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



DIVISION ONE
FILED: 01/19/2010
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 08-0636
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
)
AGUSTIN MIRANDA MATA,)
) (Not for Publication -
Appellant.) Rule 111, Rules of the
) Arizona Supreme Court)
)
)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-169872-001 DT

The Honorable Julie P. Newell, Judge Pro Tem

AFFIRMED

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

T. Anthony Guajardo Phoenix
Attorney for Appellant

B A R K E R, Judge

¶1 Agustin Mata appeals from his convictions of one count of disorderly conduct, a class six dangerous felony (count one), and one count of aggravated assault, a class three dangerous felony (count two). The trial court sentenced Mata to concurrent, mitigated prison terms, with the longest being five and a half years. For the following reasons, we affirm.

Facts and Procedural Background

¶2 On October 26, 2007, an owner of Tioga Electric asked Mata to stay the night at a work site to keep an eye on twenty large rolls of insulated copper wire that had been delivered that day.¹ Mata was told to stay in his truck and watch the wire; if he saw anything that "seemed out of the ordinary" he was told to call his foreman and 911. He was not instructed to possess a gun or use any type of force to protect the wire, and company policy forbade the possession of weapons on job sites.

¶3 During the early morning of October 27, Mata called the foreman and reported a car driving around the building. A few hours later, around 7:00 a.m., E.E. and A.G., employees of Sunset Acoustics, arrived at the jobsite to work on the ceiling. They parked in the back of the building because of work being performed on the front parking lot. E.E. was removing tools

¹ We view the facts in the light most favorable to sustaining the verdicts. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

from his car when Mata pulled up in his company truck and approached E.E. pointing a gun "from [his] neck down." The victims testified that they heard Mata say "you guys are the ones," and that he was "sure about what [they] had been doing last night." E.E. asked Mata to call the police or his foreman, but Mata refused. A.G. was able to call the police without Mata's knowledge.

¶4 Mata's foreman arrived on site and saw Mata "arguing" with two people with a gun "near his waist." Mata told his foreman that he had "seen the two of them during the night" and was "checking out their trunk." The foreman did not see anything belonging to Tioga Electric. When the police were approaching the scene, Mata put the gun in the pocket of his pants and walked inside the building with his foreman. Officer Rodriguez spoke with the victims, and they described Mata and told the officer what direction he had gone. When Mata exited the building the officers saw that he "had a gun in his waist band." Officer Lynch pushed Mata to the ground and Officer Rodriguez removed a Lorcin .380 handgun from the right side of Mata's waistband. Officer Rodriguez handcuffed Mata and then asked him some questions. Officer Rodriguez testified that Mata told him that he "never pointed" the gun and that he was "concerned about the theft" of copper wire and thought E.E. and A.G. "were coming back from the previous events of the night."

At trial, Mata testified and admitted to getting out of his truck and taking the weapon in his right hand to stop A.G. and E.E.

¶15 After a three-day jury trial, the jury found Mata guilty of the lesser included offense of disorderly conduct (as to A.G.) and aggravated assault (as to E.E.). Mata timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033(A)(1) (Supp. 2009).

Discussion

¶16 Mata argues that fundamental error, requiring reversal, occurred because the prosecutor did not give prior notice that he was going to have Officer Rodriguez testify regarding possible meth use. He argues that the prosecutor breached his affirmative duty to disclose under Arizona Rule of Criminal Procedure 15.1 because this was evidence of other wrongful acts.

¶17 Rule 15.1 requires disclosure of all witnesses "with their relevant written or recorded statements . . .," and a "list of all prior acts of the defendant which the prosecutor intends to use to prove motive, intent, or knowledge or otherwise use at trial." Ariz. R. Crim. Proc. 15.1(b)(1), (7).

The existence of possible meth or drug use was revealed for the first time in trial during A.G.'s testimony.² Defense counsel did not object based on the disclosure provisions and did not

² During A.G.'s testimony, the following took place:

Q Did you call 9-1-1 using your blue tooth before or after the people from the same company as the defendant arrived?

A Exactly at the moment that one of them came up that's when I called and and [sic] I told the other guy get out of here because this man is high and he has a gun and the guy left. He said that he --

Mr. Guajardo: Objection.

The Court [sic]: --had been there the whole night --

Mr. Guajardo: Objection.

The Court [sic]: Partying and smoking I don't know what.

The Court: What is your objection?

Mr. Guajardo: Hearsay, Your Honor. Somebody told her that somebody said this. That's hearsay.

The Court: Sustained.

Mr. Strange: I'm going to need you when you answer to only tell us about things that you saw.

The Witness: Okay.

The Court: And the answer will be stricken from the record and the jury will disregard that answer.

request a mistrial. At the end of this day of testimony the trial court asked if there was "[a]nything anybody wants to put on the record." Defense counsel did not raise any issue or objection.

¶18 The next reference to possible drug use took place during the direct examination of Officer Rodriguez:

Q What was his demeanor each time you interviewed him?

A Well, the first time I interviewed him, just from being out with other offenders in the city, I initially thought he was using meth was my initial impression. And that's just from experience in those people who use that drug, because he was very fidgety, sweating profusely, had the tympanic two. Close his eyes and he would get the shakes, the involuntary shakes. And I even asked him on that date if he was using drugs and he said no.

Defense counsel did not object to this testimony. Instead, on cross-examination defense counsel asked Officer Rodriguez follow-up questions regarding the above testimony.³

³ Following is the questioning of Officer Rodriguez on cross-examination:

Q Just to be fair, you mentioned that you know he had these symptoms that he was sweating and so on. You don't have any direct proof that he was using any drugs at all; do you, sir?

A I do not have direct proof.

Q You didn't test him for drugs, did you?

¶19 When Mata testified, he admitted that he told a detention officer that he "had taken some sort of drug the night before," but clarified that "at no point in time did I say

A No. He had mentioned to the deputy what he was --

Q Just answer yes or no. Did you test him or not?

A No.

Q He wasn't charged with any drugs; is that correct?

A No.

Q These symptoms that you said he had been sweating or whatever, that he was nervous and fidgety, that could also be consistent with someone who's nervous because he's been arrested and he's facing a serious situation?

A Except for the involuntarily eye twitch.

Q I'll give you that, that it is the sweating and all of the other stuff that you mentioned, fidgeting or whatever. These are things that -- the sweating and the other things, that could be because of the situation he was in. I mean, you're saying, well, it was something else. But again, he was not tested and not charged with any of that; is that correct?

A No. No. He was sweating profusely, a little bit more than just --

Q I understand. I think the points are made

anything about having acquired anything illegal." Mata also asserts that the "meth-crazed Defendant theory" was central to the prosecutor's closing argument. The only reference the prosecutor made in his ten-plus page closing argument was:

You heard the officer testify that he displayed the effects of someone who was under the affects of methamphetamine that morning. You heard that he had been up for 28 hours, slept for three. And only had a beer and some stuff to eat in that time. Is that realistic? Something kept him up that night.

¶10 Absent fundamental error, a defendant generally waives his objection if he fails to ask for limiting instructions or fails to request a mistrial. *State v. Ellison*, 213 Ariz. 116, 133, ¶ 61, 140 P.3d 899, 916 (2006). This applies equally to objections based on constitutional grounds. *State v. Spreitz*, 190 Ariz. 129, 145, 945 P.2d 1260, 1276 (1997). Here, fundamental error review applies because defense counsel failed to object to the alleged trial error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005); see also *State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993) (holding only fundamental error may be raised for the first time on appeal).

¶11 Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant

could not possibly have received a fair trial." *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). In fundamental error review, the defendant bears the burden of persuasion. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. This discourages a defendant from "tak[ing] his chances on a favorable verdict, reserving the 'hole card' of a later appeal on [a] matter that was curable at trial, and then seek[ing] appellate reversal." *State v. Valdez*, 160 Ariz. 9, 13-14, 770 P.2d 313, 317-18 (1989). To prevail, Mata must "establish both that fundamental error exists and that the error in his case caused him prejudice." *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

¶12 We need not address whether error occurred because under either circumstance Mata has not proven fundamental error. To show that the error was fundamental, Mata "must show that the error complained of goes to the foundation of his 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 testimony regarding possible drug use at the time of the incident was not necessary to the verdict in this case given the charges and other evidence. Mata admitted to getting out of his truck and approaching E.E. and A.G. with the weapon in his right hand to "stop[] them." E.E. testified that Mata approached him pointing a gun "from [his]

neck down." Mata's admission and the victims' testimony provided evidence of each element of Mata's convictions. Therefore, Mata cannot prove that fundamental error occurred because he cannot show that the late disclosure was an error of such magnitude that it deprived him of a fair trial. *Id.* at 567, ¶ 19, 115 P.3d at 607.

¶13 More importantly, Mata fails to establish prejudice. Mata must prove prejudice with evidence to support his claim; he may not rely upon "speculation" to carry his burden. *State v. Munniger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006); *see also State v. Ruggiero*, 211 Ariz. 262, 269 n.6, ¶ 29, 120 P.3d 690, 696 n.6 (App. 2005). Given the evidence at trial, we could only speculate as to whether the "drug" testimony affected the verdict. Mata maintains that he was "ambushed" by the testimony regarding drug abuse. However, Mata never claimed any surprise during trial. Furthermore, as the State notes, Mata admitted at trial that he had "taken some sort of drug the night before." Given that the burden is on the defendant, Mata has failed to prove fundamental error or prejudice in this case.

Conclusion

¶14 Accordingly, we find no fundamental error and affirm Mata's convictions.

/s/

DANIEL A. BARKER, Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Presiding Judge

/s/

PETER B. SWANN, Judge