IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

GILBERT LUIS ALTAMIRANO,
Appellant.

No. 2 CA-CR 2019-0091
Filed February 25, 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NOT FOR PUBLICATION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. CR20175368001
The Honorable Javier Chon-Lopez, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

The Moss Law Firm, Tucson
By Vanessa C. Moss
Counsel for Appellant

MEMORANDUM DECISION

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

E S P I N O S A, Judge:

¶1 Gilbert Altamirano appeals his convictions and sentences for three counts of aggravated driving under the influence of intoxicants (DUI), three counts of aggravated driving with a blood alcohol concentration (BAC) of .08 or more, and one count of child abuse. He argues the trial court erred by denying his motion for judgment of acquittal and refusing his request to instruct the jury on a lesser-included offense. For the following reasons, we affirm.

Factual and Procedural Background

¶2 In the morning of November 18, 2017, a Marana Police Department patrol officer noticed a car with hazard lights flashing pulled to the side of the road near Interstate 10 and Sunset Road, with the back end of the car protruding into the roadway. Upon approaching the vehicle, the officer observed Altamirano asleep in the driver's seat with an infant sitting unbuckled in a car seat in the back. The officer smelled "a strong odor of intoxicants" emanating from Altamirano and the car and saw an open container of beer in the center console and an unopened twelve-pack of beer on the passenger side floorboard. The car keys were in the ignition, the gear shift was in the drive position, and the radio was on. The hood of the car was warm, indicating it had recently been driven.

¶3 Altamirano was roused and asked to exit the car. A Tucson Police Department officer arrived and observed that Altamirano was noticeably swaying, his eyes were bloodshot and watery, his eyelids were droopy, and his speech was slurred. Altamirano repeatedly denied driving the car, telling officers, "I was not driving the car, I just pulled over." A blood sample was drawn, which later revealed Altamirano's BAC was .147. It was also determined his driver license was suspended, and he had two DUI convictions within the previous seven years.

¶4 Altamirano was charged and convicted on all counts as noted above, pursuant to a three-day jury trial. The trial court sentenced him to concurrent terms of imprisonment, the longest of which are ten years. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Motion for Judgment of Acquittal

¶5 Altamirano first argues the trial court erred by denying his motion for judgment of acquittal made at the close of the state's evidence. We review the court's ruling de novo. *State v. West*, 226 Ariz. 559, ¶ 15 (2011). Rule 20(a)(1), Ariz. R. Crim. P., provides that after the close of evidence, "the court must enter a judgment of acquittal on any offense charged in an indictment . . . if there is no substantial evidence to support a conviction." Substantial evidence is that which a reasonable juror could accept as sufficient to support a conclusion of guilt beyond a reasonable doubt. *State v. Fulminante*, 193 Ariz. 485, ¶ 24 (1999). On appeal, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Cox*, 214 Ariz. 518, ¶ 8 (App. 2007) (emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

¶6 Altamirano concedes he "was impaired by alcohol," "had his child in the car, and had prior DUIs," but contends the evidence for his DUI convictions was insufficient because the state "entirely failed to prove" his "vehicle was operated and operable."[1] Altamirano is correct that his convictions required evidence that he was driving or in actual physical control of a vehicle while under the influence of intoxicating liquor. A.R.S. § 28-1381(A). A person is in actual physical control of a vehicle when "under the totality of the facts, the person 'posed a threat to the public by the exercise of present or imminent control' over a vehicle 'while impaired.'" *State v. Zaragoza*, 221 Ariz. 49, ¶ 17 (2009) (quoting *State v. Love*, 182 Ariz. 324, 326-27 (1995)). Relevant factors to demonstrate actual physical control include whether the engine is running, the position of the driver in the car, and the location of the vehicle. *Id.* ¶ 21.

¶7 The state presented evidence that Altamirano had been found asleep in the driver's seat of a vehicle partially obstructing the roadway, with the keys in the ignition, the gear shift in the drive position, the hood

[1]Altamirano does not appear to challenge his child abuse conviction.

warm, the radio on, and the hazard lights blinking. When approached by police officers, he admitted he had been driving and had recently pulled off the road. Under the totality of the circumstances, reasonable jurors could conclude that Altamirano had posed a threat to the public by the exercise of imminent control over his vehicle while he was impaired by alcohol. *See* § 28-1381(A)(1), (2).

¶8 Altamirano nevertheless argues he "presented compelling evidence suggesting reasonable doubt via his two witnesses" who "provided convincing evidence that [his] car was out of gas at the time that he was located in the vehicle," which "would materially undermine both theories of culpability available to the State." Altamirano maintains that because the state lacked evidence of when he had driven the car, he "could have been sitting roadside consuming alcohol after the car had ceased operation." We reject his arguments for several reasons.

¶9 First, whether the car was out of gas does not "undermine" the state's evidence that Altamirano had either driven or was in actual physical control of the car while intoxicated. *See State v. Larriva*, 178 Ariz. 64, 65 (App. 1993) ("[O]perability of the vehicle is only tangentially relevant to the determination of actual physical control."); *see also State v. Dawley*, 201 Ariz. 285, ¶ 7 (App. 2001) ("[W]e question whether the ability to 'start' a vehicle is necessarily dispositive of anything."). But even assuming the car lacked gas and was inoperable, a reasonable juror could still conclude beyond a reasonable doubt that Altamirano had driven it while impaired because he admitted pulling over to where he was found, still partially in the roadway. *See Love*, 182 Ariz. at 327-28 (even if defendant "relinquished actual physical control, if it can be shown [he] drove while intoxicated to reach the place where he . . . was found, the evidence will support a judgment of guilt").

¶10 Second, there was no evidence supporting Altamirano's theory that he only consumed alcohol after the vehicle had stopped. There was evidence of one open container of beer in the center console but there were no empty containers. And a police criminalist testified that Altamirano's BAC was equivalent to six to seven standard drinks or twelve-ounce beers, not just one. Thus, his argument is entirely speculative and ignores the state's evidence.

¶11 Finally, to the extent Altamirano asks us to reweigh or resolve any conflicts in the evidence in his favor, we will not do so. *See State v. Lee*, 189 Ariz. 590, 603 (1997) (appellate court does not reweigh the evidence

"and must view the evidence in the light most favorable to sustaining the conviction, and all reasonable inferences will be resolved against a defendant"). In sum, the state presented substantial evidence from which reasonable jurors could conclude beyond a reasonable doubt that Altamirano had consumed alcohol before or while driving and had driven or been in actual physical control of his car while under the influence of alcohol. Accordingly, the trial court did not err in denying his motion for judgment of acquittal.[2] *See id.* ("When reasonable minds may differ on inferences drawn from the facts, the case must be submitted to the jury, and the trial judge has no discretion to enter a judgment of acquittal.").

Jury Instruction

¶12 At trial, Altamirano asked the court to instruct the jury that driving on a suspended license is a lesser-included offense of the charged offenses of aggravated DUI and aggravated driving with a BAC above .08 with a suspended license. The state objected, arguing that pursuant to *State v. Robles*, 213 Ariz. 268 (App. 2006), and *State v. Brown*, 195 Ariz. 206 (App. 1999), driving on a suspended license is not a lesser-included offense of any of the charged offenses. Altamirano conceded that *Robles* was "controlling in this case," but nonetheless claimed that "a better ruling" is one that would give his requested instruction. The court denied the motion, concluding that "driving on a suspended license is not a lesser-included . . . of aggravated driving under the influence."

¶13 On appeal, Altamirano maintains the trial court's "denial of the requested lesser-included offense precluded a fair trial" in this case. We review the court's decision to refuse a jury instruction for an abuse of discretion. *State v. Bolton*, 182 Ariz. 290, 309 (1995). It is well established that a jury must be instructed on all lesser-included offenses supported by the evidence. *See* Ariz. R. Crim. P. 23.3; *State v. Nieto*, 186 Ariz. 449, 456 (App. 1996). "The test for whether an offense is 'lesser-included' is whether it is, by its very nature, always a constituent part of the greater offense, or whether the charging document describes the lesser offense even though it does not always make up a constituent part of the greater offense." *State v.*

[2]We also reject Altamirano's argument that the trial court's failure to sua sponte grant his Rule 20 motion, which he failed to renew after the defense rested, was fundamental error. He claims that "in the face of such compelling evidence of reasonable doubt," the court should have acquitted him. As detailed above, the state presented substantial evidence to submit the case to the jury.

Chabolla-Hinojosa, 192 Ariz. 360, 363 (App. 1998). In *Brown*, this court held that "[d]riving on a suspended license is not an inherent constituent part of aggravated DUI," in part because aggravated DUI "does not require proof of actual driving." 195 Ariz. 206, ¶ 6. Nor did the charging document support a lesser-included offense instruction in that case. *Id.* ¶ 8.

¶14 Altamirano concedes the "trial court was correct that the case law appears to preclude" his requested instruction. He nevertheless asserts "a more practical approach" is to reject the typical "elements" and "charging document" tests, and instead conduct "a particularized examination of the facts of each case, and on how the [s]tate is attempting at trial to prove charges . . . and determine instructions from there." We rejected this argument in *Robles*, when we declined "to extend [*State v.*] *Magana*'s 'common sense' language to encompass or mandate consideration of all facts ultimately contained in the record in determining whether a lesser-included-offense instruction was required." 213 Ariz. 268, ¶ 9. Altamirano has proffered no persuasive, let alone compelling, reason for doing so now. *See Brown*, 195 Ariz. 206, ¶ 10 ("it is the charging document and not the evidence that determines" whether a lesser-included instruction should be given). Accordingly, the trial court was well within its discretion to refuse Altamirano's requested jury instruction.

Disposition

¶15 For the foregoing reasons, Altamirano's convictions and sentences are affirmed.