

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

MICHAEL JOHN CALLAN, *Appellant*.

No. 1 CA-CR 15-0794
FILED 11-1-2016

Appeal from the Superior Court in Coconino County
No. S0300CR201400563
The Honorable Mark R. Moran, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Alice Jones
Counsel for Appellee

Coconino County Public Defender's Office, Flagstaff
By Brad Bransky
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Diane M. Johnsen delivered the decision of the Court, in which Judge Jon W. Thompson and Judge Thomas C. Kleinschmidt joined.¹

JOHNSEN, Judge:

¶1 Michael John Callan appeals his convictions and sentences on two counts of aggravated driving under the influence. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 A grand jury indicted Callan on two counts of aggravated driving under the influence. Count One alleged he drove or was in actual physical control of a vehicle without a valid driver's license while impaired to the slightest degree, and Count Two alleged he had no valid driver's license and his blood alcohol concentration ("BAC") was .08 or higher within two hours of driving or being in actual physical control of a vehicle.

¶3 We view the evidence in the light most favorable to sustaining the convictions. *State v. Boozar*, 221 Ariz. 601, 601, ¶ 2 (App. 2009). A Coconino County deputy sheriff responded to a report of a vehicle that had slid off Highway 180 just outside of Flagstaff. The snowplow operator who reported the vehicle testified that it was not there when he first drove by at about 2:30 a.m., but when he drove back at about 3:30 a.m., Callan was asleep or passed out in the driver's seat, apparently "hammered." The deputy called to the scene found the vehicle about 15 feet from the highway, perpendicular to and facing the highway. Tire tracks in the snow were consistent with the vehicle having slid sideways off the highway, and with the driver having attempted unsuccessfully to drive back onto the highway.

¶4 The deputy tapped on the driver's side window several times at about 3:50 a.m. before Callan, who was slumped over in the driver's seat, tried to lift his head and grunted. The ignition and heater were turned off, although the temperature was four degrees below zero. Callan's speech

¹ The Honorable Thomas C. Kleinschmidt, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

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was slurred, and he was unable to stand without leaning on the car. Callan told the deputy that he had "pulled off the road" because his passenger grabbed his arm and vomited. The deputy observed vomit on Richelle Short, who was slumped over in the passenger seat. The deputy found the keys to the ignition in the passenger seat under Short's left thigh, within reach of Callan.

¶5 The deputy arrested Callan after discovering his driver's license had been suspended, and advised him of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). The deputy conducted breathalyzer tests at 5:37 and 5:43 a.m., which showed BAC's of .214 and .222.

¶6 Short testified at trial that she had driven the vehicle from a Flagstaff bar at about 2:00 a.m., and after pulling off the highway, climbed onto Callan's lap in the passenger seat. She testified that when she started throwing up, Callan moved to the driver's seat. Short testified she had lied when she told the deputy at the scene that Callan was the driver.

¶7 The court granted judgment of acquittal on the allegations that Callan was driving while impaired and with a BAC above the legal limit "[b]ecause of the corpus delicti problem and the statements of the defendant being the only real evidence that the state presented on the driving issue." The jury convicted Callan of both charges of aggravated DUI based on actual physical control. The court found Callan had four prior felony convictions and sentenced him to ten years in prison on each new conviction, to be served concurrently. Callan filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2016), 13-4031 (2016), and -4033(A) (2016).²

DISCUSSION

A. Sufficiency of the Evidence.

¶8 Callan argues the superior court erred in denying his motion for judgment of acquittal on the charges that he was in actual physical control of the vehicle. We review *de novo* the sufficiency of the evidence to support a conviction. *State v. West*, 226 Ariz. 559, 562, ¶ 15 (2011). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the

² Absent material revision after the date of an alleged offense, we cite a statute's current version.

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essential elements of the crime beyond a reasonable doubt." *Id.* at 562, ¶ 16 (citation omitted).

¶9 Arizona Revised Statutes § 28-1381 (2016) provides in pertinent part that it "is unlawful for a person to drive or be in actual physical control of a vehicle" while impaired by alcohol, or having an alcohol concentration of .08 or more within two hours of "driving or being in actual physical control of the vehicle." Although the legislature did not define "actual physical control," our supreme court has held that "the phrase may, under some circumstances, apply to persons who are not at the time driving or otherwise putting a vehicle in motion." *State v. Love*, 182 Ariz. 324, 326 (1995).

¶10 In *Love*, the court held that when "actual physical control" is at issue, the trier of fact should consider "the totality of the circumstances . . . in determining whether defendant was simply using the vehicle as a stationary shelter or actually posed a threat to the public by the exercise of present or imminent control over it while impaired." *Love*, 182 Ariz. at 326-27. Among the factors the supreme court has suggested the finder of fact should consider in determining whether the defendant was using the vehicle as a temporary shelter or posed a threat to himself or others are:

1. Whether the vehicle was running;
2. Whether the ignition was on;
3. Where the ignition key was located;
4. Where and in what position the driver was found in the vehicle;
5. Whether the person was awake or asleep;
6. Whether the vehicle's headlights were on;
7. Where the vehicle was stopped;
8. Whether the driver had voluntarily pulled off the road;
9. Time of day;
10. Weather conditions;
11. Whether the heater or air conditioner was on;
12. Whether the windows were up or down;

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13. Any explanation of the circumstances shown by the evidence.

State v. Zaragoza, 221 Ariz. 49, 54, ¶ 21 (2009); *see also Love*, 182 Ariz. at 326.

¶11 Under this test, the fundamental issue for the jury is "whether the defendant actually posed a threat to the public by the exercise of present or imminent control of the vehicle while impaired." *See Zaragoza*, 221 Ariz. at 54, ¶ 21. Here, the evidence was sufficient to permit the jury to conclude that Callan was in actual physical control of the vehicle, and accordingly the court did not abuse its discretion in denying the motion for judgment of acquittal. Callan was in the driver's seat of the vehicle, passed out, with a BAC more than twice the legal limit. The keys were under the passenger's left thigh, within Callan's reach. The passenger was slumped over, passed out, and had vomited on herself. The temperature was four degrees below zero, but the heater was not on. Callan told the deputy that he slid off the highway when his passenger grabbed his arm and threw up. The vehicle ended up facing the highway, and, according to testimony, at some point very nearly made it back on the highway before coming to rest. Under these circumstances, a rational trier of fact could have found beyond a reasonable doubt that Callan posed a threat to the public by the exercise of imminent control of the vehicle while impaired and with a BAC above the legal limit, and accordingly the court did not err in denying a motion for judgment of acquittal on this theory.

B. Denial of Motion to Strike Defendant's Statements.

¶12 Callan argues that, after the court entered judgment of acquittal on the driving allegations, it abused its discretion in failing to strike his statements that he drove to the location at which the vehicle was discovered.

¶13 After granting judgment of acquittal on the driving allegation, the court denied Callan's motion to strike exhibits 41, 43 and 45, the recordings of Callan's statements that he had driven the vehicle from a friend's house and had slid off the highway because Short had grabbed him and had thrown up. The court reasoned that the exhibits already had been admitted and heard by the jury, and were relevant to the State's theory that Callan was in actual physical control of the vehicle, a theory to which *corpus delicti* did not apply. We review evidentiary rulings for abuse of discretion. *State v. Ellison*, 213 Ariz. 116, 129, ¶ 42 (2006).

¶14 The court did not abuse its discretion in refusing to strike Callan's recorded statements. The statements were relevant to show that it

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was Callan who slid off the highway, rather than his passenger, and that he did so because his passenger grabbed his arm and threw up. His explanation, when viewed in light of the skid marks and the position of the vehicle showing that Callan nearly succeeded in returning to the highway, were relevant to show that he presented an imminent danger to the public. *See Zaragoza*, 221 Ariz. at 54, ¶ 21.³

¶15 Because it is neither necessary nor appropriate in considering Callan's arguments on appeal, we decline the State's request to revisit the viability of the *corpus delicti* rule and address whether the court improperly applied that rule in granting judgment of acquittal on the driving allegation.

C. Denial of Motion for Mistrial.

¶16 Callan also argues that the prosecutor engaged in misconduct during closing argument by making repeated references to "precluded evidence" of his driving, and that the court abused its discretion in failing to grant a mistrial on this basis.

³ For the first time in his reply brief, Callan argues that, after granting his motion for acquittal on the driving allegations, the court erred by failing to strike "any scant evidence" that he drove to the scene that the State offered to show he was in actual physical control of the vehicle. In support, Callan cites *Dunn v. United States*, 284 U.S. 390, 402-03 (1932), for the proposition that a not-guilty verdict

necessarily determines that the evidence failed to establish a fact which is an essential ingredient of the offense charged in the other count, [such that], in determining whether the evidence was sufficient to sustain the finding of guilt, the court must exclude from consideration the fact so found in favor of the accused.

The language Callan cites, however, is from the dissent in the case, not the majority. Regardless, and setting aside the legal basis for the superior court's decision in this case to grant the Rule 20 motion on the driving allegation, the resulting ruling did not establish conclusively that Callan did not drive the vehicle to the spot at which it slid off the highway. *See Dowling v. United States*, 493 U.S. 342, 348 (1990).

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¶17 After granting judgment of acquittal on the driving allegations, and before closing arguments, the court cautioned the prosecutor to

remember the time line that the [actual physical control] addresses and the theory of the case of [actual physical control] is different from the driving So the state needs to be cautioned not to attempt to boot strap any theory that they may have had or evidence which shows that Mr. Callan may have been a driver at some point in the evening in order to bolster the [actual physical control] case and perhaps confuse the jury.

As an example, the court warned that any evidence that Callan drove the vehicle after 2:00 a.m. when the bar closed,

doesn't necessarily put him in actual physical control of the vehicle at the time that the deputy showed up and contacted him. Those are two separate occasions. I don't see the state being able to use an argument, a good faith argument of the earlier driving to support a conviction for the specific element that you've alleged and the time of [actual physical control].

The court, however, declined to provide any further guidance to the prosecutor about specific evidence he could or could not argue showed actual physical control.

¶18 Defense counsel moved for a mistrial after closing arguments on the ground that the prosecutor "consistently tried to confuse the jury" by repeatedly referring to evidence Callan had drove the car from the bar. The court denied the motion, reasoning that although evidence that Callan drove from the bar was not relevant to the allegation that he was in actual physical control, evidence that Callan or his passenger attempted to get back on the highway was relevant to the allegation of actual physical control. The court instead gave the following clarifying instruction:

An element of each offense is whether the defendant was in actual physical control of the vehicle. Evidence of driving may be relevant to you in making your determination, but you need not find defendant was or was not driving.

You may consider evidence of driving that may or may not have occurred prior to [the deputy's] contact with Mr. Callan

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only on the issue of whether he was in actual physical control at the time of [the deputy's] arrival on the scene.

¶19 A declaration of mistrial is "the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Dann*, 205 Ariz. 557, 570, ¶ 43 (2003). In determining whether to grant a mistrial, a judge should consider (1) whether the prosecutor's comments called the jurors' attention to matters they should not consider in reaching a verdict and (2) the probability under the circumstances that the comments influenced the jurors. *State v. Bailey*, 160 Ariz. 277, 279 (1989). Similarly, "[p]rosecutorial misconduct constitutes reversible error only if (1) misconduct exists and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial." *State v. Morris*, 215 Ariz. 324, 335, ¶ 46 (2007).

¶20 A mistrial is appropriate only if "misconduct could not be cured by any other means." *State v. Schroeder*, 167 Ariz. 47, 51 (App. 1990). "Because the trial court is in the best position to determine the effect of a prosecutor's comments on a jury, we will not disturb a trial court's denial of a mistrial for prosecutorial misconduct in the absence of a clear abuse of discretion." *State v. Newell*, 212 Ariz. 389, 402, ¶ 61 (2006).

¶21 No such abuse of discretion occurred here. We do not view the prosecutor's argument about Callan's admission that he was the driver as an improper attempt to confuse the jury. Our review of the cited portions of the closing argument suggests that, aside from a brief reference to what the evidence showed Callan did earlier in the evening, the prosecutor for the most part instead was trying to argue that the evidence that Callan had slid off the highway and very nearly returned to the highway was relevant to show that he was in actual physical control of the vehicle at the time he was contacted by the deputy. The argument that Short lied when she claimed she was the driver was appropriate to show that it was Callan, not Short, who posed the danger. This evidence was clearly relevant to the *Zaragoza* factor of whether Callan had voluntarily pulled off the road, and to the ultimate issue of whether Callan presented an imminent danger. *See Zaragoza*, 221 Ariz. at 54, ¶ 21. Moreover, insofar as we are able to ascertain, these arguments were not precluded by the court's ruling. The court was in the best position to determine whether the prosecutor's references to Callan's driving were improper and would have confused the jury. *See State v. Jones*, 197 Ariz. 290, 304, ¶ 32 (2000). The court instead determined that an instruction clarifying the relevance of the evidence, although the court noted, "I'm not sure it needs to be cured. Maybe it's a helpful instruction." Under these circumstances, we cannot say that the prosecutor engaged in

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misconduct or that the court abused its discretion in denying the motion for mistrial.

CONCLUSION

¶22 For the foregoing reasons, we affirm Callan's convictions and sentences.



AMY M. WOOD • Clerk of the Court
FILED: AA