ 2, 3 P.3d 392, 394 (App. 2000). "We review the trial court's denial of a motion to suppress evidence for an abuse of discretion," deferring to the trial court's findings of fact but reviewing any legal conclusions de novo. *State v. Jacot*, 235 Ariz. 224, ¶ 9, 330 P.3d 981, 984 (App. 2014).

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[1]We cite the versions of these traffic statutes in effect at the time Grijalva committed his offenses. *See* 2009 Ariz. Sess. Laws, ch. 124, § 1; 2008 Ariz. Sess. Laws, ch. 286, §§ 13, 15 and ch. 256, § 19.

[2] Although Grijalva's absence from trial "prevent[ed] sentencing from occurring within ninety days after conviction," this court has held that § 13-4033(C), under which an absconding defendant waives his right to appeal a conviction, cannot apply unless the defendant has been "informed he could forfeit the right to appeal if he voluntarily delays his sentencing for more than ninety days." *State v. Bolding*, 227 Ariz. 82, ¶ 20, 253 P.3d 279, 285 (App. 2011). We have reviewed the record and found no evidence that Grijalva was given such an admonition. Accordingly, we conclude that Grijalva's absence did not waive his right to appeal.

¶6 The state and Grijalva characterize this issue as whether the Border Patrol agent who stopped Grijalva had reasonable suspicion to believe Grijalva was driving while intoxicated. But, as explained below, reasonable suspicion is not the relevant standard here.

¶7 Grijalva was initially stopped at a Border Patrol checkpoint. It is well-settled law that the Border Patrol may "stop[] and question [motorists] . . . in the absence of any individualized suspicion at reasonably located checkpoints." *United States v. Martinez-Fuerte*, 428 U.S. 543, 562 (1976). Likewise, Grijalva's referral to a secondary inspection point did not require "particularized reason . . . to justify it." *Id.*; *see United States v. Rascon-Ortiz*, 994 F.2d 749, 753 (10th Cir. 1993) ("[A]ny distinction between primary and secondary inspection is meaningless."). However, the scope of such a stop "is limited to the justifying, programmatic purpose of the stop: determining the citizenship status of persons passing through the checkpoint. The permissible duration of an immigration checkpoint stop is therefore the time reasonably necessary to determine the citizenship status of the persons stopped." *United States v. Machuca-Barrera*, 261 F.3d 425, 433 (5th Cir. 2001). Although the duration of the stop may be extended "if the initial, lawful stop creates reasonable suspicion warranting further investigation," *id.* at 434, that reasonable suspicion must be regarding a crime that the Border Patrol has jurisdiction to enforce. *See United States v. Hernandez-Lopez*, 761 F. Supp. 2d 1172, 1198-99 (D. N.M. 2010). The Border Patrol has no jurisdiction to enforce Arizona state traffic laws. *See id.* (Border Patrol lacks authority to stop persons suspected of DUI or reckless driving); *see also United States v. Rodriguez-Rivas*, 151 F.3d 377, 381 (5th Cir. 1998) (Border Patrol may not stop vehicle for absence of license plate). Accordingly, the Border Patrol agent did not require reasonable suspicion to stop Grijalva at the checkpoint or to direct him to the secondary inspection point, but reasonable suspicion that Grijalva was driving while intoxicated was not sufficient grounds to detain him longer than reasonably necessary to ascertain his citizenship.

¶8 A Border Patrol agent, however, may act as a private person and "make a lawful citizen's arrest pursuant to [A.R.S.] § 13-

3884." *State v. Garcia-Navarro*, 224 Ariz. 38, ¶ 12, 226 P.3d 407, 410 (App. 2010). Section 13-3884(1) allows a private person to make an arrest "[w]hen the person to be arrested has in his presence committed a misdemeanor amounting to a breach of the peace." Under Arizona law, DUI is such an offense. *State v. Chavez*, 208 Ariz. 606, ¶ 16, 96 P.3d 1093, 1097 (App. 2004).

¶9 Grijalva contends that, under *Chavez*, not all DUI should be considered a breach of the peace, but rather that there must be a "case-by-case analysis of the facts and surrounding circumstances" to determine whether a breach of the peace occurred. *Id.* ¶ 12. However, this quote from *Chavez* discusses whether "a given act" constitutes a breach of the peace and says nothing about DUI specifically. Indeed, *Chavez* later states, "We hold that driving a vehicle while intoxicated constitutes a misdemeanor amounting to a breach of the peace within the meaning of § 13-3884(1)." 208 Ariz. 606, ¶ 16, 96 P.3d at 1097. *Chavez* also cites legal treatises and extrajurisdictional case law supporting the proposition that DUI necessarily constitutes a breach of the peace because an intoxicated driver is always a potential threat to public safety. *Id.* ¶¶ 8-9; *see* 11 C.J.S. *Breach of the Peace* § 6 (2008) ("[T]he operation of a motor vehicle while intoxicated . . . amounts to a breach of the peace, whether such conduct in a particular case consists of actual or threatened violence."). Accordingly, the Border Patrol agent was authorized by § 13-3884(1) to arrest Grijalva based on the observations at the checkpoint, Grijalva was not subjected to an illegal seizure, and the trial court did not err in denying Grijalva's motion to suppress the evidence that resulted from the stop.

Foundation for Blood Evidence

¶10 Grijalva next asserts that the trial court erred in admitting evidence of his BAC because the state failed to establish a "proper chain of custody" for the samples of his blood. "A trial court's conclusion that evidence has an adequate foundation is reviewed for an abuse of discretion." *State v. McCray*, 218 Ariz. 252, ¶ 8, 183 P.3d 503, 507 (2008).

¶11 Grijalva claims there was a gap in the chain of custody as initially disclosed by the state. He has not clearly articulated such

a gap, and the relevant exhibits have not been provided on appeal.[3] However, during her testimony, a deputy of the Santa Cruz County Sheriff's Office stated that the chain-of-custody document ended when she placed Grijalva's blood samples in an evidence refrigerator. The deputy testified that, when evidence was brought in, the evidence custodian, M.C., would usually inspect it to ensure that it was neither tampered with nor broken. She then admitted that the chain-of-custody form did not reflect that M.C. had done that in this case. The state later explained that M.C. had taken the evidence out of the refrigerator, examined it, moved it to another refrigerator, and then transported the evidence to the Department of Public Safety crime lab.

¶12 The state later provided a supplementary chain-of-custody form, which reflected M.C.'s handling of the blood samples. The state called M.C. to the stand and he testified he generally keeps his records of when he has handled evidence on his computer and updates chain-of-custody forms only when he is subpoenaed. M.C. had not updated the chain-of-custody form in this case prior to the state's disclosure because he had not been subpoenaed.

¶13 When the foundation for the admission of evidence is based on a chain of custody, "evidence can be admitted 'notwithstanding the inability of the state to show a continuous chain of custody . . . unless a defendant can offer proof of actual

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[3] It is within the defendant's control as to what the record on appeal will contain, and it is the defendant's duty to prepare the record in such a manner as to enable an appellate court to pass upon the questions sought to be raised in the appeal. Where matters are not included in the record on appeal, the missing portion of the record will be presumed to support the decision of the trial court.

State v. Rivera, 168 Ariz. 102, 103, 811 P.2d 354, 355 (App. 1990) (citation omitted).

change in the evidence, or show that the evidence has, indeed, been tampered with.'" *Id.* ¶ 11, *quoting State v. Ritchey*, 107 Ariz. 552, 557, 490 P.2d 558, 563 (1971) (alteration in *McCray*). Grijalva has made no showing that the blood evidence was altered, changed, or tampered with. Furthermore, the state cured any gap in continuity of possession when it called M.C. to the stand. Even if such a gap existed, "[f]laws in the chain of custody normally go to the weight the jury gives to the evidence, not to its admissibility." *State v. Morales*, 170 Ariz. 360, 365, 824 P.2d 756, 761 (App. 1991).

¶14 Grijalva also claims the trial court erred in not precluding M.C. as a witness as a sanction for the state's failure to timely disclose the correct and complete chain of custody or M.C. as a potential witness. We review a trial court's decision regarding sanctions for an abuse of discretion, *State v. Towery*, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996), and will not reverse unless "'no reasonable judge would have reached the same result under the circumstances.'" *State v. Naranjo*, 234 Ariz. 233, ¶ 29, 321 P.3d 398, 407 (2014), *quoting State v. Armstrong*, 208 Ariz. 345, ¶ 40, 93 P.3d 1061, 1070 (2004). Rule 15.7, Ariz. R. Crim. P., permits a trial court to impose sanctions for disclosure violations, which may include precluding a party from calling a witness. However, preclusion is a disfavored sanction and should be used only when no less stringent sanction can "achieve the ends of justice." *Naranjo*, 234 Ariz. 233, ¶ 30, 321 P.3d at 407. Here, the trial court provided Grijalva a brief continuance in order to interview M.C. before his testimony. *See* Ariz. R. Crim. P. 15.7(a)(3). Grijalva has not explained why this was insufficient to cure any harm caused by the state's untimely disclosure, and the court did not abuse its discretion in not precluding his testimony as a sanction for any disclosure violation. *See State v. Martinez-Villareal*, 145 Ariz. 441, 448, 702 P.2d 670, 677 (1985) (appellant bears burden of demonstrating prejudice from nondisclosure).

¶15 Because any gap that occurred in the chain of custody was cured by M.C.'s testimony, and the admission of M.C.'s testimony was not error, the court did not abuse its discretion in concluding sufficient foundation supported the admission of Grijalva's blood evidence. Under such circumstances, Grijalva's trial

challenge to its reliability, based on alleged defects in the chain of custody, went to the weight and not the admissibility of that evidence.

Sufficiency of the Evidence

¶16 Grijalva next claims the trial court erred in denying his motion for judgment of acquittal made pursuant to Rule 20, Ariz. R. Crim. P. We review de novo a trial court's denial of a motion for judgment of acquittal. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). "A judgment of acquittal is appropriate only when there is no substantial evidence to prove each element of the offense and support the conviction." *State v. McCurdy*, 216 Ariz. 567, ¶ 14, 169 P.3d 931, 937 (App. 2007). Substantial evidence supports a conviction if the evidence is sufficient for reasonable jurors to conclude a person is guilty beyond a reasonable doubt. *State v. Ramsey*, 211 Ariz. 529, ¶ 40, 124 P.3d 756, 769 (App. 2005).

¶17 Specifically, Grijalva asserts that neither the Border Patrol agent who initially stopped him nor the deputy who conducted the DUI investigation observed any problems with his driving. But the Border Patrol agent testified that Grijalva "floored it" when he was directed to the secondary inspection area, and "almost hit[]" parked Border Patrol vehicles.

¶18 Moreover, such evidence was not necessary to support the charges here. If a defendant's BAC is at or above .08 within two hours of driving, he may be presumed to be under the influence of an intoxicant, and the jury was instructed on this presumption. § 28-1381(G)(3). Testimony was presented that Grijalva's BAC was .238. Sufficient evidence therefore supported a conclusion that Grijalva was impaired to the slightest degree.

¶19 Grijalva also argues that because "questions relating to the blood evidence and the chain of custody cast a shadow on the legitimacy of the test results," the evidence was insufficient to support his convictions for aggravated DUI with a BAC of over .08 and .20. We have already addressed this contention above and need not address it further.

Sentencing

¶20 Grijalva asserts two claims of sentencing error. First, he claims the trial court erred in sentencing him as a category three repetitive offender because the state did not prove by clear and convincing evidence that he was the same person his official documents showed as having two or more historical prior felony convictions. *See* A.R.S. §§ 13-105(22), 13-703(C).[4] Grijalva did not object on this basis in the trial court and has therefore forfeited review of the issue absent fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). Grijalva has not argued fundamental error on appeal, and we therefore consider the claim waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

¶21 Second, Grijalva asserts the trial court erred in failing to consider his health issues as a mitigating factor at sentencing. Absent an abuse of discretion, "a sentence within statutory limits will not be disturbed on appeal." *State v. Sproule*, 188 Ariz. 439, 440, 937 P.2d 361, 362 (App. 1996). The court imposed the presumptive sentence and did not find any aggravating or mitigating factors. Grijalva claims this shows the court did not give consideration to the mitigating evidence he presented. But a court's decision not to find a mitigating circumstance does not mean the court did not consider the evidence in mitigation presented by the defendant. *See State v. Forde*, 233 Ariz. 543, ¶ 141, 315 P.3d 1200, 1232 (2014). Accordingly, no abuse of discretion occurred.

Double Jeopardy

¶22 Although Grijalva did not raise this claim in his opening brief, the state has pointed out that fundamental error occurred when Grijalva was convicted of both aggravated DUI with a BAC of .08 or above and aggravated DUI with a BAC of .20 or

[4]We cite the versions of these criminal statutes in effect in December 2009, when Grijalva committed his offenses. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 10, 28.

above.[5] In *Merlina v. Jejna*, 208 Ariz. 1, ¶¶ 12-14, 90 P.3d 202, 205 (App. 2004), we concluded that such offenses are multiplicitous charges, for which multiple punishments may not be imposed. "[W]hen a defendant is *convicted* more than once for the same offense, his double jeopardy rights are violated even when . . . he receives concurrent sentences." *State v. Brown*, 217 Ariz. 617, ¶ 13, 177 P.3d 878, 882 (App. 2008). Grijalva's conviction and sentence for aggravated DUI with a BAC of .08 or greater therefore cannot stand.

Disposition

¶23 For the foregoing reasons, we vacate Grijalva's conviction and sentence on count two for aggravated DUI with a BAC of .08 or greater; his remaining convictions and sentences are affirmed.

[5]We commend the state's counsel for his professionalism and candor in so doing. *See* ER 3.3, Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42.