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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. GERMAN SALAZAR MORALES, Appellant.	2 CA-CR 2009-0156 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20080585

Honorable Jane L. Eikleberry, Judge
Honorable Gus Aragon, Judge

AFFIRMED IN PART; VACATED IN PART

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson
Tucson
Attorneys for Appellee

Law Office of Thomas Jacobs
By Thomas Jacobs
Tucson
Attorney for Appellant

H O W A R D, Chief Judge.

¶1 After a jury trial, appellant German Morales was convicted of one count of driving under the influence of an intoxicant (DUI) and one count of aggravated DUI. The trial court sentenced him to time served for the DUI—180 days' incarceration in the county jail—and to twelve years imprisonment for the aggravated DUI. Morales raises several issues on appeal. For the following reasons, we vacate his conviction and sentence for DUI but affirm his conviction and sentence for aggravated DUI.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). A police officer saw Morales driving at night without headlights. The officer initiated a traffic stop, and Morales pulled his car over to the side of the road. The officer noticed Morales had red, watery eyes, slurred speech, and smelled of alcohol. After Morales refused to participate in a field sobriety test, the officer obtained a warrant to obtain a sample of his blood. The sample was obtained and tested, establishing Morales's blood alcohol concentration was above the legal limit.

¶3 Morales was arrested and subsequently charged with several counts of aggravated DUI. He ultimately was convicted of one count of aggravated DUI as well as the lesser-included offense of DUI on another count. Morales appeals from these convictions.

Reasonable Doubt Instruction

¶4 Morales first argues the reasonable doubt instruction the trial court gave pursuant to *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995), constituted fundamental

or structural error in that it "violated [his] state and federal due process rights" by "lowering the reasonable doubt standard to the clear and convincing evidence standard used in civil cases."[1] Our supreme court repeatedly has rejected similar challenges to the instruction it directed trial courts to give in *Portillo*. *See, e.g.*, *State v. Garza*, 216 Ariz. 56, ¶ 45, 163 P.3d 1006, 1016-17 (2007); *State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916 (2006); *State v. Roseberry*, 210 Ariz. 360, ¶ 55, 111 P.3d 402, 411-12 (2005); *State v. Dann*, 205 Ariz. 557, ¶ 74, 74 P.3d 231, 249-50 (2003); *State v. Lamar*, 205 Ariz. 431, ¶ 49, 72 P.3d 831, 841 (2003); *State v. Van Adams*, 194 Ariz. 408, ¶¶ 29-30, 984 P.2d 16, 25-26 (1999). We are bound to follow our supreme court's decisions. *State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003). Morales, in fact, concedes that *Portillo* is the law in Arizona. We therefore reject this claim.

Double Jeopardy

¶5 Morales next claims the trial court erred in denying his post-trial motion to dismiss and vacate his DUI conviction based on the double jeopardy clauses of the federal and state constitutions because it is a lesser-included offense of the charge of aggravated DUI of which he was convicted. *See Lemke v. Rayes*, 213 Ariz. 232, ¶¶ 16-

[1]In his reply brief, as we understand his argument, Morales also claims our supreme court failed to consider "federal law" when directing trial courts to give the reasonable doubt instruction articulated in *Portillo* and therefore asserts that although our supreme court has rejected challenges to the *Portillo* instruction on state grounds, it has not considered such challenges under federal law. Arguments raised for the first time in a reply brief, however, are generally waived. *State v. Ruggiero*, 211 Ariz. 262, n.2, 120 P.3d 690, 695 n.2 (App. 2005). And even if this argument were not waived, our supreme court did in fact consider federal law in *Portillo*. *See generally* 182 Ariz. 592, 898 P.2d 970. Morales's argument is therefore meritless.

18, 141 P.3d 407, 413-14 (App. 2006) (double jeopardy principles prohibit convictions and punishment for both greater offense and lesser-included offense); *State v. Siddle*, 202 Ariz. 512, ¶¶ 7-10, 47 P.3d 1150, 1153-54 (App. 2002) (same). The state concedes error. We accept the state's concession and vacate Morales's conviction for DUI.

Use of Prior Felonies to Enhance Sentence

¶6 Morales finally argues that the trial court erred by using his prior felony convictions both to increase the aggravated DUI charge in count three of the indictment from a misdemeanor to a felony and also to enhance the sentencing range.[2] *See* A.R.S. §§ 28-1381, 1383. We review the legality of a sentence enhancement de novo. *See State v. Smith*, 219 Ariz. 132, ¶ 10, 194 P.3d 399, 401 (2008).

¶7 In *State v. Campa*, 168 Ariz. 407, 411, 814 P.2d 748, 752 (1991), our supreme court held that the defendant's prior felony DUI convictions were used properly to enhance his sentence because, given that the DUI charge could have been increased to felony status by prior DUI misdemeanors, the prior felony convictions were not "necessarily included elements of" the charged offense. Attempting to distinguish his case from *Campa*, on which the trial court relied in part, Morales contends that it is inapplicable because his prior felony convictions were actually "used to prove necessary

[2]We first note that Morales's sentence on count one was not enhanced, nor was the charge increased based on his prior felony convictions. At one point, Morales argues his sentence on count two was improper, but this count did not go to trial, so we assume this reference was an error and he intended to state, as he did elsewhere, that he was challenging his sentence on count three which was enhanced.

elements of Counts One and Three" of his indictment.[3] But the circumstances here are virtually identical to those in *Campa*, and Morales has failed to show that his prior felony convictions should be regarded differently from those in *Campa*.

¶8 Morales also appears to be analogizing his case to *State v. Orduno*, 159 Ariz. 564, 566-67, 769 P.2d 1010, 1012-13 (1989), where our supreme court held that a motor vehicle cannot be considered a "dangerous instrument" to enhance a sentence when it already has been used to prove an essential element of the crime. But the *Campa* court implicitly distinguished *Orduno* by concluding that the prior felony convictions were not "necessarily included elements of" the crime in that case. 168 Ariz. at 411, 814 P.2d at 752. Thus, *Campa* controls the result here.

¶9 Finally, Morales attempts to analogize his case to *State v. Alvarez*, 205 Ariz. 110, 67 P.3d 706 (App. 2003). But in *Alvarez*, we held that the trial court erred by using the same factor not listed in A.R.S. § 13-702 to both enhance the sentencing range and also aggravate the sentences within that new range. 205 Ariz. 110, ¶ 18, 67 P.3d at 711-12. This is not what happened here. Although Morales's sentence was enhanced by

[3]Morales contends that the United States Supreme Court held, in *Blakely v. Washington*, 542 U.S. 296 (2004), "that 8th Amendment protections against double jeopardy preclude the use of any aggravating factor to enhance a sentence *more than once*." (Emphasis provided by Morales.) We first note that it is the Fifth Amendment to the United States Constitution that protects criminal defendants against double jeopardy. *See* U.S. Const. amend. V. Further, the Supreme Court in *Blakely* addressed the Sixth Amendment right to trial by jury—neither the Eighth Amendment nor the Fifth Amendment Double Jeopardy Clause—and held that a trial court cannot enhance or aggravate a sentence using factors, other than prior convictions, that were not found by a jury. 542 U.S. at 301, 305-07. Therefore, *Blakely* is entirely inapplicable to Morales's contention that the trial court erred by enhancing his sentence with his prior convictions.

his prior felony convictions, it was not aggravated by them. In fact, he was sentenced to the presumptive prison term. Therefore, Morales's argument lacks merit.

Disposition

¶10 Based on the foregoing, we vacate Morales's conviction and sentence for DUI. We affirm, however, his conviction and sentence for aggravated DUI.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge