IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RICHARD THOMAS KUCZYNSKI,
Appellant.

No. 2 CA-CR 2019-0079
Filed August 27, 2020

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NOT FOR PUBLICATION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. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20162742001
The Honorable James E. Marner, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
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Counsel for Appellant

MEMORANDUM DECISION

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

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

¶1 Richard Kuczynski appeals from his convictions and sentences for four counts of aggravated driving under the influence of an intoxicant (DUI). For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the jury's verdicts, resolving all inferences against Kuczynski. *State v. Nihiser*, 191 Ariz. 199, 201 (App. 1997). On the evening of June 12, 2016, a Pima County Sheriff's deputy was conducting scene security for a vehicle arson. A silver car drove by extremely and suspiciously slowly. Several onlookers advised the deputy that the individuals in the silver car had committed the arson, but the lone deputy could not yet leave the scene to pursue the silver car and instead called for backup "to check out the vehicle just due to its suspicious nature." Before that backup arrived, a number of individuals associated with the burning car's owner used another vehicle to chase the silver car, honking, with both cars driving "at a very high rate of speed . . . all over the roadway." The deputy stopped both vehicles by blocking the road with his patrol car.

¶3 Kuczynski was the driver of the silver car. Three separate law enforcement officers observed that his eyes were red and watery and his speech was slurred and incoherent. He also smelled of alcohol, had a flushed face, was unsteady on his feet, and seemed confused, fidgety, defensive, and "extremely nervous." Officers also saw an open beer can in the cup holder between the driver and passenger seats of the vehicle, as well as multiple "Molotov cocktails" and loaded firearms, including a pistol, on the floor between the passenger's legs.

¶4 When police asked Kuczynski to perform field sobriety tests, he refused. But he submitted to a preliminary breath test, after which he was arrested for DUI. Kuczynski admitted he had been consuming alcohol, and a test of his blood revealed a BAC of 0.159.

¶5 When consenting to have his blood drawn, Kuczynski admitted he did not have a valid driver license. Indeed, on the night in question, Kuczynski's privilege to drive had "multiple suspensions and revocations," due to DUI offenses committed in December 1999 and August 2001.[1] Kuczynski had been notified of these revocations and suspensions by mail and had acknowledged them when applying for an identification card in January 2012.

¶6 At the conclusion of a three-day trial, the jury found Kuczynski guilty of four counts of aggravated DUI.[2] After a priors hearing at which the trial court found the state had proven four historical prior felony convictions for aggravated DUI, the court sentenced Kuczynski to enhanced, aggravated, concurrent, twelve-year prison terms. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Exclusion of Exculpatory Evidence

¶7 Before trial, the state moved to preclude any mention of the events that led up to the traffic stop as irrelevant, prejudicial to both Kuczynski and the state, and misleading or confusing to the jury. This included evidence about the arson, for which Kuczynski was not charged, as well as Kuczynski's claim that the passenger had used duress to force him to participate in the arson. Kuczynski opposed the state's motion, arguing that the evidence was necessary for him to present a complete defense by showing that the physical signs the state attributed to alcohol impairment could have been caused by the arson activities. He maintained

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[1]Kuczynski served time in prison for these offenses from February 12, 2003 until January 17, 2012. He was released to community supervision, but he absconded from October 3, 2012 until November 30, 2012. He was then incarcerated again until February 11, 2014. As the state correctly advised the jury, under A.R.S. § 28-1383(B), this time in custody or in absconder status must be excluded from the calculation of time necessary for aggravated DUI convictions under § 28-1383(A)(2).

[2]The four counts are: (1) aggravated DUI while his license was suspended or revoked; (2) aggravated DUI with a BAC of 0.08 or more while his license was suspended or revoked; (3) aggravated DUI having been convicted of two or more prior DUI violations within the prior eighty-four months; and (4) aggravated DUI with a BAC of 0.08 or more having been convicted of two or more prior DUI violations within the prior eighty-four months.

that the fumes from the gasoline in the Molotov cocktails in the car could have caused his red eyes and confusion and that having a gun pointed at him by the passenger in his car could have caused his agitation.

¶8 After a hearing, the trial court granted the state's motion, precluding evidence of the arson, that Molotov cocktails and firearms were found in the car, that Kuczynski and his passenger were wearing gloves when stopped, and that Kuczynski had claimed that the passenger forced him to participate in the arson under duress. The court made an exception for evidence of open containers of gasoline in the car, including their smell and potential effect on Kuczynski.

¶9 On appeal, Kuczynski contends the trial court's pretrial ruling denied him due process because it deprived him of a meaningful opportunity to present a complete defense. But, as Kuczynski concedes, the court reversed that ruling on the first day of trial.

¶10 Kuczynski objected to the state's opening statement and direct examination of its first witness on the ground that both had provided a false narrative to the jury—that Kuczynski had been pulled over only for speeding and erratic driving, with no mention of the car chase or screaming onlookers—which he could only correct by violating the trial court's prior order. The court agreed that the state's opening and first direct examination had "opened the door on many of the rulings previously made by the Court regarding the motion in limine." It then allowed Kuczynski broad leeway in cross-examining the police officer, specifically including "matters leading up to the stop" and the fact that the deputy had been dealing not only with Kuczynski and his passenger, but also the people who had chased them. The court clarified that it was not allowing a duress defense, but rather allowing Kuczynski "to present evidence to suggest there were other causes of the erratic nervous, mood shifting behavior."

¶11 Kuczynski then cross-examined the state's first witness, the deputy who had initiated the traffic stop. He elicited testimony that the deputy initially had been suspicious of the silver car because it drove past the arson scene extremely slowly and that he called for backup to investigate the car before any speeding occurred. The deputy also testified that the silver car had been chased by angry onlookers associated with the burned car's owner and that, after he pulled both cars over, a few of the people who had been chasing the silver car jumped out of their vehicle and were yelling to an extent requiring "strong directives" from the deputy to get back in their vehicle and leave, whereas nobody exited or yelled from the silver car. It was in this context that the deputy observed both

Kuczynski and his passenger to be both nervous and fidgeting, and he acknowledged that he might expect people to be "highly nervous" in such a situation.

¶12 The deputy also testified that he had found multiple non-airtight containers of gasoline in the car and that, despite the June heat, both Kuczynski and his passenger had been wearing gloves. He further testified to finding a pistol on the front passenger floorboard between the passenger's legs, as well as a long rifle in the back seat, both loaded with rounds in the chambers. The following day, Kuczynski also elicited testimony from the state's toxicologist that physical conditions such as bloodshot or watery eyes and slurred speech can be caused by "other things besides alcohol."

¶13 During summation, Kuczynski stressed that the deputy had called for backup after seeing the silver car drive by the arson scene slowly, well before the speeding and erratic driving occurred during the car chase. He urged the jury that it was understandable for a person to be "under stress, confused, slurred, excited" and "a little confused" when his passenger was armed with various weapons and a "gas bomb," he had been chased, and then a police officer stopped both cars, "yelling with a gun out." He also argued obliquely that his red, watery, bloodshot eyes and his flushed face could have been caused by something other than alcohol, although he did not expressly draw the connection to the arson as he had before trial.

¶14 Given the trial court's reversal of its pretrial ruling, as well as the extensive evidence Kuczynski elicited and marshalled at trial once that retraction was made, any error in the court's initial preclusion of the evidence was harmless. *See State v. Leteve*, 237 Ariz. 516, ¶¶ 18, 25 (2015) (even where evidence erroneously precluded, reversal inappropriate if error harmless); *State v. Romero*, 240 Ariz. 503, ¶ 15 (App. 2016) (party's ability to present substance of defense informs harmlessness).

Motions for Mistrial

¶15 Kuczynski also challenges the trial court's denial of various mistrial motions. We review such rulings for an abuse of discretion, bearing in mind that the trial judge was best situated to assess the impact of the challenged statements on the jury. *State v. Dann*, 205 Ariz. 557, ¶ 43 (2003).

¶16 Kuczynski sought a mistrial after the state's opening statement and again after its direct examination of its first witness, arguing

the state had deliberately misrepresented the events preceding the arrest. The trial court denied the motion for mistral but reversed its earlier ruling as discussed above, also warning the state to be careful with its questions.

¶17 A mistrial—"the most dramatic remedy for trial error"—is only appropriate "when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *Id.* (quoting *State v. Adamson*, 136 Ariz. 250, 262 (1983)). Here, we defer to the trial court's determination that reversing the pretrial ruling and allowing Kuczynski to freely question witnesses in order to present a complete picture to the jury was sufficient to ensure him a fair trial. To the extent the state had "fill[ed] in the void" left by the court's pretrial order with a "fictionalized version" of how the stop occurred, the court's change of course on the first day of trial provided Kuczynski with sufficient opportunity to correct the narrative.

¶18 Kuczynski also moved for a mistrial based on the testimony of a detective involved in his arrest. The detective testified that she asked Kuczynski if he had been drinking because "he had the signs of possibly having some type of impairment." When asked by the state why she had asked a deputy assigned to the DUI unit to respond to the location, she responded: "I believed that there was some type of impairment. I didn't know what that impairment was and so I called one of the guys that do it all the time." Kuczynski objected and moved to strike this last answer, but the objection was overruled. Later, Kuczynski explained that he had objected because, by voicing an opinion that he was impaired, the detective had "testified to the ultimate issue." The trial court denied the motion for mistrial. Kuczynski renewed the motion on the second day of trial. The court again denied it, explaining that the detective "did not offer an unfettered opinion that [Kuczynski] was intoxicated" but, rather, was "very, very equivocal."

¶19 Kuczynski contends the detective's testimony was improper and should have been stricken, exacerbating the impact of the preclusion of evidence, requiring a mistrial. But there was no error. The detective testified only that Kuczynski exhibited signs of "possibly" having "some type of impairment," expressly stating that she "didn't know what that impairment was." These statements did not run afoul of our supreme court's warning in *Fuenning v. Superior Court*, 139 Ariz. 590, 599-600 & n.8 (1983), urging trial courts to exercise caution in admitting opinion evidence that a defendant was "drunk," "intoxicated," or "under the influence." The detective provided no definitive opinion, and her statements could be heard to support either the state's theory of alcohol impairment or

Kuczynski's defense that his symptoms could have resulted from the arson-related activities and resulting car chase.

Double Punishment

¶20 Kuczynski argues his sentences are illegal because the same prior felony DUI convictions were used for three purposes: (1) as predicate DUIs to aggravate counts three and four, which would otherwise have been misdemeanor offenses; (2) to enhance Kuczynski to a Category Three recidivism range for sentencing; and (3) as aggravators in sentencing, to increase the sentences above the presumptive term of ten years. He contends for the first time on appeal that this constitutes "an unconstitutional double punishment," which is a fundamental error.

¶21 We review questions of double jeopardy de novo. *State v. Cooney*, 233 Ariz. 335, ¶ 11 (App. 2013). A violation of double jeopardy constitutes fundamental error, *id.*, but we find no such violation here.

¶22 Our supreme court has expressly rejected the argument that "double jeopardy and double punishment prohibitions prevent the legislature from considering an element of a crime more than once in exercising its authority to prescribe punishment for a single crime." *State v. Bly*, 127 Ariz. 370, 371 (1980). The court has also concluded that the enhancement provisions of our recidivist statute apply to Title 28 felonies, including DUI offenses that are upgraded due to prior DUI convictions. *See State v. Campa*, 168 Ariz. 407, 410-11 (1991). Finally, it is well established that constitutional considerations do not prevent a trial court from using the same prior convictions to both enhance a sentence under the recidivist statute and aggravate the sentence within the enhanced range. *State v. Bonfiglio*, 228 Ariz. 349, ¶ 21 (App. 2011).

¶23 Section 28-1383(A)(2), A.R.S., evinces the legislature's clear intention of punishing defendants more severely when they are convicted of DUI or aggravated DUI after having committed two or more such offenses within the prior eighty-four months. That is what occurred here. It is also "precisely what courts have long held is constitutionally permissible." *Cooney*, 233 Ariz. 335, ¶ 15. Kuczynski cites no case law from any jurisdiction in support of his contention that his situation is somehow distinct because his prior convictions were also used as aggravators.

Disposition

¶24 We affirm Kuczynski's convictions and sentences.