IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

BRANDY LEE BRENTS, *Appellant*.

No. 1 CA-CR 16-0105
FILED 5-18-2017

Appeal from the Superior Court in Navajo County
No. S0900CR201400328
The Honorable Donna J. Grimsley, Judge, *Retired*

AFFIRMED AS MODIFIED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Jillian Francis
Counsel for Appellee

Coronado Law Firm PLLC, Lakeside
By Eduardo H. Coronado, Kai M. Henderson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Diane M. Johnsen delivered the decision of the Court, in which Judge Margaret H. Downie and Judge James P. Beene joined.

J O H N S E N, Judge:

¶1 Brandy Lee Brents appeals his conviction for destruction of a public jail. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Shortly before noon on April 20, 2014, a detention officer began distributing lunch trays to inmates housed in the K-pod of the Navajo County Jail.[1] When the detention officer reached Brents's cell, she unlocked a small trapdoor and slid a tray inside. After the detention officer shut and locked the trapdoor, she heard Brents complain angrily that he had not received the calorie-dense meal he believed he had been prescribed. In response, the detention officer told Brents he was entitled to 2000 calories per day based on his diabetic dietary restrictions, not 2000 calories per meal. Dissatisfied with the detention officer's response, Brents shouted obscenities and threats and demanded to speak with a sergeant. When the detention officer told Brents that she would not summon a sergeant, Brents began hitting the window of his cell with his lunch tray. On the third strike, Brents broke the outer pane of the window.

¶3 The State charged Brents with one count of destruction of a public jail. The State also alleged an aggravating circumstance (felony conviction within preceding ten years) and that Brents had 13 prior felony convictions.

¶4 After a two-day trial, a jury found Brents guilty as charged. The superior court then took judicial notice that Brents had two historical prior felony convictions and found that his criminal history and a conviction within the last ten years were aggravating factors. Concluding mitigating factors "slightly" outweighed these aggravating factors, however, the court sentenced Brents to a mitigated term of four and one-

[1] We view the facts in the light most favorable to sustaining the verdict. *State v. Payne*, 233 Ariz. 484, 509, ¶ 93 (2013).

half years' imprisonment, to be served consecutively with a sentence imposed in an unrelated case. Brents timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2017), 13-4031 (2017) and -4033(A)(1) (2017).[2]

DISCUSSION

A. Admission of Other-Act Evidence.

¶5 Brents contends the superior court improperly admitted evidence of a prior act.

¶6 Before trial, the State moved in limine to introduce evidence that on an earlier occasion, Brents had cracked a cell window by striking it with his fist. The State argued the evidence demonstrated that Brents's subsequent destruction of the window as charged was knowing and intentional. After an evidentiary hearing, the court granted the motion.

¶7 At trial, a former deputy with the Navajo County Sheriff's Office testified that on February 14, 2012, he was called to the Navajo County Jail to respond to a report that Brents, then in custody in the jail, had broken the window in his cell. When the deputy approached the cell, Brents volunteered that he had broken the window "out of frustration."

¶8 In its final instructions to the jury, the court addressed this evidence as follows:

> Evidence of other acts has been presented. You may consider this act only if you find that the State has proved by clear and convincing evidence that the defendant committed this act. You may only consider this act to establish the defendant's intent. You must not consider this act to determine the defendant's character or character trait, or to determine that the defendant acted in conformity with the defendant's character or character trait and therefore committed the charged offense.

¶9 We review a ruling on a motion in limine for an abuse of discretion. *State v. Gamez*, 227 Ariz. 445, 449, ¶ 25 (App. 2011). "Absent a clear abuse of discretion, we will not second-guess a trial court's ruling on

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

the admissibility or relevance of evidence." *State v. Rodriguez*, 186 Ariz. 240, 250 (1996).

¶10 Before admitting prior-act evidence, "the trial court must find that the evidence is admitted for a proper purpose under Rule 404(b), is relevant under Rule 402, and that its probative value is not substantially outweighed by the potential for unfair prejudice under Rule 403." *State v. Mott*, 187 Ariz. 536, 545 (1997); Ariz. R. Evid. ("Rule") 402, 403, 404(b). The court also must provide an appropriate limiting instruction if requested under Rule 105. *Mott*, 187 Ariz. at 545.

¶11 Applying these principles here, Brents neither disputes that the prior-act evidence was relevant nor that the State sought to introduce the evidence for a proper purpose, namely, to demonstrate intent and the absence of mistake or accident. *See* Rule 404(b). Instead, Brents argues that the probative value of the prior act was limited because it was well known in the jail that cell windows could be broken, and therefore evidence of the prior act should have been precluded under Rule 403. Although a detention officer testified that it was not uncommon for jail personnel to encounter a broken cell window, it does not necessarily follow that it was common knowledge among inmates that cell windows could be broken by striking them from the inside. The other-act evidence at issue therefore was probative, showing Brents not only knew that cell windows could be broken, but also how that feat could be accomplished. Brents correctly notes that this evidence was unfavorable to the defense, but it was not unfairly prejudicial. That is, the evidence did not suggest that the jury should render its "decision on an improper basis, such as emotion, sympathy, or horror." *Mott*, 187 Ariz. at 545-46. Moreover, the superior court provided a limiting instruction admonishing the jurors to consider the evidence only for purposes of evaluating Brents's intent. *See State v. Newell*, 212 Ariz. 389, 403, ¶ 68 (2006) ("We presume that the jurors followed the court's instructions."). Therefore, because the prior-act evidence was relevant, offered for a proper purpose, probative, and not unfairly prejudicial, the superior court did not abuse its discretion by admitting it.[3]

[3] To the extent Brents argues the manner in which the prior act and the charged act were committed was insufficiently similar to justify the admission of the prior-act evidence to prove identity, we note the State did not offer the evidence for that purpose.

B. Denial of Motion for Judgment of Acquittal.

¶12 Brents contends the superior court erred by denying his motion for judgment of acquittal. Specifically, he argues that absent expert testimony or forensic evidence explaining "how the outside of a double paned window can be broken from [] force applied to the inside pane," no reasonable juror could have found him guilty.

¶13 After the State rested, Brents moved unsuccessfully for a judgment of acquittal pursuant to Arizona Rules of Criminal Procedure 20 ("Rule 20"). We review *de novo* a superior court's ruling on a Rule 20 motion. *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 essential elements of the crime beyond a reasonable doubt." *Id.* at 562, ¶ 16 (citation omitted). Sufficient evidence upon which a reasonable jury can convict may be direct or circumstantial. *State v. Borquez*, 232 Ariz. 484, 487, ¶¶ 9, 11 (App. 2013). A judgment of acquittal is appropriate only when "there is no substantial evidence to warrant a conviction." Rule 20(a).

¶14 As charged in this case and set forth in A.R.S. § 31-130 (2017), a person commits destruction of or injury to a public jail by "intentionally and without lawful authority" breaking, pulling down or otherwise destroying "a place of confinement." Here, the evidence reflects that a detention officer saw Brents ram his lunch tray into a cell window three times, eventually breaking the outer pane. At trial, the detention officer confirmed that the photographs offered by the State and admitted in evidence accurately reflected the window damage she saw. In addition, another detention officer testified that the lunch tray later recovered from Brents's cell was fractured. Given these facts, there was sufficient evidence from which a reasonable jury could find that Brents intentionally broke his cell window. Therefore, the court did not err by denying Brents's Rule 20 motion.

C. Denial of Request for a *Willits* Instruction.

¶15 Brents argues the superior court improperly denied his request for a *Willits* instruction. *See State v. Willits*, 96 Ariz. 184 (1964). First, he asserts that the State acted negligently by failing to maintain in proper working order one of the cameras mounted to videotape the K-pod, and argues that if that camera had been working, it would have captured "potentially exculpatory" video. Second, Brents challenges the video

recorded by the other camera in the pod, arguing the State edited the recording to remove potentially exculpatory evidence.

¶16 A *Willits* instruction permits a jury to infer from the State's failure to preserve evidence that such evidence "would have been exculpatory." *State v. Fulminante*, 193 Ariz. 485, 503, ¶ 62 (1999). "To be entitled to a *Willits* instruction, a defendant must prove: (1) that the state failed to preserve material evidence that was accessible and might tend to exonerate him, and (2) resulting prejudice." *Id.* We review a superior court's ruling regarding a *Willits* instruction for an abuse of discretion. *State v. Glissendorf*, 235 Ariz. 147, 150, ¶ 7 (2014).

¶17 At trial, several detention officers testified regarding the recording equipment located in the K-pod of the jail, explaining two motion-activated cameras are mounted in the corners of the ceiling. Although a sergeant testified that he was not aware of any malfunction with either camera on April 20, 2014, the lieutenant who retrieved the video recordings as part of the investigation testified that only one of the cameras was working that day. The lieutenant further testified that jail personnel are unable to "edit" the video recordings, but explained he did specify which section of film to "pull" for viewing, and limited the section retrieved to the time period he believed was relevant to the investigation.

¶18 The superior court denied Brents's request for a *Willits* instruction, ruling there was insufficient evidence that the State had lost or destroyed evidence.

¶19 The State's failure to preserve potentially exculpatory evidence may justify a *Willits* instruction, even if it is the result of negligence rather than bad faith. *See Fulminante*, 193 Ariz. at 503, ¶ 62. With respect to the inoperative camera, however, Brents has not alleged that the State failed to preserve evidence; rather, he asserts the State failed to maintain recording equipment that could have, potentially, generated exculpatory evidence. Because the State has no duty to act ahead of time to ensure that evidence of a crime not yet committed will be captured and preserved, its failure to maintain one of the K-pod cameras did not justify a *Willits* instruction. *See State v. Davis*, 205 Ariz. 174, 180, ¶ 37 (App. 2002); *see also State v. Tyler*, 149 Ariz. 312, 317 (App. 1986) ("There is no duty to seek out and gain possession of potentially exculpatory evidence . . . .").

¶20 As for the camera that was working, Brents contends that the State failed to preserve video recordings that may have shown that the window was broken between breakfast and lunch, and that Brents was

injured when he exited his cell after the lunch period. Although the video recording shown to the jury is not included in the appellate record, based on the trial testimony describing its contents, the video shown to the jury spanned only the detention officer's distribution of lunch trays and the immediate investigation that followed. Nothing in the record suggests, however, that Brents requested extended footage or that other recordings from that day had been destroyed. Nonetheless, even assuming the remainder of the video recordings from April 20, 2014 had been destroyed, the record reflects that the lieutenant retrieved and preserved all the video footage he believed was relevant to the investigation, *see Davis*, 205 Ariz. at 180, ¶ 37 (*Willits* instruction is not warranted unless the exculpatory value of evidence was apparent before the evidence was destroyed), and Brents has offered only speculation that the other footage may have been exculpatory. *See Fulminante*, 193 Ariz. at 503, ¶ 63 (no *Willits* violation when defendant's contention that destroyed evidence may have supported his defense was "highly questionable at best").

¶21 For all these reasons, the superior court did not err by denying Brents's request for a *Willits* instruction.

D. Asserted Consideration at Sentencing of Other Alleged Acts.

¶22 Brents contends the superior court improperly considered other alleged criminal acts as an aggravating factor at sentencing, and then compounded the error by ordering his sentence in this matter to run consecutively with a sentence imposed in an unrelated case.

¶23 Before trial, the State alleged that Brents had 13 prior felony convictions. The State also alleged as an aggravating circumstance that Brents was convicted of a felony within 10 years preceding the date of the current offense.

¶24 After the jury returned its verdict, Brents waived a presentence report and requested expedited sentencing to accommodate an impending surgery. At the sentencing hearing, the superior court, without objection, took judicial notice of its earlier finding in another criminal case, CR 2014-058, that Brents "had at least two historical prior felony convictions." The State then requested that the court impose a presumptive five-year sentence to run consecutively with Brents's sentence in CR 2014-058, arguing such a sentence was warranted not only by Brents's "extensive criminal record" of 13 felony convictions, but also by his character and background as reflected in several what it called "uncharged, dismissed cases." Citing A.R.S. § 13-701(D)(25) (2017) (use of any factor "relevant to

the defendant's character or background" as an aggravating factor), the prosecutor referenced three unidentified other matters involving "violent[]" sexual assaults allegedly committed by Brents, described some of the underlying allegations, and explained that the cases were dismissed because the victims "had psychological problems which rendered their testimony quite weak."

¶25 At that point, defense counsel objected to any consideration of the assaults, arguing that "[j]ust because" a person alleges something "doesn't mean that it's true . . . accurate or even real." Defense counsel then acknowledged that Brents had at least two prior felony convictions, but asserted Brents's "mental health history" and payment to replace the window outweighed that aggravating circumstance.

¶26 After hearing from the parties, the court noted that Brents was a repetitive offender and then stated, "as aggravating factors I do find his criminal history, which includes criminal convictions within the last ten years." Nonetheless, the court found that the minor nature of the window damage and Brents's mental health issues warranted a "slightly" mitigated sentence. Accordingly, the court imposed a mitigated term of 4.5 years' imprisonment and ordered it to run consecutively with Brents's sentence in CR 2014-058.

¶27 For the first time on appeal, Brents argues he was denied his constitutional right to confront witnesses against him when the prosecutor raised the other assaults at sentencing. Because he failed to raise this argument in the superior court, we review his argument only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005).

¶28 The Sixth Amendment guarantees a defendant the opportunity to confront any witness against him in "all criminal prosecutions." U.S. Const. amend. VI. In *State v. McGill*, 213 Ariz. 147, 158, ¶ 46 (2006), our supreme court analyzed the extent to which this protection "extends to sentencing hearings." Noting that the United States Supreme Court previously held that the right of confrontation does not apply to such proceedings, *see Williams v. New York*, 337 U.S. 241 (1949), our supreme court distinguished "between hearsay used to *establish an aggravating factor*, to which the Confrontation Clause applies, and hearsay used to *rebut mitigation*, to which the Confrontation Clause does not apply." *McGill*, 213 Ariz. at 159, ¶ 51 (citing *State v. Greenway*, 170 Ariz. 155 (1991)).

¶29 In this case, the State brought up the alleged assaults to establish an aggravating factor pursuant to A.R.S. § 13-701(D)(25) and in support of its general argument against leniency, rather than to challenge Brents's mitigation evidence. Indeed, the State raised the assaults before Brents introduced any mitigation evidence, and Brents's mitigation evidence was limited to his impaired mental health, the fact that he had paid to replace the window, and his current efforts to maintain good behavior. Because the State raised the assaults to establish an aggravating factor rather than to rebut evidence of mitigating circumstances, reference to those other matters was subject to the Confrontation Clause, and therefore violated Brents's constitutional right to confront witnesses against him. *See Greenway*, 170 Ariz. at 161, n.1.

¶30 On this record, however, there is no basis to conclude that the superior court considered the assault allegations, either as an aggravating factor or as a basis for imposing consecutive sentences. The court stated it found that Brents's "criminal history, which include[d] criminal convictions within the last ten years" was an aggravating factor. Contrary to Brents's contention, the court's use of the phrase "criminal history" does not necessarily imply that the court deemed the assault allegations as an aggravating factor. Rather, viewed within the context of the entire record, including the State's allegation of 13 prior felony convictions, eight of which were from the early 1990's, the court's statement may simply reflect that it considered all of Brents's prior felony convictions and found that some occurred "within the ten years immediately preceding the date of the offense," thereby qualifying as an aggravating factor under A.R.S. § 13-701(D)(11). Although the court did not expressly disclaim consideration of the alleged assaults, it neither referenced the allegations nor A.R.S. § 13-701(D)(25), and nothing in the record otherwise suggests that the court considered the assaults in imposing the sentence. *See State v. Brewer*, 170 Ariz. 486, 503 (1992) ("[a]bsent proof to the contrary," an appellate court presumes that a superior court judge considered only relevant sentencing factors and set aside any inadmissible evidence).

¶31 Moreover, mere speculation that a court would have imposed a lesser sentence if it had not considered an improper aggravating factor does not establish prejudice for purposes of fundamental error review. *See State v. Munninger*, 213 Ariz. 393, 397, ¶ 14 (App. 2006). Here, Brents argues that but for the reference to the other alleged assaults, he would have received a more lenient sentence, but the record does not substantiate this assertion. That is, because nothing in the record suggests that the alleged assaults were a factor in the court's sentencing calculus, there is no basis to believe that the court would have imposed a lesser sentence had the State

not brought them up. Therefore, Brents has failed to demonstrate the requisite prejudice.

E. Length of Sentence.

¶32 Brents argues the length of his sentence, 4.5 years, is grossly disproportionate to the crime he committed and violates the constitutional protection against cruel and unusual punishment.

¶33 Because Brents did not raise this argument in the superior court, we review only for fundamental, prejudicial error. *State v. Kasic*, 228 Ariz. 228, 231, ¶ 15 (App. 2011). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Henderson*, 210 Ariz. at 567, ¶ 19. "We will not disturb a sentence that is within the statutory range absent an abuse of the trial court's discretion." *State v. Joyner*, 215 Ariz. 134, 137, ¶ 5 (App. 2007).

¶34 The Eighth Amendment to the United States Constitution, barring the infliction of "cruel and unusual punishments," has been applied to lengthy prison sentences, but "noncapital sentences are subject only to a 'narrow proportionality principle' that prohibits sentences that are 'grossly disproportionate to the crime.'" *State v. Berger*, 212 Ariz. 473, 475, 477, ¶¶ 8-10, 17 (2006) (quoting *Ewing v. California*, 538 U.S. 11, 20, 23, 30 (2003)). Accordingly, "only in 'exceedingly rare' cases will a sentence to a term of years violate the Eighth Amendment's prohibition on cruel and unusual punishment." *Id.* at 477, ¶ 17 (quoting *Ewing*, 538 U.S. at 22).

¶35 In reviewing the constitutionality of a sentence, we first determine whether "there is a threshold showing of gross disproportionality by comparing 'the gravity of the offense [and] the harshness of the penalty.'" *Id*. at 476, ¶ 12 (alteration in original) (quoting *Ewing*, 538 U.S. at 28). "If this comparison leads to an inference of gross disproportionality," we then "test[] that inference by considering the sentences the state imposes on other crimes and the sentences other states impose for the same crime." *Id*.

¶36 When evaluating whether a sentence is excessive, courts "must accord substantial deference to the legislature and its policy judgments as reflected in statutorily mandated sentences." *Id*. at 476, ¶ 13. In so doing, a court must determine whether the legislature has a reasonable basis for believing the sentencing scheme substantially advances the goals of the criminal justice system. *Id*. at 477, ¶ 17. "A prison sentence is not grossly disproportionate, and a court need not proceed beyond the

threshold inquiry, if it arguably furthers the State's penological goals and thus reflects 'a rational legislative judgment, entitled to deference.'" *Id*. (quoting *Ewing*, 538 U.S. at 30).

¶37 In comparing the gravity of a crime and the severity of the punishment, we consider whether "the sentence imposed for each specific crime" is excessive, not the cumulative sentence. *Id.* at 479, ¶ 28. Stated differently, because a defendant does not have a constitutional right to concurrent sentences for separate crimes, we "will not consider the imposition of consecutive sentences in a proportionality inquiry." *Id.* at 479, ¶ 27. "Thus, if the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate." *Id*. at 479, ¶ 28.

¶38 As applied to these facts, we cannot say that the sentence of 4.5 years' imprisonment is grossly disproportionate to the crime of destruction of or injury to a public jail when imposed on a defendant with as many prior felony convictions as Brents has. The legislature's decision to designate the crime a Class 5 felony reflects the State's interest in regulating jails and protecting the safety of its employees and inmates. Had this been Brents's first felony offense, the presumptive term would have been 1.5 years' imprisonment, and the possible range from one-half year to 2.5 years' imprisonment. A.R.S. § 13-702(D). The legislature has determined, however, that increased punishments are warranted for repetitive offenders. A.R.S. § 13-703 (2017). Because Brents had 13 prior felony convictions, he was sentenced as a category-three repetitive offender, and exposed to an increased sentencing range of three years to 7.5 years' imprisonment. A.R.S. § 13-703(J). The mitigated sentence of 4.5 years' imprisonment that the court imposed was well within the statutory range. Therefore, because the sentence is not disproportionately long for a repetitive offender who has destroyed or injured a structural element of a jail, and we do not consider the cumulative sentence in the proportionality inquiry, Brents's sentence was not "clearly excessive" in violation of the constitutional proscription against cruel and unusual punishment.

CONCLUSION

¶39 For the foregoing reasons, we affirm Brents's conviction and sentence. We modify the judgment, however, to reflect that he did not plead guilty but was found guilty by a jury.

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