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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



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FILED: 12/17/09
PHILIP G. URRY, CLERK
BY: DN

STATE OF ARIZONA,) 1 CA-CR 08-0572
)
Appellee,) DEPARTMENT B
)
v.) MEMORANDUM DECISION
)
ROBERT MARTINEZ,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Mohave County

Cause No. CR 2007-0562

The Honorable Steven F. Conn, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
by Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Melissa Parham, Assistant Attorney General
Attorneys for Appellee

Dana P. Hlavac, Mohave County Public Defender Kingman
by Jill L. Evans, Deputy Public Defender
Attorneys for Appellant

W E I S B E R G, Judge

¶1 Robert Martinez ("Defendant") appeals his convictions
for three counts of trafficking in stolen property in the second

degree and from the sentences imposed. On appeal, Defendant argues the trial court committed reversible error in allowing the prosecutor to impeach him with a prior felony conviction more than ten years old and with two undisclosed misdemeanor convictions. He also argues the trial court abused its discretion in precluding evidence of a third party suspect's prior conviction. For reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Defendant was indicted on one count of burglary, one count of theft, and three counts of trafficking in stolen property in the first degree. The evidence at trial showed that on April 14, 2006, someone burglarized a residence in Kingman and stole jewelry, CDs and DVDs. Two days later, Defendant pawned some of the jewelry at two local pawn shops and sold some of the CDS and DVDS to a used book store.

¶3 When Defendant was arrested, he admitted selling some of the subject property for an unknown "friend of a friend" named David. He told the police he could not contact David, but "he would just have to run into him" around town. He additionally told the police that another unrelated person sold him a bag of jewelry that he also pawned.

¶4 Defendant testified at trial. He stated that an acquaintance named Richard P. asked him to sell property belonging to an ex-girlfriend to help Richard P.'s mother pay

her bills. Defendant said he did not know the property was stolen. He testified that he lied to the police "because I never had nothing like this happen to me before" and was scared. Defendant also stated that Richard P. had been in prison and "knows a lot of people." He said he was afraid of what might happen to him in jail for being a "snitch." Two defense witnesses testified that Richard P. had also approached them some time during the same year to pawn or purchase some jewelry. Another witness testified that in April 2007, Richard P. had stolen some jewelry and other items from her house.

¶5 The jury acquitted Defendant of the burglary and theft charges, but convicted him of three counts of the lesser-included offenses of trafficking in stolen property in the second degree. The court imposed presumptive, concurrent sentences of three and one-half years on each count. Defendant timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033 (A) (Supp. 2008).

DISCUSSION

Impeachment by Prior Convictions

¶6 Defendant argues the trial court committed reversible error in allowing the prosecutor to impeach him with an eleven-year-old felony conviction and three undisclosed misdemeanor convictions. We review a ruling on the admissibility of prior

convictions for an abuse of discretion. *State v. Green*, 200 Ariz. 496, 498, ¶ 7, 29 P.3d 271, 273 (2001).

¶7 Before Defendant testified, the prosecutor informed the court that he did not plan to use Defendant's 1997 Nevada conviction for attempted burglary to impeach his credibility under Rule 609, Arizona Rules of Evidence, because it was more than ten years old. The judge advised defense counsel, however, that the conviction could be used if Defendant opened the door by offering evidence of his good character, one of Defendant's noticed defenses.

¶8 Defendant subsequently testified he lied to the police because nothing like that had ever happened to him before. The judge found that, by this testimony, Defendant was "conveying to the jury that he's never been in trouble before, he's never been interviewed by the police before, he doesn't have any prior convictions, and I think that is an extremely misleading statement for him to make." Over defense counsel's objection, the judge ruled that Defendant had placed his "law-abiding past history at issue here" and opened the door to cross-examination on his prior felony conviction for attempted burglary. The judge then asked both counsel if they had any other issues to discuss. The prosecutor responded, "Your Honor, I think the defendant has also had contact with the Kingman Police Department on previous occasions, but I wasn't planning on

asking him about that, so I don't think we need to bring that up or talk about it."

¶9 On cross-examination, Defendant admitted he had been convicted of attempted burglary in Nevada in 1997. On redirect examination, when asked by defense counsel if he had been in any trouble or convicted of a crime after his 1997 conviction, Defendant responded that he had not. On re-cross examination, the prosecutor asked Defendant whether he had been convicted in 2003, 2005, and 2007 of misdemeanor shoplifting, and Defendant admitted that he had. The judge explained afterward that he allowed the prosecutor to ask the follow-up question about the shoplifting convictions because Defendant opened the door by testifying he did not have any convictions since the 1997 conviction and "this was extremely misleading."

¶10 Defense counsel moved for a mistrial on the ground that the State failed to disclose its intent to use the shoplifting convictions before trial. Counsel claimed he would never have asked Defendant those questions if the convictions had been disclosed.

¶11 The judge denied the motion for mistrial. He found that Defendant knew about his shoplifting convictions and that defense counsel was put on notice of them based upon the prosecutor's comments at sidebar. The judge later denied a motion for new trial based in part on the same ground.

A. Felony Conviction for Attempted Burglary

¶12 Under the circumstances here, we cannot say that the judge abused his discretion in allowing the prosecutor to ask Defendant if he had a prior conviction for attempted burglary. The judge agreed with the prosecutor before Defendant testified that the eleven-year-old felony conviction could not be used to impeach his credibility under Rule 609. He warned Defendant, however, that if his witnesses testified regarding his good character, the evidence would be admissible to rebut such evidence. Defendant opened the door to admission of his past criminal history by testifying that he lied to police because nothing like that had ever happened to him before.

¶13 In *State v. Tovar*, 187 Ariz. 391, 930 P.2d 468 (App. 1996), the defendant testified that he never owned or used a handgun. The prosecutor was then permitted to impeach the defendant's testimony with a juvenile adjudication for robbing a store with the use of a handgun. The prosecutor's question about his prior felony conviction was not a generalized attempt to impeach his character for truthfulness or lack thereof, but rather a means of demonstrating that defendant lied to the jury about never having used a handgun. See *id.* at 393, 930 P.2d at 470. Thus, the prior conviction was not used to impeach the defendant's credibility, but to contradict defendant's testimony. The court stated, "[o]nce a defendant has put

certain activity in issue by . . . denying wrongdoing, the government is entitled to rebut by showing that defendant has lied." *Id.* (citation omitted); see also *State v. Kemp*, 185 Ariz. 52, 61, 912 P.2d 1281, 1290 (1996) (holding that by asserting the nonexistence of evidence connecting defendant to the murder, defense counsel invited any error in meeting the assertion with contrary proof, notwithstanding a prior ruling excluding the evidence). The court did not err in finding that Defendant's lie put his "law-abiding past history" at issue and opened the door for the State to rebut his testimony with evidence of his prior felony conviction. See *Tovar*, 187 Ariz. at 393, 930 P.2d at 470.

¶14 Further, we do not find the trial court abused its discretion in ruling that the prosecutor could inquire specifically as to whether Defendant had a prior conviction for attempted burglary. The court found that Defendant implied he had never before been involved in a property crime, an "extremely misleading" statement under the circumstances. This testimony opened the door to rebuttal with evidence of the prior conviction for a property crime.

¶15 The court could have sanitized the prior conviction or limited the prosecutor to asking Defendant whether he had previously been *interrogated* by police about a property crime. In its extensive rationale for its ruling, however, the court

implicitly balanced the probative value of evidence regarding the nature of the prior conviction against any unfair prejudice to Defendant under Rule 403, Arizona Rules of Evidence. We decline to hold that the trial court abused its discretion by allowing the prosecutor to ask Defendant about his prior conviction for attempted burglary. See *State v. Sullivan*, 130 Ariz. 213, 217, 635 P.2d 501, 505 (1981) (finding no abuse of discretion in court's balancing under Rule 403 and ultimately allowing admission of the defendant's prior conviction for possession of narcotics to impeach his credibility under Rule 609, in light of his testimony that he was "framed" on drug charges and "didn't have any knowledge that the cocaine was going to be sold").

B. Misdemeanor Shoplifting Convictions

¶16 Defendant also argues the trial court abused its discretion in denying his motion for mistrial and motion for new trial based on the court's alleged error in allowing the State to impeach Defendant with his misdemeanor convictions that were not disclosed before trial. See Ariz. R. Crim. P. 15.1. We will not find an abuse of discretion in a discovery ruling unless defendant shows that he suffered prejudice as a result of the nondisclosure. *State v. Martinez-Villareal*, 145 Ariz. 441, 448, 702 P.2d 670, 677 (1985). We also review a trial court's denial of a motion for mistrial for abuse of discretion. *State*

v. Jones, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000). A declaration of mistrial is "the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Dann*, 205 Ariz. 557, 570, ¶ 43, 74 P.3d 231, 244 (2003) (citation omitted).

¶17 We reject Defendant's argument that the prosecutor should have previously disclosed his intent to use Defendant's prior misdemeanor convictions as "prior acts of the defendant" evidence under Arizona Rule of Criminal Procedure ("Criminal Rule") 15.1(b)(7) or as evidence to rebut his defense of good character under Criminal Rule 15.1(h). Here, the prosecutor informed the court and defense counsel that Defendant had contact with the Kingman Police Department on previous occasions but that he did not intend to ask Defendant any questions about that. Then, defense counsel elicited testimony from Defendant that he did not have any convictions since the 1997 Nevada conviction. The record clearly shows the prosecutor had no intention of using evidence of the misdemeanor convictions until Defendant lied about them at trial. See *State v. Binford*, 120 Ariz. 86, 89, 584 P.2d 67, 70 (App. 1978) (holding that trial court did not abuse its discretion in allowing three undisclosed witnesses to testify in rebuttal to defendant's testimony that was the "product of his last minute decision to take the

stand"); *Lee*, 185 Ariz. at 555-56, 917 P.2d at 698-99 (affirming denial of motion to preclude state from seeking death penalty as sanction for untimely notice, in light of the defendant's actual notice of the state's intent to do so). The trial court did not abuse its discretion by refusing to grant either a mistrial or a new trial based on an alleged discovery violation.

Preclusion of Third-Party's Conviction for Trafficking

¶18 Defendant argues the judge denied him his right to present a complete defense and a fair trial by precluding him from introducing a certified record of Richard P.'s 2001 conviction for trafficking in stolen property. The judge precluded the evidence because Defendant failed to supply the necessary foundation showing the convicted person was the same person that Defendant accused of "duping" him into selling stolen property. The court also found Defendant failed to demonstrate the relevance of the evidence, other than to show Richard P.'s propensity to commit these crimes.

¶19 We review a trial court's ruling concerning the admissibility of third-party culpability evidence for abuse of discretion. *State v. Prion*, 203 Ariz. 157, 161, ¶ 21, 52 P.2d 189, 193 (2002). The constitutional right to due process guarantees a criminal defendant "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). "A defendant's right to present relevant evidence

is not unlimited, but rather is subject to reasonable restrictions," including application of evidentiary rules. *United States v. Scheffer*, 523 U.S. 303, 308 (1998). To be relevant, evidence of third-party culpability "need only tend to create a reasonable doubt as to defendant's guilt." *State v. Gibson*, 202 Ariz. 321, 324, ¶ 16, 44 P.3d 1001, 1004 (2002). Further, Rule 404(b), Arizona Rules of Evidence, which precludes use of other acts to show propensity, also applies to other acts of third parties. *State v. Tankersley*, 191 Ariz. 359, 369, ¶ 39, 956 P.2d 486, 496 (1998).

¶20 Defendant argued below that Richard P's conviction for trafficking in stolen property was relevant to show "absence of mistake or knowledge, conformity with the plan . . . and [because] this trafficking in stolen property involved pawn shops . . . he probably did this very same crime." Defendant argues on appeal that the evidence was relevant to show that he lacked knowledge that the property was stolen, to show Richard P.'s "common scheme or plan" of stealing jewelry and pawning it, or convincing someone else to pawn it as well as to show that Richard P. was the person who approached defendant to pawn the property. Defendant also argues that it corroborated his testimony that he lied to police because he was afraid of Richard P. and did not want to be a snitch.

¶21 We agree with the trial court that the evidence was neither relevant nor admissible on the grounds stated. Richard P.'s 2001 conviction for trafficking in stolen property did not have a tendency to make it more probable that Defendant lacked knowledge that the property was stolen, or that Richard P. was the person who approached Defendant to pawn the property. It was not relevant to his third-party culpability defense because it did not create a reasonable doubt as to Defendant's guilt.

¶22 Further, Richard P.'s 2001 conviction and his alleged role in duping Defendant into pawning property five years later did not evidence a "common scheme or plan" for purposes of Rule 404(b). Different offenses may be considered "part of a common scheme or plan" only if they are part of "an over-arching criminal plan." *State v. Ives*, 187 Ariz. 102, 109, 927 P.2d 762, 769 (1996). The offenses must be "sufficiently related to be considered a single criminal offense" [and] the common scheme or plan must be 'a particular plan of which the charged crime is a part.'" *Id.* at 108, 927 P.2d at 768 (citation omitted). Richard P.'s conviction in 2001 for a similar offense and his alleged role in Defendant's offense in 2006 cannot be considered part of an over-arching criminal plan nor are they sufficiently related so as to constitute a single criminal offense.

¶23 Moreover, even if the evidence had marginal relevance to corroborate Defendant's testimony that he lied to police for

fear of being a snitch, any probative value was far outweighed by its improper use as propensity evidence and by the danger of unfair prejudice, confusion of the issues or misleading the jury under Rule 403. Finally, relevance aside, the judge did not abuse his discretion in precluding the evidence based on lack of foundation. There was no reversible error.

CONCLUSION

¶24 We have reviewed the issues raised by Defendant. For the foregoing reasons, we affirm his convictions and sentences.

/S/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

/S/_____
PATRICIA K. NORRIS, Presiding Judge

/S/_____
MARGARET H. DOWNIE, Judge