

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

JEROME TIWAIN HINTON, *Appellant*.

No. 1 CA-CR 16-0129
FILED 3-28-2017

Appeal from the Superior Court in Maricopa County
No. CR2011-128670-001
The Honorable Joan M. Sinclair, Judge

AFFIRMED AS MODIFIED

COUNSEL

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

Maricopa County Public Defender's Office, Phoenix
By Tennie B. Martin
Counsel for Appellant

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MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Donn Kessler joined.

C A T T A N I, Judge:

¶1 Jerome Tiwain Hinton appeals his convictions and sentences for possession of marijuana for sale, misconduct with weapons, and possession of drug paraphernalia. Hinton argues that the superior court erred by allowing prejudicial testimony from an undisclosed witness and by ordering that he pay the cost of DNA testing as part of his sentences. For reasons that follow, we vacate the order requiring Hinton to pay the cost of DNA testing but affirm his convictions and sentences in all other respects.

FACTS AND PROCEDURAL BACKGROUND

¶2 During a search of a residence on West Highland Avenue, police officers found two baggies containing approximately 35 grams of marijuana, a bong, a digital scale, plastic baggies, and two hand guns. Hinton, who was present during the search, told officers that he lived at the residence and that the marijuana found in the home was his, but stated it was for personal use. After further questioning, however, he admitted that he sold marijuana and was a “small-time drug dealer.”

¶3 The State charged Hinton with possession of marijuana for sale, two counts of misconduct involving weapons, and possession of drug paraphernalia. The State further alleged that Hinton had two historical prior felony convictions and that he committed the charged offenses while on probation.

¶4 Prior to trial, the superior court granted Hinton’s motion to sever one of the counts of misconduct involving weapons (prohibited possessor). Hinton was present for the first three days of his trial, but failed to appear on the fourth day. Trial continued in his absence, and the jury found him guilty as charged on the three remaining counts.

¶5 After Hinton was taken into custody three years later, the superior court sentenced him as a repetitive offender to three concurrent prison terms, the longest of which is 10 years. As part of his sentence, the

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court ordered Hinton to pay the cost of DNA testing. Hinton timely appealed.

DISCUSSION

¶6 Hinton argues the superior court erred by permitting his probation officer to testify that Hinton reported his address as the West Highland residence. In particular, he contends the testimony should have been precluded because the probation officer was not disclosed as a witness as required by Rule 15.1 of the Arizona Rules of Criminal Procedure, and that admission of the testimony was unfairly prejudicial.

¶7 Rule 15.1 requires that the State disclose to the defendant the names and addresses of all persons to be called as witnesses in the State's case-in-chief. Ariz. R. Crim. P. 15.1(b)(1). We review the court's "assessment of the adequacy of disclosure for an abuse of discretion." *State v. Roque*, 213 Ariz. 193, 205, ¶ 21 (2006).

¶8 Here, the State listed the probation officer as a potential witness in a supplemental disclosure statement filed two months before trial. The probation officer was again listed as a witness in the joint pretrial statement filed one month before trial, and the prosecutor told Hinton's counsel that the probation officer would be called as a witness if Hinton were to call a witness to testify that Hinton lived somewhere else. In addition, the probation officer was included in the list of potential witnesses read to the voir dire panel during jury selection. Under these circumstances, the court did not abuse its discretion by finding that the witness had been sufficiently disclosed in compliance with Rule 15.1.

¶9 We likewise reject Hinton's argument that the court erred by not precluding the probation officer's testimony as unfairly prejudicial. The superior court is authorized to exclude otherwise relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Ariz. R. Evid. 403. We review evidentiary rulings for an abuse of discretion, deferring to the superior court's assessment of relevance and unfair prejudice. *State v. Smith*, 215 Ariz. 221, 232, ¶ 48 (2007); *see also State v. Via*, 146 Ariz. 108, 122 (1985) (noting that deference is appropriate because the superior court is best positioned to balance probative value and prejudice).

¶10 Any evidence offered by the State that is relevant and material will generally be harmful to a defendant, but it is only when evidence is unfairly prejudicial that it must be excluded. *State v. Schurz*, 176 Ariz. 46, 52 (1993). "Unfair prejudice" is prejudice that has "an undue tendency to

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suggest decision on an improper basis, such as emotion, sympathy or horror.” *Id.* (citation omitted). Hinton argues that allowing the probation officer to testify was unfairly prejudicial because it alerted the jury to his prior criminal behavior.

¶11 The probation officer’s testimony that Hinton reported that he lived at the West Highland residence was unquestionably relevant. *See* Ariz. R. Evid. 401 (“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”); *see also State v. Fish*, 222 Ariz. 109, ¶ 48 (App. 2009) (same). The evidence was particularly relevant given that Hinton’s counsel asserted in opening statement that Hinton did not live at that address and that the evidence would show that Hinton did not have knowledge of criminal activity taking place there.

¶12 Moreover, the risk of unfair prejudice was reduced by sanitizing the probation officer’s testimony. Specifically, the court permitted the probation officer to testify only that Hinton had a legal obligation to report his address to her without indicating what position she held or the basis for Hinton’s legal obligation to report. Accordingly, the superior court did not abuse its discretion by allowing the sanitized testimony.

¶13 Finally, Hinton argues, and the State concedes, that the superior court erred by ordering Hinton to pay the applicable fee for the cost of DNA testing pursuant to Arizona Revised Statutes § 13-610. We agree. A convicted defendant is not required to pay the testing fee, *see State v. Reyes*, 232 Ariz. 468, 472, ¶ 14 (App. 2013), and we therefore vacate the order that Hinton pay the cost of DNA testing.

CONCLUSION

¶14 We vacate the sentencing order directing that Hinton pay the cost of DNA testing, but affirm Hinton’s convictions and sentences in all other respects.



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