2018 WL 3301554
Only the Westlaw citation is currently available.
THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)
(1); Ariz. R. Crim. P. 31.19(e).
Court of Appeals of Arizona,
Division 2.

THE STATE OF ARIZONA, Appellee,
v.
KAREN MARGARET NEVINS, Appellant.

No. 2 CA-CR 2017-0339
|
Filed July 5, 2018

Appeal from the Superior Court in Pima County
No. CR20160387001
The Honorable Michael J. Butler, Judge
AFFIRMED

Attorneys and Law Firms

Mark Brnovich, Arizona Attorney General, Joseph T. Maziarz, Chief Counsel, By Karen Moody, Assistant Attorney General, Tucson, Counsel for Appellee

James Fullin, Pima County Legal Defender, By Robb P. Holmes, Assistant Legal Defender, Tucson, Counsel for Appellant

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

MEMORANDUM DECISION

ECKERSTROM, Chief Judge:

***1 ¶1** Karen Nevins appeals from her convictions and sentences for two counts of aggravated **driving** **under** the **influence** of an intoxicant (DUI). For the following reasons, we affirm.

Factual and Procedural Background

¶2 In November 2015, in the late evening, the Tucson Fire Department responded to a call for service in a drugstore parking lot. The firefighters arrived to find a vehicle parked across multiple parking spaces with the engine running, and Nevins unconscious in the driver's seat. After the fire captain knocked on the window repeatedly, Nevins woke up and unlocked the door. The captain reached in, turned off the engine, and took the keys out of the ignition. An officer with the Tucson Police Department arrived sometime during the captain's interaction with Nevins.

¶3 When the officer arrived, he asked Nevins if she had had anything to drink. She responded by swearing at the officer and saying she wanted to go home. The officer asked for her license, and she attempted to hand him her debit card. Eventually, Nevins successfully found her driver's license and gave it to the officer. Another officer arrived and conducted a DUI investigation. That officer noticed that Nevins smelled of alcohol, had watery and bloodshot eyes, and was slurring her speech. He performed a horizontal gaze nystagmus test and noted six out of six cues indicating impairment. He then administered a walk-and-turn test, and observed five out of eight possible cues of impairment. Nevins admitted that she had been drinking. The officer administered a breath test and obtained a reading of .204 blood alcohol concentration (BAC).

¶4 After a jury trial, Nevins was convicted of aggravated DUI, and aggravated **driving** with an alcohol concentration of .08 or more, based on her having committed or been convicted of two or more prior DUI violations. The trial court suspended the imposition of sentence and imposed concurrent, three-year terms of probation. The court also sentenced Nevins to a four-month prison term as required by statute, to be served concurrently with the terms of probation.

Duplicity

¶5 Nevins first argues that the state presented evidence of two separate acts that could support the charges, rendering the charges duplicitous. She contends that her act of **driving** to the drugstore was alleged as the act of

driving, and the fact that she was found in the driver's seat of the car was alleged as an act of actual physical control. "When the text of an indictment refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge, our supreme court has ... referred to this problem ... as a duplicitous charge ...." *State v. Klokic*, 219 Ariz. 241, ¶ 12 (App. 2008). Because a duplicitous charge risks the possibility that the jury was not unanimous in its verdict, it constitutes fundamental error. *See State v. Waller*, 235 Ariz. 479, ¶¶ 33-34 (App. 2014).

¶6 **Driving** and actual physical control, however, are not "independent crime [s]," but rather "alternative (and not mutually exclusive) ways of violating the DUI laws." *State v. Rivera*, 207 Ariz. 69, ¶ 10 (App. 2004). The acts of **driving** to, and parking at, the drugstore were "one discrete crime occurring at a distinct time and place." *Id.* ¶ 14. When an offense "may be committed in multiple ways ... the jury must be unanimous as to whether the charged criminal act has been committed," *State v. Millis*, 242 Ariz. 33, ¶ 21 (App. 2017), but "the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed." *State v. West*, 238 Ariz. 482, ¶ 13 (App. 2015), *quoting State v. Herrera*, 176 Ariz. 9, 16 (1993). Because **driving** and actual physical control are alternative means of committing one crime, and the acts were part of a single crime, Nevins was not subjected to a duplicitous charge.

Corpus Delicti

***2** **¶7** Nevins next claims her statement that she **drove** to the drugstore should not have been admitted because "[t]he state failed to provide sufficient evidence of the *corpus delicti* of the crime." Because Nevins did not raise this issue in the trial court, she has forfeited review absent fundamental, prejudicial error. *See State v. Chappell*, 225 Ariz. 229, ¶ 8 (2010).

¶8 "The corpus delicti doctrine ensures that a defendant's conviction is not based upon an uncorroborated confession or incriminating statement." *State v. Morris*, 215 Ariz. 324, ¶ 34 (2007). "The corpus delicti rule requires that, before a defendant's statements are admissible as evidence of a crime, the State must show both proof of a crime and that someone is responsible for that crime." *State v. Nieves*, 207 Ariz. 438, ¶ 7 (App. 2004). The corpus delicti may be satisfied through circumstantial evidence. *State v. Hall*, 204 Ariz. 442, ¶ 43 (2003).

¶9 Nevins is correct that, other than her own statement, there is no direct evidence that she **drove** to the drugstore. But she was found in the driver's seat, late at night, in the parking lot, with the engine running and with no passengers in the car. From this evidence, it was reasonable to infer that Nevins was the one who **drove** to the drugstore. *See State ex rel. McDougall v. Superior Court*, 188 Ariz. 147, 149 (App. 1996).

Sufficiency of the Evidence

¶10 Finally, Nevins contends the evidence was insufficient to support a finding that she actually **drove** to the drugstore.[1] In addition to the evidence noted above, Nevins also admitted to **driving**. Sufficient evidence therefore supported Nevins's convictions. *See State ex rel. O'Neill v. Brown*, 182 Ariz. 525, 526, 527-28 (1995) (sufficient evidence supported conviction of driver found intoxicated in driver's seat of parked car).

Disposition

¶11 For the foregoing reasons, we affirm Nevins's convictions and sentences.

All Citations

Not Reported in P.3d, 2018 WL 3301554

Footnotes

1 Nevins also claims the evidence was insufficient to support the finding that she was in actual physical control of the car when she was unconscious in the driver's seat. Even assuming arguendo that the evidence was insufficient, as discussed above, there were alternative means of committing the same crime, and the state was not required to provide sufficient evidence of both. *See Rivera*, 207 Ariz. 69, ¶¶ 10-11.

End of Document