IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

FRANCISCO ALBERTO NORIEGA,
Appellant.

No. 2 CA-CR 2015-0259
Filed April 22, 2016

Appeal from the Superior Court in Pima County
No. CR20132162001
The Honorable Kenneth Lee, Judge

AFFIRMED

COUNSEL

Harriette P. Levitt, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Howard and Judge Staring concurred.

E S P I N O S A, Judge:

¶1 After a jury trial, Francisco Noriega was convicted of four counts of aggravated driving under the influence of an intoxicant (DUI), specifically: DUI with a suspended or revoked license and driving with a blood alcohol concentration (BAC) at or above .08 with a suspended or revoked license, DUI having two or more DUI violations in the preceding eighty-four months, and driving with a BAC of .08 or greater having two or more DUI violations in the previous eighty-four months. The trial court sentenced him to concurrent, six-year prison terms for each offense.

¶2 Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), asserting she has reviewed the record but found no arguable issue to raise on appeal. Consistent with *Clark*, 196 Ariz. 530, ¶ 32, 2 P.3d at 97, she has provided "a detailed factual and procedural history of the case with citations to the record" and asks this court to search the record for error. Noriega has filed a supplemental brief arguing the trial court erred in denying his motion to suppress, in failing to remove a juror who spoke to a witness, and in denying his motion for a judgment of acquittal.

¶3 Viewing the evidence in the light most favorable to sustaining the jury's verdicts, *see State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), sufficient evidence supports them here. In May 2013, Noriega was found seated in the driver's seat of a parked car with the keys in the ignition; breath tests showed his BAC to be .160 and .164, he failed several field sobriety tests, and he admitted having been driving. Noriega's driver's license was

suspended and revoked at the time of the incident, and he previously had been convicted of two DUI offenses committed in 2010. *See* A.R.S. §§ 28-1381(A)(1), (2), 28-1383(A)(1), (2).

¶4 Because the evidence supporting his convictions is sufficient, we reject Noriega's argument that 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 the denial of a Rule 20 motion. *State v. Parker*, 231 Ariz. 391, ¶ 69, 296 P.3d 54, 70 (2013). A judgment of acquittal is appropriate only when there is no substantial evidence to support the conviction. Ariz. R. Crim. P. 20(a); *State v. Scott*, 177 Ariz. 131, 138, 865 P.2d 792, 799 (1993). Evidence is substantial if it could be accepted by any rational trier of fact as sufficient to support the essential elements of the crime beyond a reasonable doubt. *State v. West*, 226 Ariz. 559, ¶ 16, 250 P.3d 1188, 1191 (2011).

¶5 Noriega insists the evidence was insufficient because one officer testified he could not have seen whether keys were in the car's ignition; Noriega contends it was therefore "impossible" for the investigating officer to have done so. He thus concludes there was insufficient evidence he was in actual physical control of the car. *See* § 28-1381(A); *State v. Zaragoza*, 221 Ariz. 49, ¶ 21, 209 P.3d 629, 634 (2009) (facts evaluated in assessing actual physical control include "[w]hether the ignition was on" and "[w]here the ignition key was located"). But even if we agreed with Noriega that the question of his guilt hinged on whether the key was in the vehicle's ignition, ignoring the evidence he admitted he was driving, it was the jury's duty to weigh conflicting evidence and we will not reweigh that evidence on appeal. *See State v. Buccheri–Bianca*, 233 Ariz. 324, ¶ 38, 312 P.3d 123, 133 (App. 2013). And, even if the officers could not have seen the key in the ignition, both testified the dash lights were illuminated, which meant the key was in the ignition.[1]

[1]Noriega also insists that the instrument panel on the car could have been illuminated without a key being in the ignition and invites us to "research that information to allow the truth to be brought to light." We consider only the evidence presented at trial,

¶6 We also reject Noriega's argument that the trial court erred in denying his motion to suppress the evidence obtained after his arrest. In reviewing the court's ruling, "we consider only the evidence presented at the suppression hearing and view the facts in the light most favorable to sustaining the trial court's ruling." *State v. Gonzalez*, 235 Ariz. 212, ¶ 2, 330 P.3d 969, 970 (App. 2014). Unless a constitutional issue is presented, which is not the case here, we review the ruling on the motion to suppress for abuse of discretion. *State v. Booker*, 212 Ariz. 502, ¶ 10, 135 P.3d 57, 59 (App. 2006).

¶7 Noriega argues, as he did below, that the police officers lacked probable cause to arrest him because there was no evidence he was in actual physical control of the car. *See* § 28-1381(A); *Zaragoza*, 221 Ariz. 49, ¶ 21, 209 P.3d at 634. Probable cause to arrest exists "'when reasonably trustworthy information and circumstance would lead a person of reasonable caution to believe that a suspect has committed an offense.'" *State v. Jackson*, 208 Ariz. 56, ¶ 31, 90 P.3d 793, 802 (App. 2004), *quoting State v. Hoskins*, 199 Ariz. 127, ¶ 30, 14 P.3d 997, 1007-08 (2000). Like his Rule 20 argument, Noriega essentially asks us to reweigh the evidence, which we will not do. Viewed in the light most favorable to upholding the trial court's ruling, the evidence showed an inebriated Noriega was sitting in the driver's seat of a car that had recently been driven, and the key was in the ignition. The court did not err in concluding the officers had probable cause to arrest Noriega for DUI.[2]

---

which was that the instrument panel of the vehicle could not be illuminated without the key in the ignition.

[2] Noriega asserts in passing that the trial court erred by permitting the state to introduce at the evidentiary hearing the transcripts of defense interviews of two police officers, thereby violating his "due process" right to "face his accuser." But Noriega agreed the transcripts could be submitted and asked only that he be permitted to file supplemental memoranda to point out inconsistencies between the officers' versions of events, which the court permitted him to do. Noriega has not identified, nor have we found, any authority suggesting this procedure was improper. *See*

¶8 Finally, Noriega argues the trial court erred in denying his motion to remove a juror who spoke to one of the police officers during trial. On the third day of trial, the prosecutor informed the court a juror had told one of the officers in the hallway that morning "I appreciate all that you do." Noriega asked the court to dismiss the juror. After speaking with the officer and juror, however, the court declined to do so. Noriega has cited no authority suggesting the court abused its discretion in retaining the juror, and we have found no basis to conclude that it did. *See State v. Lehr*, 227 Ariz. 140, ¶ 43, 254 P.3d 379, 389 (2011). We therefore do not address this issue further. *See State v. King*, 226 Ariz. 253, ¶ 11, 245 P.3d 938, 942 (App. 2011) (failure to properly develop claim constitutes waiver).

¶9 The evidence supports the trial court's decision to sentence Noriega as a category-three repetitive offender. A.R.S. §§ 13-105(22)(a)(iv), 13-703(C). His sentences are within the statutory range and were properly imposed. *See* A.R.S. §§ 13-703(J), 28-1383(L)(1).

¶10 Pursuant to our obligation under *Anders*, we have searched the record for fundamental error and found none. *See State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985). And we have rejected the arguments Noriega raised in his supplemental brief. Noriega's convictions and sentences are therefore affirmed.

State v. King, 226 Ariz. 253, ¶ 11, 245 P.3d 938, 942 (App. 2011) (failure to properly develop claim constitutes waiver)*; cf. Gerstein v. Pugh*, 420 U.S. 103, 120 (1975) ("adversary safeguards," including confrontation, "not essential for the probable cause determination").