

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

VALERIE MARQUEZ ESCOBIDO, *Appellant*.

No. 1 CA-CR 14-0659
FILED 10-8-2015

Appeal from the Superior Court in Maricopa County
No. CR2013-107270-001
The Honorable Phemonia L. Miller, Judge Pro Tempore

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

Maricopa County Legal Defender's Office, Phoenix
By Cynthia D. Beck
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Jon W. Thompson and Judge Lawrence F. Winthrop joined.

H O W E, Judge:

¶1 Valerie Marquez Escobido appeals her convictions and sentences for aggravated driving under the influence (“DUI”) with a suspended license and aggravated DUI with a blood alcohol concentration (“BAC”) of .08 percent or more with a suspended license. Escobido argues that she was entitled to a modified jury instruction regarding the presumption of notice of suspension. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In September 2012, Escobido drove to a Circle K on a suspended license to purchase more beer after a night of drinking “a whole bunch.” As she left the store’s parking lot, she hit a curb and struck a truck, but continued driving toward her apartment. When Escobido arrived at her apartment complex, a Scottsdale police officer there on unrelated surveillance observed Escobido exit her damaged vehicle while stumbling and covered in blood. Concerned for her welfare, the officer approached Escobido and sat her on the ground. The officer asked Escobido for her name, but because she was unable to tell him who she was, he identified her by retrieving a drivers’ license from her pants pocket.

¶3 Because Escobido was injured, the officer had her taken to the hospital for treatment. There, two Phoenix police officers interviewed Escobido. One officer, reading off a standard set of interview questions, asked if she knew that her license was suspended, and she responded, “Yes.” When asked how she knew that, she replied, “A letter from MVD.” The other officer again asked if she knew that her license was suspended, and she repeated that she did. Test results later showed that Escobido’s BAC was .291 percent. The State charged her with aggravated DUI with a suspended license and aggravated DUI with a BAC of .08 percent or more with a suspended license.

¶4 During Escobido’s jury trial, a custodian of records from the Motor Vehicle Division (“MVD”) testified that two notices of suspension

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were sent to Escobido. She stated that the MVD sent the first notice on February 15, 2011, subsequent to a police stop the month before. During that stop, Escobido provided the officer – who was coincidentally one of the officers that interviewed her at the hospital – with a current address of West Shaw Butte. The MVD custodian testified that the officer had noted this address on the order of suspension form he forwarded to the MVD, but that the MVD had sent the notice to Escobido’s previous address. She also stated that the MVD had sent the second notice on June 5, 2012 to an address on West Cactus Road, which Escobido had updated nine months before.

¶5 Escobido admitted that she drove while drunk, but denied knowing that her license was suspended. She testified that she had never received the first notice from the MVD and did not remember the previous police stop. She also stated that she did not receive the second notice. Although she had lived on West Cactus Road, her lease expired at the beginning of June 2012, and she moved out and went on vacation out of state, putting her mail on hold. When she returned from vacation and picked up her mail, she had no letter from the MVD. She testified that she did not remember telling officers at the hospital that she had received the notices.

¶6 At the close of testimony, Escobido moved for a judgment of acquittal pursuant to Arizona Rules of Criminal Procedure 20, arguing that she had put forth evidence to rebut the presumption of notice of suspension and that the State did not prove that she knew or should have known that her license was suspended. The trial court denied the motion. The parties then discussed the State’s proposed jury instructions, including an instruction on the presumption of notice of suspension. The proposed instruction stated, in relevant part, that the presumption could be rejected and that the State maintained its obligation to prove each element:

You are free to accept or reject this presumption as triers of fact. You must determine whether the facts and circumstances shown by the evidence in this case warrant any presumption that the law permits you to make. Ultimately, even with the presumption, the State has the burden of proving each and every element of the offense beyond a reasonable doubt before you can find the defendant guilty.

Escobido asked the trial court to remove the instruction entirely. She argued that she had rebutted the presumption by showing that the MVD sent the first notice to the incorrect address, and by testifying that she had moved out of the West Cactus Road apartment by the time it sent the second notice

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and did not have it in her held mail. She also argued that instructing the jurors on the presumption would therefore be “confusing” because they “should just be finding whether or not she knew or should have known beyond a reasonable doubt.”

¶7 Alternatively, Escobido requested that the trial court modify the instruction by adding language requiring the State to present additional evidence of knowledge because she rebutted the presumption:

This presumption is rebuttable by the Defendant. You can find that the Defendant has put forth evidence that she did not receive the notice. If you do find that the Defendant has put forth evidence that she did not receive the notice then you must find that the State has presented more evidence than just mere neglect to establish that the Defendant knew or had reason to know that her license was suspended. This additional evidence must be proved beyond a reasonable doubt.

The trial court denied Escobido’s request, but stated that she could make the argument to the jurors at closing. Escobido did so, arguing that she had offered sufficient evidence to rebut the presumption, so the jurors no longer needed to presume knowledge of suspension. She also noted the evidence that supported the rebuttal and explained that the State had to prove knowledge beyond a reasonable doubt.

¶8 Despite Escobido’s argument, the jurors convicted Escobido of both counts. The trial court sentenced her to concurrent terms of four months’ imprisonment and two years’ probation for each count. Escobido timely appealed.

DISCUSSION

¶9 Escobido argues that the trial court should have included her proposed jury instruction because the evidence supported it. We review a trial court’s determination whether to adopt a party’s requested jury instruction for an abuse of discretion. *State v. Rosas-Hernandez*, 202 Ariz. 212, 220 ¶ 31, 42 P.3d 1177, 1185 (App. 2002). We will not reverse a jury verdict for erroneous instructions unless the instructions, taken as a whole, would mislead the jurors. *State v. Doerr*, 193 Ariz. 56, 65 ¶ 35, 969 P.2d 1168, 1177 (1998). We may consider closing arguments in determining the adequacy of jury instructions. *State v. Bruggeman*, 161 Ariz. 508, 510, 779 P.2d 823, 825 (App. 1989). We find no abuse of discretion here.

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¶10 A party is entitled to a jury instruction on any theory reasonably supported by the evidence. *State v. Tarr*, 235 Ariz. 288, 293 ¶ 14, 331 P.3d 423, 428 (App. 2014). However, the trial court is not required to give a proposed instruction when its substance is adequately covered by other instructions. *Id.* The facts of the case determine whether such an instruction should be given. *State v. Speers*, 209 Ariz. 125, 132 ¶ 27, 98 P.3d 560, 567 (App. 2004). In Arizona, the MVD must send a written notice of suspension to a driver's address on record. A.R.S. § 28-3318(A)(1). "Compliance with the mailing provisions of this section constitutes notice of the suspension The [S]tate is not required to prove actual receipt of the notice or actual knowledge of the suspension" A.R.S. § 28-3318(E). However, this presumption of notice is rebuttable. *See State v. Jennings*, 150 Ariz. 90, 94, 722 P.2d 258, 262 (1986). Once the State shows that the MVD mailed the notice, the burden shifts to the defendant to rebut the presumption by showing to the trier-of-fact that she did not receive it. *State v. Cifelli*, 214 Ariz. 524, 527 ¶ 13, 155 P.3d 363, 366 (App. 2007).

¶11 Here, the trial court provided an instruction that adequately stated the law and was not misleading. The instruction stated that a presumption of notice is permitted if the MVD mailed the notice to Escobido's address on record. The instruction further allowed the jurors to consider the evidence and decide whether it supported accepting the presumption or rejecting it. Additionally, the jurors were correctly instructed that the State ultimately bore the burden of proving each element beyond a reasonable doubt. These elements, including that Escobido "knew or should have known" about the suspension, were outlined in another instruction to the jurors. Moreover, Escobido did not need the instruction because she was able to argue to the jurors at closing that she had presented evidence that rebutted the presumption. Accordingly, because the given instructions and Escobido's closing argument adequately instructed the jurors, the trial court did not abuse its discretion in denying Escobido's request.

¶12 Escobido counters that her modified instruction was necessary pursuant to *Cifelli*. In *Cifelli*, this court held that merely neglecting to notify the MVD of a change of address, by itself, does not satisfy the mens rea requirement that a defendant knew or should have known that his or her license was suspended. *Id.* at 529 ¶ 19, 155 P.3d at 368. However, neglecting to change her address is not at issue here. Escobido testified that West Cactus Road was her mailing address as of June 5, 2012 when the MVD sent the second notice there. Thus, because *Cifelli* does not apply, the trial court did not abuse its discretion in denying Escobido's request.

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CONCLUSION

¶13

For the foregoing reasons, we affirm.



Ruth A. Willingham · Clerk of the Court
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