DIVISION ONE
FILED: 05-25-2010
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0139
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
ADRIAN ALEXANDER VILLA,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-113902-001 DT

The Honorable Lisa M. Roberts, Judge Pro Tempore

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals Section/Capital Litigation Section
And Sherri Tolar Rollison, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Stephen R. Collins, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 Adrian Alexander Villa (Defendant) appeals his convictions and sentences for one count of theft of means of

transportation, a class three felony; one count of possession of burglary tools, a class six felony; one count of criminal trespass in the first degree, a class six felony; and one count of criminal damage, a class six felony. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On March 1, 2008, the victim reported his 2007 Chevy Tahoe stolen. Following the guidance of an OnStar representative, Officer C. of the Phoenix Police Department located the stolen vehicle shortly after the crime was reported. Officer C. witnessed Defendant sitting in the stolen vehicle's driver's seat. Defendant exited the vehicle and Officer C. gave commands. Defendant subsequently ran from Officer C. and was later located hiding in the attic of a nearby vacant house. Defendant did not have the owner's permission to enter the home.

¶3 Despite repeated commands, Defendant did not come out of his hiding place inside the attic. In order to remove Defendant from the attic, the police were forced to remove vents, damage ductwork, remove portions of drywall and use two canisters of pepper spray. Officer C. found a lanyard containing numerous keys in the vacant house. Among the keys was the victim's key to his 2007 Chevy Tahoe. Officer C. impounded the remaining keys because they included a "jiggle key," a type of key used to steal vehicles.

¶4 During closing argument, Defendant's counsel stated, "[w]ell, strangely enough, [Defendant] and I are about to tell you, '[o]kay, vote guilty,'" regarding the criminal damage allegation of count four. In addressing count three, criminal trespass, Defendant's counsel stated "[o]nce again, yep, he's guilty on that." Nevertheless, Defendant's counsel did argue Defendant was not guilty on the remaining counts, theft of means of transportation and possession of burglary tools.

¶5 The jury convicted Defendant on all four counts. The trial court sentenced him to the presumptive term on each count. Those terms were to run concurrently, with the longest sentence being 11.25 years. Defendant filed a timely notice of appeal and 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 and -4033.A (2010).[1]

DISCUSSION

¶6 Defendant raises one issue on appeal: whether his counsel's concession of guilt on two counts during closing argument was the equivalent of a guilty plea, therefore requiring a colloquy pursuant to *Boykin v. Alabama*, 395 U.S. 238 (1969) and Arizona Rule of Criminal Procedure 17. Because Defendant did not object to his counsel's concession at trial, we review for

[1] We cite to the current version of the applicable statutes because no revisions material to this decision have since occurred.

fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Under this standard of review, Defendant "must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* at ¶ 20.

Federal Constitutional Requirements

¶7 "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." *Boykin*, 395 U.S. at 242. When a defendant pleads guilty, several constitutional rights are waived, "including the privilege against self-incrimination, the right to trial by jury, the right to proof of guilt beyond a reasonable doubt, and the opportunity to confront accusers." *State v. Allen*, 223 Ariz. 125, ___, ¶ 13, 220 P.3d 245, 247 (2009). Accordingly, "to satisfy due process concerns, [a trial court] must ensure that the defendant understands the rights being waived and enters the plea agreement knowingly and voluntarily." *Id.*

¶8 Nevertheless, "stipulations to facts combined with 'not guilty' pleas are 'simply not equivalent to a guilty plea for *Boykin* purposes, even if the stipulation is to all elements necessary to a conviction and even if it might appear to a reviewing court that the stipulation serves little purpose.'" *Id.* at ___, ¶ 14, 220 P.3d at 247-48 (citation omitted). Ultimately, "[t]he constitution does not compel a full *Boykin*

colloquy in the absence of a formal guilty plea." *Id.*, 220 P.3d at 248. In this case, Defendant did not enter a formal guilty plea; rather, Defendant's concessions were only offered during closing argument.[2] As a result, Defendant did not waive any of the constitutional rights protected by *Boykin*. Thus, a *Boykin* colloquy was not required.

Rule 17 and the "Tantamount to a Guilty Plea" standard

¶9 Defendant argues the trial court should have established that his concession was made knowingly and voluntarily pursuant to Rule 17. However, nothing in Rule 17 requires a trial court to engage a defendant in a formal colloquy absent a *guilty* or *no-contest* plea. *See* Ariz. R. Crim. P. 17; *Allen*, 223 Ariz. at ___, ¶ 20, 220 P.3d at 249. Because Defendant in this case entered a plea of not guilty on all charges, the trial court was not required to perform a Rule 17 colloquy with Defendant.

¶10 Nevertheless, relying on *State v. Allen*, 220 Ariz. 430, 207 P.3d 683 (App. 2008), *vacated in part*, 223 Ariz. 125, 220 P.3d 245 (2009), Defendant contends his counsel's concession during closing argument was the equivalent of a guilty plea and

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[2] The trial court properly instructed the jury that "what is said in closing arguments is not evidence." *See State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006). Additionally, we presume that the jury followed the trial court's instructions. *Id.*

therefore required a Rule 17 advisement from the trial court. However, after the filing of the opening brief in this case, the Arizona Supreme Court vacated in part this Court's holding in *Allen*. 223 Ariz. 125, 220 P.3d 245.

¶11 In doing so, the Arizona Supreme Court stated that "[a]t one time, Arizona cases extended the *Boykin* colloquy requirement to a stipulation that was 'tantamount to a guilty plea.'" *Id.* at ___, ¶ 15, 220 P.3d at 248. However, the Arizona Supreme Court "explicitly rejected the 'tantamount to a guilty plea' standard as unworkable." *Id.*; *see State v. Avila*, 127 Ariz. 21, 23, 617 P.2d 1137, 1139 (1980). Accordingly, we reject Defendant's argument as it relates to our vacated holding in *Allen*. We find no error in the trial court's failure to engage Defendant in a Rule 17 colloquy.

CONCLUSION

¶12 For the reasons previously stated, we affirm Defendant's convictions and sentences.

/S/
_____
PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
_____
DIANE M. JOHNSEN, Judge

/S/
_____
JON W. THOMPSON, Judge