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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/23/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0311
)
Appellee,) DEPARTMENT E
)
v.) MEMORANDUM DECISION
)
ROBERT THOMAS PLEICKHARDT,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-006166-001 DT

The Honorable Paul J. McMurdie, Judge

AFFIRMED

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J O H N S E N, Judge

¶1 Robert Thomas Pleickhardt appeals his conviction and sentence for aggravated robbery, a Class 3 felony. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND¹

¶2 A grand jury indicted Pleickhardt on one count of aggravated robbery in violation of Arizona Revised Statutes ("A.R.S.") sections 13-1902(A) (West 2012) and -1903(A) (West 2012).² At trial, the victim testified she was in a grocery store parking lot loading her bags into her car when a tan car stopped alongside her. Pleickhardt exited the passenger side of the car and grabbed the purse the victim was carrying on her shoulder. He yanked the purse several times until the victim fell, and the two struggled over the purse on the ground. Pleickhardt gained control of the purse and ran back with it to the car. The victim saw the license plate number of the car as it drove away and gave the number to law enforcement. Another witness also gave the same license plate number to authorities.

¶3 A detective testified he arrested Pleickhardt and his girlfriend, Kathleen Madden, on charges unrelated to the robbery 12 days later. They were apprehended as they approached the

¹ Upon review, we view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Pleickhardt. *State v. Lopez*, 209 Ariz. 58, 59, ¶ 2, 97 P.3d 883, 884 (App. 2004).

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

same tan car involved in the grocery store incident. Madden was carrying a cell phone belonging to the victim of the grocery store robbery. Over the defense's objection, the superior court allowed the jury to see video clips of an interview police conducted of Pleickhardt following his arrest. In the portions shown to the jury, the detective asked Pleickhardt no questions about the grocery store incident, but Pleickhardt made several statements concerning his use of the tan car.

¶14 The jury convicted Pleickhardt of aggravated robbery and found two aggravating factors. The court found Pleickhardt was on release from confinement at the time of the offense and had two historical prior felony convictions. The court sentenced him to the presumptive term of 11.25 years' imprisonment. We have jurisdiction of Pleickhardt's timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (West 2012), 13-4031 (West 2012) and -4033(A) (West 2012).

DISCUSSION

A. The *Portillo* Instruction.

¶15 Pleickhardt argues the superior court erred in giving the reasonable doubt instruction our supreme court mandated in *State v. Portillo*, 182 Ariz. 592, 595, 898 P.2d 970, 973 (1995). He argues the instruction misstates the law in violation of the United States and Arizona Constitutions by shifting the burden

to the defendant to prove the possibility of innocence and lowers the standard for reasonable doubt.

¶16 The court in *Portillo* approved the language of a reasonable doubt instruction and ordered the instruction be given to juries in all future criminal cases. *Id.* at 596, 898 P.2d at 974. Since then, the supreme court has reaffirmed the instruction's validity on several occasions. *See, e.g., State v. Ellison*, 213 Ariz. 116, 133, ¶ 63, 140 P.3d 899, 916 (2006); *State v. Dann*, 205 Ariz. 557, 575-76, ¶ 74, 74 P.3d 231, 249-50 (2003); *State v. Van Adams*, 194 Ariz. 408, 418, ¶ 30, 984 P.2d 16, 26 (1999).

¶17 The superior court in this case gave the jury the instruction required by *Portillo* and Pleickhardt failed to object. We therefore review for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567-68, ¶¶ 19-24, 115 P.3d 601, 607 (2005) (appellant who failed to object to alleged trial error must show fundamental error occurred and that such error prejudiced him).

¶18 The superior court did not err in giving the *Portillo* instruction, and we reject Pleickhardt's contention that we should "re-visit" and "overrule" *Portillo*. This court is "not at liberty . . . to find the *Portillo* instruction unconstitutional. Our supreme court has expressly approved of the instruction and . . . [w]e have no authority to overrule the

supreme court's decision on this matter." *State v. Hoover*, 195 Ariz. 186, 188-89, ¶ 14, 986 P.2d 219, 221-22 (App. 1998) (quotation omitted).

B. Admission of Statements from the Unrelated Investigation.

¶9 Pleickhardt argues the superior court denied him a fair trial by admitting the video clips of his interview on the unrelated offenses. He contends the court should have excluded the video pursuant to Arizona Rule of Evidence 403 because the probative value of the statements he made on the portions of the interview shown to the jury was outweighed by the prejudice he suffered when the jury learned he had been arrested and questioned on the other offenses.

¶10 Arizona Rule of Evidence 403 provides that the "court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice." We review a decision to admit evidence challenged pursuant to Rule 403 for an abuse of discretion. *State v. Spencer*, 176 Ariz. 36, 41, 859 P.2d 146, 151 (1993). We view the evidence "in the light most favorable to the proponent, maximizing its probative value and minimizing its prejudicial effect." *State v. Kiper*, 181 Ariz. 62, 66, 887 P.2d 592, 596 (App. 1994).

¶11 The superior court did not abuse its discretion in admitting the excerpts of Pleickhardt's interview. The statements in the video clips were relevant to show that

Pleickhardt possessed and controlled the car used in the robbery, which refuted his defense that he was not the assailant. Pleickhardt's videotaped statement that he and Madden were living out of the car because they could not afford an apartment also demonstrated his motive to steal the victim's purse.

¶12 Pleickhardt argues his "possession and control" over the car could have been established without unfair prejudice if the State had accepted his offer to stipulate that he made those statements to police. The superior court, however, is not required to exclude probative evidence merely because a party offers to stipulate to facts the evidence tends to prove. See *State v. Coghill*, 216 Ariz. 578, 587, ¶ 38, 169 P.3d 942, 951 (App. 2007) (party's offer to stipulate is only one factor the court considers in determining whether to exclude evidence).

¶13 The videotaped statements shown to the jury related only to Pleickhardt's use of the car, and the clips together spanned only two minutes. On appeal, Pleickhardt does not argue he was prejudiced by the substance of the statements he made during the excerpts shown to the jury. Instead, he argues he was prejudiced by the testimony of the detective who introduced the video and told the jury that the interview took place while Pleickhardt was under arrest and that the interview from which the excerpts were taken lasted 10 to 12 hours. But Pleickhardt

did not object to the detective's testimony. Because he did not raise this issue at trial, we review it for fundamental error. See *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. To establish fundamental error, Pleickhardt must prove that error occurred and that it was fundamental and prejudiced the result of the proceeding. *Id.* at 567-69, ¶¶ 20-26, 115 P.3d at 607-09.

¶14 We are not persuaded the court fundamentally erred by allowing the jury to learn Pleickhardt was arrested and interviewed for 10 to 12 hours in connection with other alleged offenses. Even assuming the detective's comments should have been precluded on relevance grounds, any error the superior court committed was not fundamental error. Error is fundamental only when it "goes to the foundation of [a defendant's] case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Id.* at 568, ¶ 24, 115 P.3d at 608. The detective's statements about the arrest and length of the interview were isolated and brief, with the emphasis of the testimony on what Pleickhardt stated about the car during the interview. Thus, admitting the challenged testimony was not an error that went to the foundation of Pleickhardt's case.

¶15 Moreover, Pleickhardt has not shown he was prejudiced by admission of the detective's statements. The jury was not informed of the offenses for which Pleickhardt was arrested and

interviewed; nor was it told whether he was ever convicted of those offenses or whether there was any relationship between those offenses and the aggravated robbery, and neither the arrest nor the length of the interview was mentioned again during the remainder of the trial. Especially in light of the strong evidence establishing Pleickhardt's guilt, including eyewitness testimony and the discovery of the victim's cell phone in Madden's purse, the court did not commit fundamental error in admitting the detective's testimony.

C. Sufficiency of the Evidence.

¶16 Pleickhardt also argues there was insufficient evidence to support the jury's guilty verdict. He argues the victim's identification of him was not credible and the State did not demonstrate his connection to the vehicle used in the robbery. When considering the sufficiency of the evidence, "we view the evidence in the light most favorable to sustaining the verdict and reverse only if no substantial evidence supports the conviction." *State v. Pena*, 209 Ariz. 503, 505, ¶ 7, 104 P.3d 873, 875 (App. 2005). Evidence is substantial if reasonable persons could disagree whether it establishes a fact at issue. *State v. Rodriguez*, 186 Ariz. 240, 245, 921 P.2d 643, 648 (1996). We review the record to determine whether "any rational trier of fact could have found the essential elements of the

crime beyond a reasonable doubt.” *State v. Cox*, 217 Ariz. 353, 357, ¶ 22, 174 P.3d 265, 269 (2007) (emphasis in original).

¶17 Substantial evidence supported the verdict. The victim testified she made eye contact with Pleickhardt when he approached her from the tan car, and she was face-to-face with him when they struggled over her purse on the ground. Her description of Pleickhardt matched one provided by another witness. The victim then identified Pleickhardt in a photo lineup and in court.

¶18 We reject Pleickhardt’s argument that the victim was more focused on memorizing the car’s license plate than her assailant’s appearance and that she must have assumed the assailant’s photo would be included in the photo lineup. “No rule is better established than that the credibility of the witnesses and the weight and value given to their testimony are questions exclusively for the jury.” *Id.* at 357, ¶ 27, 174 P.3d at 269 (quotation omitted). Pleickhardt cross-examined the victim regarding her recollection of the assailant’s appearance and whether she assumed the officer would include the assailant’s photo in the lineup. In addition, the court instructed the jury on evaluating the reliability of in-court identifications and credibility of witnesses.

¶19 Pleickhardt further argues the car used in the robbery was not registered to him or Madden and he did not have keys to

it when he was arrested. Nevertheless, when Pleickhardt was arrested, he was approaching the same car in which witnesses saw the assailant flee from the grocery store parking lot. And as discussed above, Pleickhardt acknowledged during his videotaped interview that he lived in the car, drove it and bought gasoline for it.

¶20 In short, there was more than sufficient evidence on which a reasonable jury could conclude that Pleickhardt was the man who took the victim's purse and left the scene in a car driven by an accomplice. See A.R.S §§ 13-1902(A), -1903(A).

CONCLUSION

¶21 For the foregoing reasons, we affirm Pleickhardt's conviction and sentence.

/s/
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/
PATRICIA K. NORRIS, Presiding Judge

/s/
JON W. THOMPSON, Judge