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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

JEFFERY GARY WAYNE, *Appellant*.

No. 1 CA-CR 15-0799
FILED 3-14-2017

Appeal from the Superior Court in Maricopa County
No. CR2014-000889-002
The Honorable Richard L. Nothwehr, Judge *Pro Tempore*

AFFIRMED IN PART/ REVERSED AND REMANDED IN PART

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michael T. O'Toole
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Terry J. Reid
Counsel for Appellant

STATE v. WAYNE
Decision of the Court

MEMORANDUM DECISION

Judge Paul J. McMurdie delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Patricia K. Norris joined.

M c M U R D I E, Judge:

¶1 Jeffery Gary Wayne (“Wayne”) appeals his convictions and sentences for one count of possession of dangerous drugs for sale, four counts of misconduct involving weapons, two counts of possession of drug paraphernalia, and two counts of possession of narcotic drugs. For the reasons outlined below, we reverse the convictions and remand for a new trial for all counts related to the items found in Wayne’s backpack (counts 1, 3, 4, 5, 6, 8 and 9). We remand for resentencing on count 2, the conviction related to Wayne’s possession of the semi-automatic weapon while being a prohibited possessor. We affirm the conviction and sentence for possession of drug paraphernalia related to the scales found near Wayne at the time of his arrest.

FACTS AND PROCEDURAL BACKGROUND¹

¶2 In a routine check of hotel registers in high-crime areas of Phoenix, officers discovered a person registered in a hotel who had an outstanding warrant. The officers proceeded to the hotel to effectuate an arrest. Upon arrival, a man [Codefendant Gillispie]² opened the door, and after repeated commands to show his hands, one of the officers heard “a pretty significant thud.” Gillispie later acknowledged the thud was the sound of a semi-automatic firearm falling to the floor. The officers arrested Gillispie on misdemeanor warrants, searched him, found methamphetamine and baggies in his pocket, and retrieved the semi-automatic firearm from behind the door. After the officers removed Gillispie from the room, the officers located the woman with the outstanding warrant, arrested her, and removed her from the room.

¹ We view the facts in the light most favorable to sustaining the convictions. *State v. Boozer*, 221 Ariz. 601, 601, ¶ 2 (App. 2009).

² Codefendant Gillispie pled guilty pursuant to a plea agreement and is not a party to this appeal.

STATE v. WAYNE
Decision of the Court

¶3 The officers saw Wayne sitting at the kitchen table with a digital scale and a methamphetamine pipe nearby. Wayne told the officers that a backpack sitting on the floor belonged to him, and police obtained a warrant to search the premises, including the backpack. In the backpack, police found documents belonging to Wayne, a revolver, a banker's bag containing 220 grams of methamphetamine, a tin containing 30 Oxycodone pills and five Methadone pills, \$1,410 in cash rolled and tucked into a plastic hotel drinking cup, unused gram baggies, and numerous torch lighters. A search of the premises further revealed other drug paraphernalia including pipes, lighters, and a scale at a kitchen counter just a few feet away from the table where Wayne was seated. A drug enforcement officer testified that under the totality of the circumstances it was his opinion that the methamphetamine and pills found in Wayne's backpack were possessed for sale.

¶4 Wayne testified at the trial that the revolver, drugs, unused gram baggies, and the \$1,410 in cash police found in his backpack did not belong to him, and he was unaware the items were in his backpack. Wayne claimed someone must have planted the items in his backpack during one of several times he was in the bathroom.

¶5 One of the responding officers testified Gillispie, the man who answered the door, told Wayne "to deny ownership of the bag and he would take charge of it." Wayne testified, however, that he did not recall Gillispie making that statement. Wayne also testified he did not know Gillispie had the semi-automatic firearm with him until Gillispie grabbed the weapon from the couch when the officers knocked on the door. Wayne acknowledged having prior felony convictions.

¶6 The jury convicted Wayne of possession of dangerous drugs for sale, as alleged in count 1; two counts of misconduct involving weapons for knowingly possessing a semi-automatic firearm and a revolver during commission of a felony, as alleged in counts 4 and 5; two counts of possession of drug paraphernalia, as alleged in counts 6 and 7; and two counts of possession of narcotic drugs, as lesser-included offenses of the charged crimes of possession of narcotic drugs for sale in counts 8 and 9. The jury also found that Wayne possessed the semi-automatic firearm and the revolver that were the subject of counts 2 and 3. In a sentencing proceeding, the jury found Wayne was a prohibited possessor; a necessary element for a conviction on counts 2 and 3.

¶7 The court found the existence of one prior historical felony conviction, and sentenced Wayne as a repetitive offender to the following

STATE v. WAYNE
Decision of the Court

terms of incarceration, to be served concurrently: count 1 (possession of dangerous drugs for sale, class 2 felony), 15 years; counts 2-5 (misconduct involving weapons, class 4 felonies), 10 years; counts 6 and 7 (possession of drug paraphernalia, class 6 felonies), 1.75 years; and counts 8 and 9 (possession of narcotic drugs, class 4 felonies), 6.5 years. Wayne filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A) (2016).³

DISCUSSION

I. Search of the Backpack.

¶8 Wayne argues the court fundamentally erred, violating his due process rights, by allowing the prosecutor to comment on and elicit testimony regarding invocation of his Fourth Amendment rights by refusing to consent to the search of the backpack.

¶9 The prosecutor addressed Wayne's refusal to consent to the search of his backpack, without objection from defense counsel, three times during trial. In the opening statement, the prosecutor stated Wayne consented to search of his wallet, but not his backpack. The prosecutor said that Wayne also complained the officer was violating his constitutional rights by asking him to consent. The prosecutor explained that the officer told Wayne the search would only violate his rights if done so without his consent or a search warrant. The officers "honored his desire," and obtained a search warrant.

¶10 The prosecutor subsequently elicited testimony from two of the responding officers regarding Wayne's refusal to consent to the search of the backpack. The first officer testified that Wayne allowed the officer to search his person and wallet. The second officer further relayed Wayne's comment that the officer was "violating his civil rights," and the officer's response. The prosecutor did not ask Wayne about the lack of consent on cross-examination. However, a juror asked Wayne why he did not want the officers to open his backpack, and Wayne responded:

It was more – in my mind it was more of just – a violation of my personal rights and my personal property. For several years I was either on probation or parole, and I didn't have a choice. And at that point I felt I did. And I was trying to

³ We cite to the current version of applicable statutes or rules when no revision material to this case has occurred.

STATE v. WAYNE
Decision of the Court

exercise that. I wasn't trying to hide what – this pile of stuff that he just put in front of me, because I didn't know it was there. But I was trying to exercise my right. This is the United States of America, right? We're supposed to have rights.

¶11 A prosecutor violates a defendant's due process rights when he uses a defendant's refusal to consent to a warrantless search as evidence of guilt. *See State v. Stevens*, 228 Ariz. 411, 417, ¶¶ 16-17 (App. 2012) (the court fundamentally erred, to defendant's prejudice, by allowing the prosecutor to use her invocation of Fourth Amendment right as direct evidence of guilt); *State v. Palenkas*, 188 Ariz. 201, 212 (App. 1996) (prosecutor violated defendant's due process rights by using his refusal to consent to a warrantless search as evidence of defendant's guilt).

¶12 The state urges this court to revisit *Palenkas* and *Stevens* and conclude they were wrongly decided because the use of a defendant's refusal to consent as evidence against him "would not appreciably impair the policies behind the Fourth Amendment—i.e., to protect against unreasonable searches and seizures." We decline to do so. As reasoned in *Stevens*, "[i]f the Fourth Amendment is to provide rigorous protection against unlawful searches, occupants must not be dissuaded from exercising the right for fear of incurring a penalty in any subsequent criminal prosecution." *Stevens*, 228 Ariz. at 417, ¶ 15. We conclude the prosecutor's remarks in opening statement and the subsequent introduction of evidence that Wayne refused to consent to a search of his backpack, constituted error.

¶13 Because Wayne failed to raise any objection at trial, we review for fundamental error. *Stevens*, at 414, ¶ 6. To receive relief under a fundamental error standard of review, a defendant must prove error occurred, the error was fundamental, and the defendant was prejudiced thereby. *State v. Henderson*, 210 Ariz. 561, 568, ¶¶ 23-24, 26 (2005). This Court has previously held that presenting evidence and commenting on a defendant's refusal to consent to a search is fundamental error. *State v. Stevens*, 228 Ariz. at 417, ¶¶ 16-17. Therefore, we need only determine if the fundamental error prejudiced Wayne. *Id.* 228 Ariz. at 417, ¶ 16.

¶14 Here, Wayne's defense was that someone must have stashed the contraband (drugs, gun, money, and drug paraphernalia) in his backpack without his knowledge. Evidence of Wayne's refusal to consent to the search of the backpack after consenting to warrantless searches of other items prejudiced Wayne "in presenting" his defense. *Stevens*, 228 Ariz. at 417, ¶ 18. While the state made no argument that Wayne's refusal

STATE v. WAYNE
Decision of the Court

demonstrated he knew the backpack contained contraband, and instead focused on Wayne's claim that someone must have planted the items in his backpack without his knowledge, does not vitiate the damage done to Wayne's case. The prejudice is evidenced by the fact that a juror specifically questioned Wayne as to why he refused to consent to the search of the backpack after agreeing to allow search of other items. Wayne was prejudiced "in presenting" his defense that the drugs were planted because such a defense seems almost nonsensical when he only objected to the search of the item containing contraband. *Stevens*, at ¶ 18

¶15 Therefore, we hold that Wayne suffered fundamental, prejudicial error regarding all counts related to items contained in the backpack and reverse those counts. However, because the prejudice extends only to the items found in the backpack, we affirm the conviction regarding count 2, misconduct involving weapon, possessing the semi-automatic weapon (found behind the door) while being a prohibited possessor; and count 7,⁴ possession of drug paraphernalia, the scale found near Wayne when the officers entered the hotel room. Regarding count 4, misconduct involving a weapon by knowingly using or possessing the semi-automatic weapon (found behind the door) during the commission of a felony; we reverse that count because the predicate felony for the charge is the felony conviction in count 1, which we are reversing.

II. Bifurcated trial.

¶16 Wayne argues the superior court erred by employing a hybrid procedure to obtain a conviction as to count 2,⁵ misconduct involving weapons as a prohibited possessor. He argues he was denied due process and the bifurcation resulted in structural error by failing to obtain a knowing and intelligent waiver of his right to a jury trial on this count.

¶17 On the second day of trial, prior to reading the indictment to the jury, the parties stipulated to an alternative bifurcated procedure to

⁴ Wayne was properly sentenced as to Count 7 under A.R.S. § 13-703(I) as a non-dangerous, repetitive, category two offender and sentenced to the presumptive term of 1.75 years' incarceration. Accordingly, we affirm his sentence as to Count 7.

⁵ Count 3 is reversed in Section I for fundamental error. Therefore, we will only refer to count 2 in discussing Wayne's argument regarding the bifurcated procedure.

STATE v. WAYNE
Decision of the Court

obtain a verdict on count 2, alleging Wayne, a prohibited possessor, had knowingly possessed a deadly weapon, namely, the semi-automatic firearm. The prosecutor stated he was “fine with doing a bifurcated trial with the stipulation as opposed to a severed trial.” Defense counsel responded, “I would agree.”

¶18 Both parties signed the stipulation that provided: 1) the court clerk would omit counts 2 and 3 when reading the indictment to the jury, 2) a special interrogatory would be presented to the jury to determine whether Wayne possessed the weapons for purposes of the charged offenses, and 3) in the event that the jury found Wayne was in possession, the jury would be instructed during the aggravation phase of the trial, on the elements of a prohibited possessor, and if they found Wayne to be a prohibited possessor, it would support a conviction as to count 2 and 3.

¶19 The court followed the stipulated procedure and in the guilt phase of the trial the jurors found Wayne had possessed the semi-automatic firearm. In the sentencing phase, the jurors found Wayne was a prohibited possessor. Wayne now asserts on appeal that the procedure agreed to by the parties was error.

¶20 Wayne invited any error he asserts on appeal by stipulating to the procedure adopted by the court. *See State v. Parker*, 231 Ariz. 391, 405, ¶ 61 (2013) (“Parker’s stipulation to admit the videotaped interviews precludes him from asserting on appeal that their admission was error.”); *State v. Pandeli*, 215 Ariz. 514, 528, ¶ 50 (2007) (applying invited error doctrine when defense counsel responded to court’s inquiry by stating he did not object to the testimony, and agreed it was admissible).

¶21 Even if Wayne did not invite this error, because he failed to object at trial we review his claim for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 568, ¶ 22 (2005). As noted above, for fundamental error review the defendant has the burden of proving the court erred, the error was fundamental in nature, and he was prejudiced thereby. *Henderson*, 210 Ariz. at 567, ¶ 20. Wayne has failed to meet his burden.

¶22 Our supreme court has determined that a severance is necessary to resolve a charge involving weapon misconduct if it requires the state to prove defendant has a prior conviction. This severance is necessary to avoid any “serious risk of prejudice.” *State v. Burns*, 237 Ariz. 1, 14-15, ¶¶ 34-39, (2015) (Burns’ prior felony conviction [making him a prohibited possessor] was prejudicial and irrelevant to the other charges; severance was necessary to promote a fair determination of Burns’ guilt or

STATE v. WAYNE
Decision of the Court

innocence under Arizona Rule of Criminal Procedure 13.4(a)). While the stipulated bifurcated procedure in this case was unconventional, and one we do not anticipate to recur, it did not deprive Wayne of his right to a jury trial on the misconduct involving weapons charge based on his prohibited possessor status.⁶

¶23 The jury ultimately found beyond a reasonable doubt all elements of the offense, and this finding was announced in open court, although in a bifurcated proceeding. *See* A.R.S. § 13-3102(A)(4) (A person commits misconduct involving weapons by knowingly . . . [p]ossessing a deadly weapon . . . if such person is a prohibited possessor.”); *see Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (The rights to due process and a public trial by an impartial jury “indisputably entitle a criminal defendant to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.”). The court was not required to obtain a knowing and intelligent agreement to this “alternate procedure to determine guilt” as Wayne argues. *See People v. Guillen*, 113 Cal. Rptr. 43, 46 (App. 1974) (holding that personal waiver of defendant was not necessary for bifurcation of trial, reasoning in part that an “order bifurcating the trial is no more than one directing the order of proof which is largely within the discretion of the trial judge.”); *cf. State v. Allen*, 223 Ariz. 125, 129, ¶ 22 (2009) (the trial court need not conduct a colloquy with a defendant before accepting his counsel’s stipulation to elements of the offense).

¶24 Moreover, Wayne has failed to show how the bifurcated procedure prejudiced him, as necessary for reversal on fundamental error review. He suggests that prejudice must be presumed from “such a

⁶ The method of proceeding did not follow the procedural rules requiring the clerk to read the indictment to the jury, and the jury to “specify each count or offense of which the defendant has been found guilty or not guilty.” *See* Ariz. R. Crim. Pro. 19.1(a)(1), 23.2(c). The rules, however, expressly provide that “[w]ith permission of the court, the parties may agree to any other method of proceeding” and here, the court did so. Ariz. R. Crim. Pro. 19.1(a). *See State v. Goudeau*, 239 Ariz. 421, 449, ¶ 92 (2016) (the trial court’s “inherent power and discretion to adopt special, individualized procedures designed to promote the ends of justice in each case that comes before them.”) On re-trial, as to count 3, we do not anticipate a bi-furcated trial to take place. Rather, two separate trials should be held: one for count 3, misconduct involving weapons; and a separate trial for counts 1, 5, 6, 8 and 9. The trials may be tried to the same jury if the parties stipulate to that procedure.

STATE v. WAYNE
Decision of the Court

wholesale disregard of the rules whose purpose is to enforce Appellant's right to a jury trial and due process." He argues in a similar vein that "the overwhelming number of errors make it impossible to determine if a reasonable jury informed of the charges, instructed on the charges, and provided with a verdict would have found Appellant guilty of the charges." We decline to presume prejudice, and Wayne's speculation as to what the jury might have done had the procedure been different relies on speculation, which is an insufficient basis for finding prejudice on fundamental error review. *See State v. Munninger*, 213 Ariz. 393, 397, ¶ 14 (App. 2006). In short, Wayne has failed to demonstrate that the court fundamentally erred, to his prejudice, in adopting the procedure stipulated by the parties.

III. **Sentencing Error.**

¶25 Wayne argues the court fundamentally erred by imposing sentences outside the permissible range, requiring remand of count 2 for resentencing. The State agrees. Imposition of a sentence outside the statutory range constitutes fundamental, reversible error. *State v. Provenzano*, 221 Ariz. 364, 369, ¶ 18 (App. 2009).

¶26 The jury convicted Wayne on count 2, misconduct involving weapons, i.e., possessing a semi-automatic firearm while a prohibited possessor. *See* A.R.S. § 13-3102. The court found the existence of one historical prior felony conviction, and accordingly sentenced Wayne as a category two repetitive offender. *See* A.R.S. § 13-703(B). The sentencing range for a category two offender convicted of a class 4 felony carries a presumptive term of 4.5 years' incarceration, a mitigated term of 2.25 years, with an aggravated term of 7.5 years. A.R.S. § 13-703(I). The court sentenced Wayne to 10 years in prison for count 2; outside the statutory scheme. Accordingly, the court fundamentally erred in sentencing Wayne on count 2, requiring a remand for resentencing.

STATE v. WAYNE
Decision of the Court

CONCLUSION

¶27 For the foregoing reasons, we affirm the conviction and sentence as to count 7; affirm the conviction for count 2 but remand for resentencing; and reverse and remand for a new trial Wayne's remaining convictions and sentences as to counts 1, 3, 4, 5, 6, 8, and 9.



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