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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



DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0154
)
Appellee,) DEPARTMENT D
)
v.) MEMORANDUM DECISION
)
VLADIMIR B. RIVERO,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2007-008924-011 DT

The Honorable Lisa Roberts, Judge *Pro Tempore*

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Craig W. Soland, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Christopher V. Johns, Deputy Public Defender
Attorneys for Appellant

J O H N S E N, Judge

¶1 Vladimir Rivero appeals his conviction of trafficking in stolen property in the second degree, a Class 3 felony. He

argues the superior court erred by instructing the jury on the definitions of "intentionally" and "knowingly" when he could have been convicted upon proof of mere recklessness. We affirm his conviction and resulting sentence.

FACTUAL AND PROCEDURAL HISTORY

¶12 Rivero was charged with violating Arizona Revised Statutes ("A.R.S.") section 13-2307(A) (2001), which states, "A person who recklessly traffics in the property of another that has been stolen is guilty of trafficking in stolen property in the second degree."

¶13 At trial, the State requested the jury be instructed on the definitions of three mental states, intentionally, knowingly and recklessly. Rivero objected, arguing that instructing the jury on "intentionally" and "knowingly" would confuse the jury because the charge against him only required the State to prove he acted recklessly.

¶14 The superior court stated,

Well what I find is that there is a possibility that the jurors will conclude that the mental state that was proven in this case is actually intentionally or knowingly, so I am going to give the included mental state instruction and because I'm going to give that instruction, I believe there does need to be a definition of knowingly or intentionally otherwise the included mental state dash [sic] recklessly instruction will not have any meaning unless those two mental states are defined for the jurors.

¶15 The court then asked the attorneys, "Does Counsel agree that because the included mental states dash [sic] recklessly instruction is going to be given that the jurors need to have a definition of knowingly and intentionally?" The State and defense counsel both answered affirmatively. At no time did defense counsel object to the mental-state instruction that stated: "If the State is required to prove that the defendant acted recklessly, that requirement is satisfied if the State proves that the Defendant acted intentionally or knowingly."

¶16 Accordingly, the jury was instructed on the elements of the offense, "No. 1, the Defendant recklessly trafficked in the property of another and No. 2, the property had been stolen." The court also gave three instructions that included definitions of "intentionally or with intent to," "knowingly" and "recklessly." The court instructed the jury that recklessly means "with respect to a result or to a circumstance described by a statute defining an offense that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists."

¶17 Rivero was convicted and sentenced to an aggravated term of 12 years' imprisonment. He timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona

Constitution, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010) and -4033(A)(1) (2010).

DISCUSSION

¶8 We review a superior court's decision to give a jury instruction for an abuse of discretion. *State ex rel. Thomas v. Granville*, 211 Ariz. 468, 471, ¶ 8, 123 P.3d 662, 665 (2005). We consider whether the jury was properly instructed by reviewing the "jury instructions as a whole." *State v. Dann*, 220 Ariz. 351, 363, ¶ 51, 207 P.3d 604, 616 (2009). We will not reverse on this ground unless the instructions, taken as a whole, would mislead the jury. *State v. Rutledge*, 197 Ariz. 389, 393, ¶ 15, 4 P.3d 444, 448 (App. 2000).

¶9 Rivero argues the jury instructions "had the practical effect of lowering the burden of proof for the prosecution" because he could have been convicted upon a showing that he acted knowingly rather than recklessly. As noted, however, Rivero's objection in the superior court was that the instructions defining intentionally and knowingly would confuse the jury. The Arizona Supreme Court has held that "raising one objection at trial does not preserve another objection on appeal." *State v. Long*, 119 Ariz. 327, 328, 580 P.2d 1181, 1182 (1978). Rivero's counsel, moreover, ultimately agreed to the instruction.

¶10 When a defendant does not object to a jury instruction, we review for fundamental error. *State v. Garcia*, 220 Ariz. 49, 50, ¶ 2, 202 P.3d 514, 515 (App. 2008). Fundamental error review requires that the defendant "first prove error." *State v. Henderson*, 210 Ariz. 561, 568, ¶ 23, 115 P.3d 601, 608 (2005). We hold that the superior court committed no error in the jury instructions.

¶11 A person acts recklessly when he "is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists." A.R.S. § 13-105(10)(c). Intentionally and knowingly, by contrast, refer to an intent or knowledge that an outcome will occur, not the risk that it will occur. A.R.S. § 13-105(10)(a), (b). Thus, proving that one acted recklessly is less burdensome than proving that one acted knowingly or intentionally. This conclusion is supported by A.R.S. § 13-202(C), which states, "If acting recklessly suffices to establish an element, that element also is established if a person acts intentionally or knowingly." The jury was instructed in accordance with this statute, and, as noted, Rivero did not object to that instruction.

¶12 Citing *State v. Noriega*, 144 Ariz. 258, 697 P.2d 341 (App. 1985), however, Rivero argues that by instructing the jury on the definitions of knowingly and intentionally, the court

incorrectly stated the state's burden. In *Noriega*, we held a court misstated the law relating to A.R.S. § 13-2307 when it instructed the jury that "[a] person who recklessly trafficks [sic] in the property of another that the defendant knows, or *should have known* has been stolen, is guilty of trafficking in stolen property in the second degree." *Id.* at 258, 697 P.2d at 341 (emphasis in original). We held this instruction was erroneous because it allowed the jury to convict based upon an objective standard of knowledge, which "place[d] a lesser burden of proof upon the prosecution than does the recklessness test." *Id.* at 259, 697 P.2d at 342.

¶13 Rivero argues the *Noriega* court held that "knowingly" is an objective standard and therefore a lesser standard than "recklessly." Not so. In *Noriega* we addressed a recklessness instruction that used the phrase "should have known." No such instruction was given in this case. Indeed, the *Noriega* court quoted at length a law review article that explained that reducing the mental-state requirement for trafficking in stolen property from knowingly to recklessly makes it easier to prove conduct without creating an objective test that would be unfair to defendants. *Id.* (quoting G. Robert Blakey and Michael Goldsmith, *Criminal Redistribution of Stolen Property: The Need for Law Reform*, 74 Mich. L. Rev. 1511, 1559-61 (1976)). The case makes clear that it is a lesser burden to prove

recklessness than to prove that a defendant acted knowingly. See *State v. Hurley*, 197 Ariz. 400, 403, ¶ 14, 4 P.3d 455, 458 (2000) (“recklessly is a lesser-included mental state of knowingly”); see also *State v. DiGiulio*, 172 Ariz. 156, 161, 835 P.2d 488, 493 (App. 1992) (“Even though second degree trafficking requires the state to show that defendant acted recklessly, that culpable mental state was established by proof of a higher mental state, that he acted knowingly.”).

¶14 We discern no error because the jury instructions as a whole ensured the jury fully understood the law it was to apply. See *Dann*, 220 Ariz. at 363-64, ¶ 51, 207 P.3d at 616-17.

CONCLUSION

¶15 For the foregoing reasons, we affirm the conviction and resulting sentence.

/s/ _____
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/ _____
PATRICIA A. OROZCO, Presiding Judge

/s/ _____
JON W. THOMPSON, Judge