IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

WILLIAM MICHAEL DIXON,
Appellant.

No. 2 CA-CR 2020-0123
Filed February 9, 2021

Appeal from the Superior Court in Pinal County
No. S1100CR201802484
The Honorable Christopher J. O'Neil, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

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By Megan K. Weagant
Counsel for Appellant

MEMORANDUM DECISION

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

E S P I N O S A, Presiding Judge:

¶1 After a jury trial held in his absence, William Dixon was convicted of aggravated driving or actual physical control while under the influence of intoxicants (DUI) and aggravated driving or actual physical control with a prohibited drug or metabolite in his body, both while his driver license had been suspended or revoked. The trial court sentenced him to concurrent ten-year terms of imprisonment. On appeal, Dixon argues the court erred by denying his motion to dismiss and his motion for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to affirming Dixon's convictions. *See State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 2 (App. 2013). Early one morning in May 2018, Dixon—accompanied by a female passenger—drove a pickup truck "at a speed a little fast" into an Apache Junction store parking lot. He backed up into a parking spot, hit the curb with the back driver's side tire, pulled forward causing the tire to drop, parked between two spaces at the front of the store, and turned off the engine. About two hours later, a customer informed a store employee that the people in the truck were possibly sleeping or in distress, and the employee called 9-1-1 to conduct a welfare check.

¶3 An officer arrived and saw Dixon and the passenger slouched over in their seats sleeping. The officer identified himself, and the passenger immediately woke up, but Dixon was "in and out of it" and "kept falling asleep." Although the passenger provided her identification, Dixon was unable to do so, and it was subsequently determined his driver license had been revoked and suspended. When Dixon was awake, his speech was slurred and mumbled. He also had body tremors. The officer then conducted field sobriety tests, which indicated that Dixon was impaired.

¶4 After being placed under arrest, Dixon stated to the officer that they had driven to the store to buy some food and had fallen asleep. Dixon was transported to the police station where the officer drew a sample of Dixon's blood, which tested positive for methamphetamine and amphetamine.

¶5 A grand jury indicted Dixon for aggravated driving or actual physical control while under the influence of intoxicants and aggravated driving or actual physical control with a prohibited drug or metabolite in his body, both while his driver license had been suspended or revoked. Dixon failed to appear for trial, but the trial court found that he had voluntarily absented himself. He was convicted as charged and sentenced as described above. This appeal followed.[1]

Motion to Dismiss

¶6 Dixon argues the trial court erred by denying his motion to dismiss because "he was using his vehicle as a stationary shelter" and "should never have been charged with [a] DUI offense." We review the denial of a motion to dismiss for an abuse of discretion. *State v. Villegas*, 227 Ariz. 344, ¶ 2 (App. 2011).

¶7 About two weeks before trial, Dixon filed a motion to dismiss "all charges" because "there [was] no evidence in this case indicating that [he], while he was asleep, operated or was otherwise in actual physical

[1]Dixon delayed his sentencing more than ninety days by absconding. *See* A.R.S. § 13-4033(C) (defendant may not appeal conviction if his absence prevents sentencing within ninety days after conviction and he fails to prove by clear and convincing evidence absence was involuntary). At arraignment, the trial court informed Dixon that if he "fails to appear for sentencing he . . . waives his . . . right to appeal." The state concedes that Dixon's "right to appeal was not likely validly waived" because the court's admonition was not consistent with *State v. Bolding*, 227 Ariz. 82, ¶ 20 (App. 2011) (defendant's voluntary delay of sentencing deemed knowing, voluntary, and intelligent only if "defendant has been informed he could forfeit the right to appeal if he voluntarily delays his sentencing for more than ninety days"). In any event, the court made no finding that Dixon had "knowingly, intelligently, and voluntarily waived his . . . right to an appeal by delaying sentencing" and, instead, informed Dixon that he could appeal. *State v. Raffaele*, 249 Ariz. 474, ¶ 15 (App. 2020). We therefore have jurisdiction over this appeal pursuant to A.R.S. § 13-4033(A)(1).

control of the Silverado pickup at a time when he was intoxicated" or that he "presented a real danger to himself or others." On the first day of trial, the parties discussed the motion, and Dixon's counsel stated he had filed it "as a pre-[Rule] 20." He explained that the motion had raised "aspects of" reasonable suspicion and probable cause because the state "should have recognized the shelter rule and not brought a prosecution." *See State v. Tarr*, 235 Ariz. 288, ¶ 11 (App. 2014) (under shelter rule, "an intoxicated person may use a vehicle as a stationary shelter and not be considered to be exercising present or imminent control over the vehicle for DUI purposes"). The trial court noted that "[u]ltimately, the issue is one of actual physical control," which "goes to the jury," but it nonetheless allowed the state to present evidence of reasonable suspicion and probable cause before denying the motion to dismiss.

¶8 Pursuant to Rule 16.4(b), Ariz. R. Crim. P., upon a defendant's motion, the trial court "must order a prosecution's dismissal if it finds that the indictment, information, or complaint is insufficient as a matter of law." "If a defendant can admit to all the allegations charged in the indictment and still not have committed a crime, then the indictment is insufficient as a matter of law." *Mejak v. Granville*, 212 Ariz. 555, ¶ 4 (2006). However, Rule 16.4(b) "is not the proper procedural means for dismissal when the trial judge believes the evidence against the defendant is insufficient to go to the jury." *State v. Rickard-Hughes*, 182 Ariz. 273, 275 (App. 1995).

¶9 Dixon relies on *Tarr* to assert that he "should never have been charged with [a] DUI offense . . . because he was using his vehicle as a stationary shelter." He points out that when the officer contacted him, he was sleeping in his truck, which was not running, and there was "no other indicia of the vehicle being used in any way other than to shelter in."

¶10 As we explained in *Tarr*, "[T]he issue of actual physical control require[s] the trier of fact to determine 'whether the defendant was simply using the vehicle as a stationary shelter, or actually posed a threat to the public by the exercise of present or imminent control over the vehicle while impaired.'" 235 Ariz. 288, ¶ 10 (quoting *State v. Love*, 182 Ariz. 324, 326 (1995)). It is therefore a factual question for the jury at trial, not a legal one for the court to resolve as part of a motion to dismiss. *See* Ariz. R. Crim. P. 16.4(b); *State v. Zaragoza*, 221 Ariz. 49, ¶ 20 (2009) ("The facts determine whether a defendant exercises physical control of a vehicle.").

¶11 Dixon nevertheless relies on *Zaragoza* to argue that "a conviction under Arizona's DUI statutes cannot be premised on a person's

speculative potential use of a vehicle." But the state's evidence consisted of more than speculation. As further discussed below, surveillance video showed the truck pulling into the store parking lot. And Dixon admitted at the time of his arrest that he had driven to the store to buy food. The trial court therefore did not abuse its discretion in denying the motion to dismiss. *See Villegas*, 227 Ariz. 344, ¶ 2.

Motion for a Judgment of Acquittal

¶12 Dixon also argues the trial court erred by denying his motion for a judgment of acquittal pursuant to Rule 20. We review de novo the sufficiency of the evidence. *State v. Snider*, 233 Ariz. 243, ¶ 4 (App. 2013). In doing so, we view the evidence in the light most favorable to sustaining the jury's verdicts and resolve all inferences against the defendant. *State v. Felix*, 237 Ariz. 280, ¶ 30 (App. 2015).

¶13 The trial court must enter a judgment of acquittal "if there is no substantial evidence to support a conviction." Ariz. R. Crim. P. 20(a)(1); *see also State v. Lopez*, 230 Ariz. 15, ¶ 3 (App. 2012). "Substantial evidence is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of [the] defendant's guilt beyond a reasonable doubt.'" *State v. Sharma*, 216 Ariz. 292, ¶ 7 (App. 2007) (quoting *State v. Mathers*, 165 Ariz. 64, 67 (1990)). "If reasonable [persons] may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial." *State v. Davolt*, 207 Ariz. 191, ¶ 87 (2004) (quoting *State v. Rodriguez*, 186 Ariz. 240, 245 (1996) (alteration in *Rodriguez*)). Substantial evidence may be either direct or circumstantial. *State v. Pena*, 209 Ariz. 503, ¶ 7 (App. 2005).

¶14 As relevant here, A.R.S. § 28-1381(A) provides:

> It is unlawful for a person to drive or be in actual physical control of a vehicle in this state under any of the following circumstances:
>
> 1. While under the influence of intoxicating liquor, any drug, a vapor releasing substance containing a toxic substance or any combination of liquor, drugs or vapor releasing substances if the person is impaired to the slightest degree.

. . . .

> 3. While there is any drug defined in [A.R.S.] § 13-3401 or its metabolite in the person's body.

The offense is aggravated if "the person's driver license or privilege to drive is suspended, canceled, revoked or refused." A.R.S. § 28-1383(A)(1). Amphetamine and methamphetamine are listed in § 13-3401(6)(vi) and (xxxviii).

¶15 Dixon does not meaningfully challenge the facts of his blood test or impairment, but argues, "Other than his mere presence in the driver's seat, there was nothing to suggest that [he] had any intent to turn the vehicle on and begin to drive." Again, he asserts that "all the evidence points to [him] using his truck as a stationary shelter." We disagree.

¶16 Section 28-1381(A) provides two ways of committing a single DUI offense: driving or being in actual physical control of the vehicle. *State v. Rivera*, 207 Ariz. 69, ¶ 8 (App. 2004). The evidence here was sufficient to establish both. When the officer approached the truck, Dixon was seated in the driver's seat with at least one of his hands on the steering wheel and the keys in the ignition. *See Zaragoza*, 221 Ariz. 49, ¶¶ 20-21 (actual physical control of the vehicle depends on facts of case and whether defendant's current or imminent control of vehicle presented real danger to himself or others). Dixon informed the officer that he had driven to the store to buy food but had fallen asleep. And, importantly, surveillance video showed him driving, not to mention erratically, in the store parking lot.[2] *See Rivera*, 207 Ariz. 69, ¶ 11 ("Of course, a person who drives a vehicle actually physically controls it; driving is a subset of actual physical control."). Accordingly, the trial court did not err in denying Dixon's motion for a judgment of acquittal. *See Snider*, 233 Ariz. 243, ¶ 4.

Disposition

¶17 For the foregoing reasons, Dixon's convictions and sentences are affirmed.

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[2]Although the driver of the vehicle was not visible on the video, Dixon was found in the driver's seat and he admitted that he drove to the store.