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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. JESUS M. BLANCO, Appellant.	)	2 CA-CR 2010-0179 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20093726001

Honorable John S. Leonardo, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and David A. Sullivan
Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Alex Heveri
Tucson
Attorneys for Appellant

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

¶1 Jesus Blanco appeals from his conviction of aggravated driving with an alcohol concentration (AC) of .08 or more. He argues the trial court erred in precluding his defense that his consumption of alcohol had been "involuntary" and in refusing to instruct the jury it could find him not guilty if it found he had unknowingly ingested the alcohol. We affirm.

¶2 On appeal, we view the facts in the light most favorable to sustaining the verdict. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In November 2008, a police officer stopped Blanco after seeing him driving erratically. After he was arrested, Blanco told the officer he had drunk "four or five" cups of Tilt, a malt liquor containing approximately six to eight percent alcohol that is also "an energy drink." The state charged him with aggravated driving under the influence and aggravated driving with an AC of .08 or greater,[1] based on his having been convicted of two or more DUI offenses in the preceding eighty-four months. *See* A.R.S. § 28-1381(A)(1), (2); A.R.S. § 28-1383(A)(2).

¶3 Before trial, Blanco requested the jury be instructed it could find him not guilty if it concluded that he "unknowingly ingested the alcohol which caused him to become impaired . . . and that he drove a motor vehicle without the knowledge that he would become impaired while driving due to the consumption of alcohol." He maintained he was unaware that Tilt contained alcohol. The Tilt can, which Blanco claimed he did not examine, stated the beverage contained alcohol. Blanco stated at trial that he had not drunk from the cans, but that the drinks were poured by a friend into a

[1]We refer to these offenses generically as "DUI" offenses throughout this decision.

foam cup. The trial court rejected Blanco's proposed instruction and precluded him from arguing he was entitled to acquittal because he had been unaware the drinks contained alcohol. But it permitted Blanco to present evidence "of what he drank, the circumstances under which he drank it and the effects that he was feeling."

¶4 After a three-day trial, the jury acquitted Blanco of aggravated driving under the influence but found him guilty of aggravated driving with a AC of .08 or higher pursuant to §§ 28-1381(A)(2) and 28-1383(A)(2). The trial court suspended the imposition of sentence, placed Blanco on two years' probation, and imposed four months in prison as a condition of probation. This appeal followed.

¶5 Blanco argues the trial court's rulings violated his due process right to present his defense. *See State ex rel. Romley v. Superior Court*, 172 Ariz. 232, 236, 836 P.2d 445, 449 (App. 1992). He acknowledges that DUI is a strict liability offense in Arizona. *See State v. Zaragoza*, 221 Ariz. 49, ¶ 20, 209 P.3d 629, 634 (2009) ("The defendant's intent is not an element of the strict liability offense of driving while intoxicated."); *see also* A.R.S. § 13-202(B) (statutes not "expressly prescrib[ing] a culpable mental state" are strict liability offenses and "no culpable mental state is required for the commission of such offense"), § 28-1381(A)(2) (no culpable mental state specified), § 28-1383(A)(2) (same). He asserts, however, that due process nonetheless requires proof that he knew he had consumed alcohol for him to be found guilty of DUI under § 28-1381(A)(2).

¶6 Blanco relies primarily on a decision by the Florida District Court of Appeal, *Carter v. State*, 710 So. 2d 110, 111, 113 (Fla. Dist. Ct. App. 1998), in which the

court concluded that, although the DUI statute's language imposed strict liability, a defendant was nonetheless entitled to an involuntary intoxication instruction because the "criminalization of conduct without fault is constitutionally limited to minor infractions such as parking violations or other regulatory offenses." In short, the court held DUI was not a strict liability offense, regardless of the statute's wording, because "intent or knowledge is a prerequisite whenever offenses carry substantial criminal sanctions." *Id.* at 112.

¶7 But Arizona has already rejected a similar argument with respect to our own DUI statutes, concluding our legislature has the authority "to criminalize certain acts without regard to the actor's intent," and had done so in regard to DUI offenses. *State v. Thompson*, 138 Ariz. 341, 345, 674 P.2d 895, 899 (App. 1983); *see also State v. Lujan*, 139 Ariz. 236, 238-39, 677 P.2d 1344, 1346-47 (App. 1984). And our supreme court has adopted the view that, in Arizona, DUI is a strict liability offense.[2] *See Zaragoza*, 221 Ariz. 49, ¶ 20, 209 P.3d at 634; *State v. Williams*, 144 Ariz. 487, 489, 698 P.2d 732, 734 (1985) ("[D]riving while intoxicated . . . does not require intent."). Although these decisions do not address the precise argument Blanco raises, were we to adopt it, we would contradict our supreme court's conclusion that Arizona's DUI statutes impose strict liability. *See Williams*, 144 Ariz. at 488, 698 P.2d at 733 (strict liability offense

[2]We note one exception to this general rule. Aggravated DUI based on driving with a suspended license is not a strict liability offense because the state must demonstrate the defendant knew or should have known his or her license had been suspended. *See* § 28-1383(A)(1); *State v. Williams*, 144 Ariz. 487, 489, 698 P.2d 732, 734 (1985).

"does not require any degree of mens rea"); *see also* A.R.S. § 13-105(10) (defining culpable mental states). "[W]e are bound by decisions of the Arizona Supreme Court and have no authority to overrule, modify, or disregard them." *City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993). Because DUI under Arizona law is a strict liability offense, it has no culpable mental state and, therefore, the unknowing consumption of alcohol is not a defense.

¶8 In a related argument, Blanco asserts, relying on *State v. Boyd*, 201 Ariz. 27, 31 P.3d 140 (App. 2001), that "a defendant must have sufficient notice that an action is criminal" and he therefore was entitled to argue at trial that he should be acquitted because "he did not know he had ingested any alcohol, and because of its combination with stimulants, was unaware of its effects." In *Boyd*, the defendant was convicted of aggravated DUI while having a prohibited drug or its metabolite in his body. *Id.* ¶ 11; *see* § 28-1381(A)(3). The drug in question was gamma hydroxy butyrate (GHB), which was listed as a dangerous drug in A.R.S. § 13-3401. *Boyd*, 201 Ariz. 27, ¶ 10, 31 P.3d at 142. Boyd had taken a vitamin supplement containing gamma butyrolactone (GBL), which converts to GHB when exposed to water, such as during human liver function. *Id.* ¶¶ 6-7, 10. GBL was not listed in § 13-3401 at the time.[3] *Boyd*, 201 Ariz. 27, ¶ 10, 31 P.3d at 142. The label on the vitamin supplement stated it contained GBL and also stated it did not contain any illegal or controlled substances. *Id.* ¶ 7. We determined that, although § 28-1381(A)(3) was not facially vague, it was unconstitutionally vague as

[3]Section 13-3401 was amended in May 2001 to include GBL as a "Regulated chemical." 2001 Ariz. Sess. Laws, ch. 334, § 12.

applied to Boyd because it did not provide notice that ingesting GBL and operating a motor vehicle would constitute a crime because GBL only converted to a controlled substance "through a bodily process unknown to a person of average intelligence and common experience." *Boyd*, 201 Ariz. 27, ¶¶ 14-15, 17, 31 P.3d at 143.

¶9 But *Boyd* does not support Blanco's argument. First, we pointed out in *Boyd* that, if § 28-1381(A)(3) were not a strict liability offense—that is, if there were a knowledge requirement—the statute would not have been vague as applied to Boyd because his criminal liability would then hinge on whether he knew the chemical would convert to an illegal substance in his body. *Boyd*, 201 Ariz. 27, ¶ 17, 31 P.3d at 143. Thus, *Boyd* does not suggest a lack of knowledge constitutes a valid defense to DUI; it instead concludes knowledge is not relevant. Second, whether a statute is unconstitutionally vague as applied is not a jury question but instead is a question of law subject to de novo review. *See State v. Hargrave*, 225 Ariz. 1, ¶ 42, 234 P.3d 569, 581 (2010). Therefore, even if we found that argument persuasive,[4] Blanco was not entitled to present it to the jury.

[4]To the extent that Blanco asserts § 28-1381(A)(2) is unconstitutionally vague as applied to him because he "did not have constitutionally sufficient notice that his conduct was prohibited," we reject that claim. Although he asserts he was unaware the beverage contained alcohol, he does not suggest, much less demonstrate, that a person of average intelligence and common experience could not have readily ascertained that fact. *See In re Dayvid S.*, 199 Ariz. 169, ¶ 11, 15 P.3d 771, 774 (App. 2000) ("A statute is void for vagueness if it fails to give persons of average intelligence reasonable notice of what behavior is prohibited . . . ."); *see also Boyd*, 201 Ariz. 27, ¶¶ 14-15, 31 P.3d at 143 (finding statute unconstitutional as applied because "person of average intelligence and common experience" would not know chemical would convert to illegal drug after consumption). Accordingly, Blanco has failed to meet his burden of establishing the

¶10 Indeed, even if Blanco's proffered defense theoretically is available to some defendants charged with DUI, the trial court's refusal to allow it here was harmless under the circumstances. Generally, a conviction need not be reversed in the face of an error—even an error depriving the defendant of a constitutional right—if a reviewing court can determine, beyond a reasonable doubt, that the error neither contributed to nor affected the verdict. *See State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). Here, the audiovisual recording admitted at trial reveals that in response to the police officer's question, "What type of alcoholic beverage have you been drinking today?" Blanco answered, "Tilt," establishing both that he knew the name of the beverage he had consumed and that it contained alcohol. Blanco's proffered defense was that he was justifiably ignorant of the fact that he had consumed alcohol. As we have observed in a different context, "While there may be some circumstances imaginable that would allow for a defense based on th[e] concept [proffered], this case does not present them." *State v. Buggs*, 167 Ariz. 333, 337, 806 P.2d 1381, 1385 (App. 1990) (flawed self-defense instruction harmless error). Any arguable error was harmless in this particular case.

¶11 In sum, we conclude Blanco was not entitled to argue he should be acquitted because he did not knowingly consume alcohol. Nor was he entitled to his requested jury instruction because it did not correctly state the applicable law. *State v. Cox*, 217 Ariz. 353, ¶ 17, 174 P.3d 265, 268 (2007) ("Courts do not err by refusing to give instructions that misstate the law."). And, even if Blanco's proffered defense was

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statute's invalidity as applied to him. *See State v. Kaiser*, 204 Ariz. 514, ¶ 8, 65 P.3d 463, 466 (App. 2003).

legally cognizable, any error in precluding it was harmless under the facts presented. We therefore affirm Blanco's conviction and the term of probation imposed.

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

CONCURRING:

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

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