FILED BY CLERK
JUN -8 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellant, v. JOE LYNN PERSHING, Appellee.	2 CA-CR 2008-0253 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20074060

Honorable Clark W. Munger, Judge

AFFIRMED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Appellant

Robert J. Hirsh, Pima County Public Defender
By David J. Euchner
Tucson
Attorneys for Appellee

E C K E R S T R O M, Presiding Judge.

¶1 After appellee Joe Pershing was arrested for driving under the influence of an intoxicant (DUI) while he had two minors in his vehicle, the State of Arizona charged him with two counts of aggravated DUI and two counts of child abuse. The trial court dismissed with prejudice the two aggravated DUI charges as duplicitous, and the state has appealed that ruling. We agree that the aggravated DUI charges were duplicitous and affirm the court's ruling.

¶2 The relevant counts of the indictment charged the following:

> COUNT THREE: (AGGRAVATED DRIVING WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR OR DRUGS WHILE A MINOR IS PRESENT, A CLASS SIX FELONY)
>
> On or about the 4th day of October, 2007, JOE LYN[N] PERSHING while in violation of § 28-1381 or § 28-1382, drove or was in actual physical control of a vehicle while, JARED D[.], a person fifteen years of age or under was present in the vehicle, in violation of A.R.S. § 28-1383(A)(3)(a)(b), (F), (J) and (L), 28-1381, 28-1384, 13-603, 13-701, 13-702, 13-702.01, 13-801, 13-804 and 13-811. . . .
>
> COUNT FOUR: (AGGRAVATED DRIVING WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR OR DRUGS WHILE A MINOR IS PRESENT, A CLASS SIX FELONY)
>
> On or about the 4th day of October, 2007, JOE LYN[N] PERSHING while in violation of § 28-1381 or § 28-1382, drove or was in actual physical control of a vehicle while, JENIFER P[.], a person fifteen years of age or under was present in the vehicle, in violation of A.R.S. § 28-1383(A)(3)(a)(b), (F), (J)

and (L), 28-1381, 28-1384, 13-603, 13-701, 13-702, 13-702.01, 13-801, 13-804 and 13-811. . . .[1]

¶3 On the first day of trial, before the jury was empaneled, Pershing moved to dismiss counts three and four, contending they were duplicitous because each count charged two separate offenses. In response, the state moved to strike the alleged violation of § 28-1382 from the two counts.[2] Instead, the court dismissed the aggravated DUI charges from the indictment. The state then moved to dismiss the child abuse charges without prejudice so it could appeal the dismissal of the DUI charges. The court clarified that it was dismissing the DUI charges with prejudice, and the state filed this timely appeal from that ruling.[3]

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[1]The language of these counts was taken from A.R.S. § 28-1383(A)(3). The version in effect at the time of Pershing's arrest was the same in relevant part. *See* 2007 Ariz. Sess. Laws, ch. 159, § 1; *see also* 2007 Ariz. Sess. Laws, ch. 219, § 1 (former version of § 28-1381 in effect at time of Pershing's arrest).

[2]This was essentially a motion to amend the indictment pursuant to Rule 13.5, Ariz. R. Crim. P. We need not decide the propriety of the court's implicit denial of that motion because, even had the court granted the state's motion, the problem of charging Pershing with violating both § 28-1381(A)(1) and (A)(2) would not have been remedied.

[3]Despite the unique procedural posture of the case, the plain language of A.R.S. § 13-4032(1) gives this court jurisdiction over the appeal. *See id.* (state may appeal dismissal of indictment or count of indictment); *cf. Litak v. Scott*, 138 Ariz. 599, 600-01, 676 P.2d 631, 632-33 (1984) (concluding state could appeal to superior court from city court's dismissal of one charge of two-count complaint). And, although the state expressed concern below about the timeliness of Pershing's motion to dismiss two counts of the indictment, it has not argued on appeal that Pershing waived his right to assert that challenge. *See* Ariz. R. Crim. P. 13.5(e), 16.1(b) (challenges to indictment must be made by pretrial motion no later than twenty days before trial); *State v. Puryear*, 121 Ariz. 359, 362, 590 P.2d 475, 478 (App. 1979) (challenge to noticeable defect in charging document precluded after defendant failed to raise issue by pretrial motion).

¶4 The only issue presented in this appeal—whether the indictment was duplicitous—is a pure question of law that we review de novo. *See State v. Ramsey*, 211 Ariz. 529, ¶ 5, 124 P.3d 756, 759 (App. 2005). An indictment may charge more than one offense "[p]rovided that each is stated in a separate count." Ariz. R. Crim. P. 13.3(a). An indictment that charges separate crimes in the same count is duplicitous. *Baines v. Superior Court*, 142 Ariz. 145, 151, 688 P.2d 1037, 1043 (App. 1984). "Duplicitous indictments are prohibited because they fail to give adequate notice of the charge to be defended, because they present the hazard of a non-unanimous jury verdict and because they make a precise pleading of prior jeopardy impossible in the event of a later prosecution." *Spencer v. Coconino County Superior Court*, 136 Ariz. 608, 610, 667 P.2d 1323, 1325 (1983).

¶5 Here, the aggravated DUI counts charged Pershing with violating either § 28-1381 or § 28-1382 while a minor was in the vehicle. § 28-1383(A)(3). Moreover, § 28-1381 can be violated in two separate ways: § 28-1381(A)(1) prohibits driving a vehicle under the influence of an intoxicant while impaired to the slightest degree, while § 28-1381(A)(2) prohibits driving with an alcohol concentration of .08 or more.[4] The state argues the language in the two counts simply tracks the language of the aggravated DUI statute, charges alternate ways of violating it, and is not duplicitous. But this court has squarely addressed the question and found duplicitous a single count in an indictment charging a defendant simultaneously with either driving under the influence of an intoxicant while impaired to the

[4]The subsections in § 28-1381 relating to illegal drugs and commercial vehicles, § 28-1381(A)(3) and (4), were not discussed below, and we need not undertake any analysis of them to resolve the issue before us.

slightest degree or driving with the threshold alcohol concentration or above.[5] *See State v. Lujan*, 139 Ariz. 236, 239, 677 P.2d 1344, 1347 (App. 1984) ("The indictment allowed the jury to convict appellant of driving while under the influence *or* driving or being in control of a vehicle with a blood alcohol level of .10. Since these are two separate offenses, the jury's verdict is void and the judgment and sentence are vacated."); *accord State v. O'Haire*, 149 Ariz. 518, 519-20, 720 P.2d 119, 120-21 (App. 1986); *see also Anderjeski v. City Court*, 135 Ariz. 549, 550-51, 663 P.2d 233, 234-35 (1983) (driving while under influence and driving with requisite blood alcohol level "two separate and distinct offenses"). And, if a single count charging a defendant with violating either § 28-1381(A)(1) or (2) is duplicitous, it follows that the addition of a third crime in the same count, § 28-1382, is also duplicitous. *See Baines*, 142 Ariz. at 151, 688 P.2d at 1043.

¶6 The state nonetheless argues the counts at issue here do not charge separate crimes but rather two ways of committing the same crime, and it directs us to our state's felony-murder jurisprudence, in which our courts have held that the jury need not reach a unanimous verdict on the underlying felony. *See State v. Lopez*, 163 Ariz. 108, 111-12, 786 P.2d 959, 962-63 (1990) (unanimity not required on predicate felonies to sustain felony-murder conviction because predicate felonies simply alternative ways of committing one

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[5]We addressed the issue under the former A.R.S. § 28-692, which has since been renumbered as A.R.S. § 28-1381. *See* 1983 Ariz. Sess. Laws, ch. 279, § 6; 1995 Ariz. Sess. Laws, ch. 132, § 3; 1996 Ariz. Sess. Laws, ch. 76, § 3. Former § 28-692 provided the threshold blood-alcohol level was .10 rather than the current alcohol-concentration level of .08. *Compare* 1983 Ariz. Sess. Laws, ch. 279, § 6, *with* 2007 Ariz. Sess. Laws, ch. 219, § 1.

crime); *see also Baines*, 142 Ariz. at 151, 688 P.2d at 1043 (finding racketeering charge not duplicitous based partly on similarity to felony-murder statute).

¶7 But our supreme court based its reasoning in *Lopez* on Arizona's long history of treating first-degree murder as a single crime, whether committed with premeditation or resulting from the commission of another felony. 163 Ariz. at 111-12, 786 P.2d at 962-63; *see State v. Smith*, 160 Ariz. 507, 513, 774 P.2d 811, 817 (1989); *State v. Emery*, 141 Ariz. 549, 552, 688 P.2d 175, 178 (1984); *State v. Encinas*, 132 Ariz. 493, 496, 647 P.2d 624, 627 (1982); *State v. Axley*, 132 Ariz. 383, 392, 646 P.2d 268, 277 (1982). And, in *Schad v. Arizona*, 501 U.S. 624 (1991), a plurality of the United States Supreme Court affirmed the constitutionality of that practice out of similar deference to those previous state determinations. *See id.* at 636 ("If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law.").

¶8 The state argues we should follow the same reasoning we apply to first-degree murder and find the aggravated DUI counts here do not state separate offenses but one crime that can be committed in different ways. But, our settled jurisprudence has treated the DUI statute's alternatives, § 28-1381(A)(1) and (2), not as "mere means of committing a single offense," *Schad*, 501 U.S. at 636, but as separate offenses. *See Anderjeski*, 135 Ariz. at 550-51, 663 P.2d at 234-35; *O'Haire*, 149 Ariz. at 520, 720 P.2d at 121; *Lujan*, 139 Ariz. at 239, 677 P.2d at 1347; *State v. Thompson*, 138 Ariz. 341, 346, 674 P.2d 895, 900 (App. 1983).

And, our supreme court decided in *Anderjeski* that the DUI statute contains two separate offenses even after it had repeatedly held first-degree murder a unitary crime in Arizona. *See* 135 Ariz. at 550-51, 663 P.2d at 234-35; *Encinas*, 132 Ariz. at 496, 647 P.2d at 627; *Axley*, 132 Ariz. at 392, 646 P.2d at 277. We are bound by decisions of our supreme court. *State v. Bejarano*, 219 Ariz. 518, ¶ 6, 200 P.3d 1015, 1017 (App. 2008).

¶9 Moreover, as noted above, this court has squarely held that charging both crimes in one count is duplicitous. *Lujan*, 139 Ariz. at 239, 677 P.2d at 1347. Our supreme court has not overruled this decision, and we will not lightly overrule a prior decision of our own. *See Neil B. McGinnis Equip. Co. v. Henson*, 2 Ariz. App. 59, 62, 406 P.2d 409, 412 (1965) ("When we disagree with a prior decision of our Court[,] whether rendered by our own Division or by our fellow Judges in Division Two, we should do so only upon the most cogent of reasons being presented."). Nor has the legislature amended the DUI statute to address or respond to *Lujan*'s holding. *Compare* 1983 Ariz. Sess. Laws, ch. 279, § 6, *with* 2007 Ariz. Sess. Laws, ch. 219, § 1. Thus, we presume it has ratified our construction of that statute. *See Hancock v. Bisnar*, 212 Ariz. 344, § 23, 132 P.3d 283, 288 (2006) (presuming legislative ratification of statutory interpretation from multiple amendments to statute leaving interpreted language intact).

¶10 Finally, our understanding of § 28-1381(A) as defining separate offenses that must be separately charged eliminates any constitutional concerns regarding jury unanimity and double jeopardy arising when a jury must assess a defendant's guilt on one count that can be committed in two separate ways. *See Spencer*, 136 Ariz. at 610, 667 P.2d at 1325. And,

"'where a statute is susceptible [of] two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [our] duty is to adopt the latter.'" *United States v. Edmonds*, 80 F.3d 810, 819 (3d Cir. 1996), *quoting United States ex rel. Attorney General v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909) (first alteration added, second alteration in *Edmonds*). Of course, our ruling today does not prevent the state from alleging in future cases that a defendant has indeed committed two separate DUI offenses. It must merely do so by alleging those offenses as separate counts in the indictment.

¶11 Accordingly, we affirm the trial court's dismissal with prejudice of counts three and four of the indictment as duplicitous.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge