IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 05-20-2010
PHILIP G. URRY, CLERK
BY: GH

STATE OF ARIZONA, Appellee, v. RICARDO HERRERA, Appellant.	)	1 CA-CR 08-0887 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2006-006724-003 DT

The Honorable Barbara L. Spencer, Judge *Pro Tempore*

AFFIRMED

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

Park Law Office, PLC — Phoenix
by James Sun Park
Attorney for Appellant

W E I S B E R G, Judge

¶1 Ricardo Herrera ("Defendant") was convicted by a jury on charges of conspiracy to commit burglary in the first-degree,

a class 2 felony; armed robbery, a class 2 felony and dangerous offense; first degree burglary, a class 2 felony and dangerous offense; and aggravated assault, a class 3 felony and dangerous offense. The trial court sentenced Defendant as a repetitive offender to aggravated prison terms totaling forty-eight years. On appeal, Defendant argues that the trial court erred by admitting inadmissible hearsay and imposing illegal sentences. For reasons that follow, we affirm.

BACKGROUND

¶2 The charges stemmed from a home invasion robbery that occurred during the early morning hours of September 15, 2005. Police officers responding to a 9-1-1 call regarding the robbery observed Defendant across the street from the home. Defendant began running, but was apprehended in a nearby park. The police also detained a second person, Jay Colbert, several blocks away. Both Defendant and Colbert were shown to the victims in a one-on-one identification. After one victim identified Colbert as one of the robbers, he was arrested. The victims were unable to identify Defendant, and he was released.

¶3 In February 2006, Colbert agreed to cooperate with the police and named defendant and two other individuals, Darquine Wilson and Glenathon Williams, as co-participants in the robbery. Colbert subsequently entered into a plea agreement to resolve the charges against him. Following his arrest, Williams

also agreed to plead guilty and cooperate with the State. At Defendant's trial, Colbert and Williams admitted to their roles in the home invasion and testified that Defendant organized the robbery.

DISCUSSION

Prior Consistent Statements

¶4 Defendant contends the trial court erred in allowing testimony regarding statements made by Colbert while being taken to the police station following his arrest. Defendant argues that the statements implicating him in the robbery should have been precluded as hearsay. The trial court ruled the statements were admissible as non-hearsay under Rule 801(d)(1)(B), Arizona Rules of Evidence. We review rulings on the admissibility of evidence for abuse of discretion. *State v. Robinson*, 165 Ariz. 51, 56, 796 P.2d 853, 858 (1990).

¶5 Rule 801(d) provides in part that a prior consistent statement by a witness is not hearsay if the witness testifies at trial and is subject to cross-examination and the statement is "consistent with the [witness's] testimony and is offered to rebut an express or implied charge against the [witness] of recent fabrication or improper influence or motive." Ariz. R. Evid. 801(d)(1)(B). Defendant argues that this rule does not permit admission of the challenged statements because there was no express or implied charge made against Colbert of recent

fabrication of his trial testimony. During defense counsel's cross-examination of Colbert, however, the following testimony was elicited: (1) Colbert did not begin cooperating with the police until five months after his arrest; (2) Colbert was motivated to obtain a deal for himself by naming others as being involved in the robbery; (3) Colbert had access to police reports before beginning to cooperate, which would inform him that defendant had been found in the area of the robbery; and (4) Colbert had also spoken to another inmate who was familiar with defendant. Considered in its entirety, the trial court could reasonably find that the cross-examination sought to raise the inference that Colbert's trial testimony regarding defendant's involvement in the robbery was a recent fabrication to obtain a favorable plea deal. *See State v. Moya*, 138 Ariz. 7, 12, 672 P.2d 959, 964 (App. 1983) (concluding that cross-examination of witness obviously intended to raise inference of recent fabrication of trial testimony and prior consistent statement admissible to rebut that inference).

¶6 Defendant further contends that Rule 801(d) does not support admission of the statements because Colbert was not subjected to cross-examination about them. Defendant complains that the prosecutor did not introduce the statements during his direct examination of Colbert, but instead referred to them for the first time during his redirect examination.

¶7 With respect to the complaint that the statements were not brought out during Colbert's direct examination, the State could not introduce the prior consistent statements until there had been an express or implied charge of recent fabrication on the part of Colbert. *See State v. Martin*, 135 Ariz. 552, 554, 663 P.2d 236, 238 (1983) (noting that prior consistent statements may not be admitted to buttress credibility of a witness, only to rebut attacks upon the credibility of that witness). Until Colbert was cross-examined, there was no evidence of recent fabrication to rebut. Accordingly, the first opportunity the prosecutor had to bring out the prior consistent statements was during redirect examination. Thus, Defendant's claim that the prosecutor sought to out-maneuver his potential defense and avoid cross-examination on the statements by not introducing the statements during the direct examination of Colbert is without merit.

¶8 Although Colbert was not cross-examined regarding the statements he made the night of his arrest, this does not preclude their admission under Rule 801(d).

> The rule requires that the declarant be "subject" to cross-examination concerning the statement. It does not require that the declarant *be* cross-examined concerning the statement. Whether defense counsel will elect to actually cross-examine the declarant regarding prior consistent statements will often be a tactical decision. Unless the record demonstrates

> that counsel was prevented from "subjecting" the declarant to cross-examination concerning prior consistent statements, the requirements of the rule are satisfied when the witness appears and testifies at trial.

State v. Parris, 144 Ariz. 219, 222, 696 P.2d 1368, 1371 (App. 1985). As Defendant acknowledges, he was aware of Colbert's statements to the officer on the night of his arrest from pre-trial interviews. Defense counsel could have cross-examined Colbert about the statements if he so desired, and defendant does not argue otherwise. Accordingly, there was no error in admitting the statements under Rule 801(d)(1)(B).

Legality of Sentences

¶9 Defendant also asserts that the trial court imposed illegal sentences on his convictions for armed robbery, a class 2 felony; burglary, a class 2 felony; and aggravated assault, a class 3 felony. The jury found these offenses to be dangerous, and the trial court designated them as such when imposing sentence. Defendant contends that because he has no dangerous historical prior convictions, the maximum sentence for the class 3 offense is fifteen years, and the maximum sentence for the two class 2 offense is twenty-one years. *See* former A.R.S. § 13-604(I) (Supp. 2005).[1] Thus, he argues that the trial court erred

[1]The sentencing provisions in Arizona's criminal code were renumbered, effective January 1, 2009. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. The sentencing statutes are cited as numbered at the time Defendant committed the offenses in 2005.

in sentencing him to a twenty-year prison term on the class 3 offense and to twenty-eight-year prison terms on the class 2 offenses because the sentences exceed the maximum allowable punishment.

¶10 As an initial matter, we note that the trial court did not sentence Defendant on the burglary conviction to a twenty-eight-year prison term, but rather only a twenty-year term. Consequently, the sentence imposed on the burglary conviction does not exceed the statutory maximum even under the sentencing range defendant asserts is applicable to this class 2 dangerous offense.

¶11 Turning to the sentences imposed on the armed robbery and aggravated assault convictions, in addition to alleging the dangerous nature of the offenses, the State alleged that Defendant had four historical prior felony convictions. Following an evidentiary hearing, the trial court found the State had proven three of the four prior convictions. Under Arizona law, a conviction for a dangerous offense may be enhanced by prior convictions for non-dangerous offenses. *State v. Knorr*, 186 Ariz. 300, 306, 921 P.2d 703, 709 (App. 1996).

¶12 At sentencing, the trial court clearly indicated that it intended to sentence Defendant as a repetitive offender with two priors "because it's a higher range than the dangerous range." When, as in the present case, the trial court elects to

sentence a defendant convicted of a dangerous offense as a non-dangerous repetitive offender, the finding of dangerousness is considered mere "surplusage" for purposes of sentencing, but the offense remains a dangerous offense and its designation can affect any future sentence the defendant may receive. *State v. Sammons*, 156 Ariz. 51, 55, 749 P.2d 1372, 1376 (1988). Given that the maximum sentences for class 2 and class 3 non-dangerous offenses with two historical prior convictions is twenty-eight and twenty years respectively, A.R.S. § 13-604(D), the sentences imposed by the trial court were within the permissible range for each of defendant's four offenses.

CONCLUSION

¶13 For the foregoing reasons, we affirm Defendant's convictions and sentences.

/S/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

/S/_____
MICHAEL J. BROWN, Presiding Judge

/S/_____
JON W. THOMPSON, Judge