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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. DAVID ALLEN CULBERTSON, JR., Appellant.	)	2 CA-CR 2010-0035 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20044003

Honorable Ted B. Borek, Judge
Honorable Richard D. Nichols, Judge

AFFIRMED

Robert J. Hirsh, Pima County Public Defender
By Rebecca A. McLean — Tucson
Attorneys for Appellant

K E L L Y, Judge.

¶1 After a jury trial was held in his absence, appellant David Culbertson, Jr., was convicted of two counts of aggravated driving under the influence of an intoxicant (DUI), two counts of aggravated driving with an alcohol concentration (AC) of .08 or greater, fleeing from a law enforcement officer, and criminal damage. The trial court entered a judgment of acquittal on a charge of escape and the jury found him not guilty of

aggravated assault. The trial court sentenced him to concurrent prison terms, the longest of which were presumptive, 4.5-year terms, and ordered him to pay various fines and other assessments. Counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (App. 1969), avowing she has reviewed the record and has found no "meritorious issues for appeal" and requesting that we review the record for "error detrimental to Appellant . . . and reverse his convictions." Culbertson has filed a supplemental brief.

¶2 In his supplemental brief, Culbertson first contends "the sentencing court erred by failing to return the case back to the trial court for sentencing." We need not address this conclusory allegation because Culbertson has not properly developed his argument, as required by Rule 31.13(c)(1)(vi), Ariz. R.Crim. P. ("The appellant's brief shall include . . . [a]n argument which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."). Moreover, the claim is patently without merit.

¶3 Next Culbertson challenges his sentences, claiming the state had not clearly alleged the prior felony convictions it had intended the trial court to consider for the purpose of sentence enhancement. And, he asserts, the two convictions the trial court relied on, which related to offenses committed in 1990 and 1992, were too old to be considered historical prior felony convictions for enhancement purposes under former

A.R.S. § 13-604, 2003 Ariz. Sess. Laws, ch. 11, §1.[1] The record reflects that the trial court thoroughly addressed the use of the prior convictions for sentence enhancement. Although the state had alleged originally that these were historical prior felony convictions pursuant to former § 13-604, in March 2005, the state filed a new allegation stating that these offenses were not historical prior felony convictions as defined by that statute, but nonetheless were prior convictions relevant to sentencing under former A.R.S. § 13-702.02, 1999 Ariz. Sess. Laws, ch. 261, § 10, now § 13-703. The state filed a memorandum on this issue, and although defense counsel objected to the use of the prior convictions to "aggravate" the sentences and asked for additional time to brief the issue, he did not file any such memorandum.

¶4 Ultimately, the jury found Culbertson had two prior felony convictions. And, at the sentencing hearing, the trial court identified the convictions it had relied on, which were precisely the ones the jury had found proven by the state, a conviction for a felony theft committed in October 1990, and a conviction for a burglary committed in April 1992. The court's use of the prior convictions was proper; Culbertson was sentenced as a repetitive offender under former § 13-702.02, not as a defendant with historical prior felony convictions under former § 13-604.

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[1]The Arizona criminal sentencing code has been renumbered, effective "from and after December 31, 2008." *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For ease of reference and because no changes in the statutes are material to the issues in this case, *see id*. § 119, unless otherwise specified, we refer in this decision to the current section numbers rather than those in effect at the time of Culbertson's offenses. As part of the sentencing code reorganization, former A.R.S. § 13-702.02 was combined with former § 13-604 to create A.R.S. § 13-703. 2008 Ariz. Sess. Laws, ch. 301, §§ 28, 119-20.

¶5 In a related argument, Culbertson contends the sentences are illegal because the state "improperly submitted the alleged priors to the jury as aggravators, and not enhancers." Again, Culbertson does not adequately present this argument; therefore we need not address it. In any event, to the extent we understand his argument, it lacks merit. The state properly alleged Culbertson had two prior felony convictions for purposes of former § 13-702.02, not historical prior felony convictions for purposes of § 13-604. It makes no difference that the jury was told it needed to find whether Culbertson had prior felony convictions for purposes of "aggravation." The court instructed the jury that it had to determine whether Culbertson previously had been convicted of the two felony convictions alleged. The eventual use of the jury's findings at sentencing did not affect their determination.

¶6 The state's March 2005 allegations, filed seven months before trial, gave Culbertson adequate notice that the state intended to use these convictions to enhance his sentences pursuant to § 13-702.02. And there could be no violation of his rights under *Blakely v. Washington*, 542 U.S. 296, 301 (2004), as he suggests, because he received presumptive prison terms, the fact of a prior felony conviction is exempt under *Blakely*, and, in any event, the jury found the existence of these prior convictions beyond a reasonable doubt.

¶7 We also reject summarily Culbertson's assertion that the jury was tainted and that the verdict was unfair because the jury was informed of these prior convictions before it reached a verdict. He does not present this argument sufficiently and it is,

moreover, belied by the record, which shows the jury reached its verdict on the charges and returned the next day for the trial on the prior felony convictions.

¶8 As a third issue on appeal, Culbertson contends cursorily that the prosecutor committed misconduct when he "improperly shifted the burden of proof during closing arguments by commenting on Culberston's failure to call witnesses he claimed could corroborate his story." Culbertson neither cites to portions of the record relevant to his argument nor supports it with legal authority. Moreover, the argument is wholly without merit. The prosecutor did not commit misconduct. Rather, he presented the state's evidence in a proper, lawful manner and made appropriate arguments at the end of trial that called upon the jury to draw reasonable inferences from the evidence presented. Culbertson voluntarily absented himself from trial and was not there to present his apparent defense that he had not been the one driving. And, because he failed to maintain contact with or in any way assist his attorney, counsel was unable to find defense witnesses and had no evidence to present in support of this defense. It was not improper for the prosecutor to comment on Culbertson's failure to present evidence supporting his "theory of the case." *State v. Sarullo*, 219 Ariz. 431, ¶ 24, 199 P.3d 686, 692-93 (App. 2008).

¶9 Culbertson also asserts the trial court erred when it permitted the trial to proceed in his absence. But his argument in support of this claim is that the court erred in allowing his trial to proceed when it knew that defense counsel had been unable to secure the presence of a particular witness for trial. Attempts were made by defense counsel to serve this witness with a subpoena, but he could not be found. Defense counsel told the

court Culbertson had not been in contact with him since the previous July, and that counsel had tried every other week to find Culbertson and his witnesses. Thus, because Culbertson does not meaningfully challenge the trial court's finding that he voluntarily had absented himself from the trial, a finding amply supported by the record,[2] we need not address this issue further.

¶10 Second, neither the state nor the court was required to try to find this witness who, like Culbertson, had disappeared. The trial court did not err and Culbertson was not deprived of a fair trial; any detriment he may have suffered as a result of his absence was his own responsibility and a consequence of his decision to abscond.

¶11 Culbertson also contends there was insufficient evidence to support the convictions, primarily challenging the sufficiency of the evidence identifying him as the driver of the vehicle. The officer had observed Culbertson travelling at a high rate of speed, through an intersection without regard for a stoplight and narrowly missing the officer's vehicle before crashing into a pole. Culbertson appears to argue the officer's testimony that he was able to positively identify Culbertson, based on three to four seconds of observation, was insufficient, as a matter of law, to establish his identity. But it is for the jury to determine "'the credibility of the witnesses and the weight and value to be given to their testimony.'" *See State v. Cox*, 217 Ariz. 353, ¶ 27, 174 P.3d 265, 269 (2007), *quoting State v. Clemons*, 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974); *see also Manson v. Brathwaite*, 432 U.S. 98, 116 (1977) ("We are content to rely upon

[2]A warrant was issued for Culberton's arrest when he failed to appear for a trial confirmation hearing after having been warned repeatedly of the requirement that he appear at all hearings and maintain contact with counsel.

the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature."). On appeal, this court will affirm a conviction if it is supported by substantial evidence, which is "such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). There was substantial evidence here establishing the elements of all offenses for which the jury rendered guilty verdicts.

¶12 Similarly, we reject Culbertson's final argument that the trial court erred when it denied his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. A trial court must grant a judgment of acquittal if there is no substantial evidence to support a conviction. Ariz. R. Crim. P. 20(a); *State v. Rodriguez*, 192 Ariz. 58, ¶ 10, 961 P.2d 1006, 1008 (1998). But just as there was sufficient evidence supporting the jury's verdicts, there was sufficient evidence to withstand the Rule 20 motion. The court did not err.

¶13 We have reviewed the record as requested and have found no error that could be characterized as fundamental and prejudicial.[3] *See State v. Henderson*, 210

[3]We note that, based on the record before us and this court's recent decision in *State v. Rogers*, No. 2 CA-CR 2009-0277, ___ WL ____ (Ariz. Ct. App. Nov. 16, 2010), it appears the trial court miscalculated the mandatory surcharge owed under A.R.S. § 16-954(C), in ordering Culbertson to pay a surcharge of $630, rather than $675.75. But, as we stated in *Rogers*, because the state did not file a cross-appeal, we will not correct this error, which inures to Culbertson's benefit. *Rogers*, ¶ 9.

Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005); *see also* A.R.S. §§ 28-1381(A)(1),(2); 28-1383(A)(1). There was substantial evidence supporting the elements of all charges and Culbertson's prison terms were within the applicable statutory parameters and were imposed in a lawful manner. Therefore, finding no error warranting relief of any kind and no issue requiring further review, we affirm the convictions and the sentences imposed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge