DIVISION ONE
FILED: 03/27/2012
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 10-0673
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	
PETER DAVID MAASSEN,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-173009-001-SE

The Honorable Rosa Mroz, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
And Barbara A. Bailey, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Tennie B. Martin, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Peter David Maassen ("Defendant") appeals from his convictions and sentences for shoplifting and trafficking in

stolen property. He asserts the trial court erred by not precluding evidence discovered by law enforcement during a warrantless search of Defendant's home. Defendant further argues the court did not have jurisdiction over this matter because not all of the acts underlying the convictions occurred in Maricopa County. Finally, Defendant contends a mid-trial amendment to the indictment constituted reversible error. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 During the last quarter of 2008, J.B., a retail crime investigator for Target, noticed a trend of high-end Logitech universal remote control devices missing from stores in Mesa, Scottsdale, Gilbert and Marana. Surveillance video recorded between October 13, 2008, and November 20, 2008, revealed numerous instances of Defendant entering a Target store, standing near the displayed remotes, and when alone, cutting the packaged remotes from the locked displays. The videos showed Defendant cutting open the plastic clamshell containers to remove the remotes and exiting the stores apparently empty-handed. To avoid setting off alarms when leaving the stores, Defendant walked around the security antennas located inside the

[1] We view the evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences against Defendant. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

exit doors. On one occasion, J.B. personally witnessed Defendant engaged in this furtive behavior.[2]

¶3 On November 20, 2008, Mesa police officers arrived at Defendant's home in Apache Junction to arrest him for the thefts. Defendant did not answer the door. An officer turned off the electricity to the home, and Defendant, wearing only his boxer shorts, came outside to investigate.

¶4 Defendant was handcuffed and brought inside to retrieve clothing. Sergeant Langley noticed a large number of packaged used consumer electronics. Defendant explained that he purchased the equipment from various retail outlets and refurbished the items before selling them on eBay. Further investigation revealed Defendant's eBay account where he offered 14 unpackaged Logitech remote controls for sale. Police obtained a search warrant for Defendant's home, and during the subsequent search, officers seized a number of new remotes that looked similar to the ones on Defendant's eBay account.

¶5 The state charged Defendant with one count of shoplifting (continuing criminal episode), a class five felony (Count 1), and one count of trafficking in stolen property in the first degree, a class two felony (Count 2). Under Count 1, the state alleged the value of the remotes at over $1,500.

[2] J.B. also observed Defendant hide a cut-open clamshell under a dog bed in the store's pet section.

Before trial, Defendant raised a Fourth Amendment challenge to a box of remote controls police noticed during a protective sweep they conducted at the time of Defendant's arrest. The court held an evidentiary hearing and found that the sweep was an improper search. Nevertheless, the court determined suppression of the evidence was not proper because the search warrant was properly supported by probable cause independent of information gleaned from the sweep.[3] Trial proceeded.

¶6 At trial, the court referred to the shoplifting at the Marana store and inquired of counsel "whether incidents occurring in another jurisdiction, not Maricopa County, could be used to support [Count 1], or must the whole thing occur in Maricopa County?" In response, instead of providing a definitive answer, the state moved to amend Count 1 to delete the allegation of a continuing criminal episode, thereby resulting in a charge of "straight shoplifting," a class 6 felony.[4] Over Defendant's objection, the court granted the state's motion.

¶7 The jury found Defendant guilty as charged. Defendant subsequently moved to dismiss and, for the first time, questioned the court's jurisdiction. With respect to Count 1,

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[3] According to testimony at the suppression hearing, the remotes were not seized until the search warrant was executed.

[4] The state also sought to amend the value alleged in Count 1 from over $1,500 to "at least $1,000 but less than $1,500."

Defendant argued the court "no longer had jurisdiction" once it permitted the state's amendment to the indictment because, in order to find Defendant guilty of shoplifting over $1,000, the jury necessarily included the remotes stolen from the Marana store, which is in Pima County. Regarding Count 2, Defendant asserted that insufficient evidence supported a finding that his home was within one mile of Maricopa County. The court denied the motion.

¶8 After finding Defendant had two prior felony convictions for third degree burglary and theft, the court sentenced him to mitigated concurrent terms of incarceration. Defendant appealed. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1), 13-4031 and 13-4033(A)(1).

DISCUSSION

I. MOTION TO SUPPRESS: FOURTH AMENDMENT

¶9 Before Mesa Police applied for a warrant to search Defendant's home, officers arrested him on November 20, 2008. A brief struggle ensued in the doorway as officers handcuffed Defendant. Detective Haynes and Sergeant Langley noticed two bicycles in the living room, and thinking another person may be in the home, Detective Simon searched the home for officer safety purposes. When he went into the master bedroom, Simon almost tripped over an open box containing numerous Logitech

remote controls. Based on this information gleaned from the protective sweep, the search warrant application contained the following:

> A protective sweep was conducted of the residence and your affiant's fellow detective observed an open box in the master bedroom walk in closet (which [Defendant] was just in prior to contact in the doorway) containing numerous Logitech Harmony Universal remote controls obviously new but not in their original packaging.

¶10 Defendant argues the remotes found in the closet should not have been admitted into evidence at trial because the sweep was an unlawful warrantless search. In reviewing the denial of a motion to suppress, we review only the evidence submitted at the suppression hearing, and we view those facts in the manner most favorable to upholding the trial court's ruling. *State v. Blackmore*, 186 Ariz. 630, 631, 925 P.2d 1347, 1348 (1996); *State v. Box*, 205 Ariz. 492, 493, ¶ 2, 73 P.3d 623, 624 (App. 2003) (citation omitted). A trial court's ruling on a motion to suppress should not be reversed on appeal absent clear and manifest error. *State v. Gulbrandson*, 184 Ariz. 46, 57, 906 P.2d 579, 590 (1995) (citation omitted). Although we defer to the trial court's factual determinations, we review de novo its ultimate legal conclusion. *Box*, 205 Ariz. at 495, ¶ 7, 73 P.3d at 626 (citation omitted). Similarly, we review de novo a trial court's determination as to whether probable cause supports a

search warrant affidavit. *State v. Buccini*, 167 Ariz. 550, 555-56, 810 P.2d 178, 183-84 (1991) (citations omitted).

¶11 Here, the court agreed with Defendant that the protective sweep of the home was unlawful.[5] However, we conclude that the court properly excised from the search warrant affidavit the information obtained as a result of the sweep and determined that the remaining information sufficiently established probable cause. *See Gulbrandson*, 184 Ariz. at 58, 906 P.2d at 591 ("The proper method for determining the validity of the search . . . is to excise the illegally obtained information from the affidavit and then determine whether the remaining information is sufficient to establish probable cause."). Most significantly, the information in the affidavit that provided probable cause included J.B.'s observations from the surveillance tapes of Defendant unlawfully secreting remote controls from the Target stores.[6] *State v. McCall*, 139 Ariz.

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[5] The court found the observed bicycles insufficient for officers to deduce that another person was there who "would likely do them harm." Further, the court found that the crime of theft did not "suggest a reasonable, articulable fact that the officers would be at all threatened by anyone else if there was anyone else in the house." *See Maryland v. Buie*, 494 U.S. 325, 334 (1990).

[6] According to the affidavit, the same suspect observed in the remote thefts was observed getting into a black Lexus during one of his trips to Target. The car was registered to Defendant and Defendant's Motor Vehicle Division picture matched the subject in the videos.

147, 156-57, 677 P.2d 920, 929-30 (1983) (reasonable to infer stolen items would be located at suspect's home); *see also United States v. Martinez-Garcia*, 397 F.3d 1205, 1217 (9th Cir. 2005) (holding that "[p]robable cause requires a fair probability, but not a certainty, that a search would yield evidence of crime") (citation omitted); *United States v. Chavez-Miranda*, 306 F.3d 973, 978 (9th Cir. 2002) (holding probable cause for a search warrant existed when the "affidavit clearly set forth the existence of criminal activity" and "a reasonable inference from the affidavit's facts suggested that incriminating evidence or contraband related to the crimes under investigation would likely be located there.").

¶12 Because the search warrant was supported by probable cause based on information independent of the officer's discovery of remotes during the sweep, the court did not abuse its discretion in denying Defendant's motion to suppress. *See State v. Paxton*, 186 Ariz. 580, 584, 925 P.2d 721, 725 (App. 1996) (citation omitted) ("Evidence obtained in violation of the Fourth Amendment need not be suppressed when that evidence would inevitably have been discovered by lawful means.").[7]

[7] Because the search warrant was supported by probable cause, we need not address the admissibility of the remotes based on their discovery by police after Defendant agreed to allow officers to retrieve clothing for him.

II. MOTION TO DISMISS: JURISDICTION

¶13 Defendant contends the court lacked jurisdiction over this case because some of the shoplifting incidents occurred in Marana, which is located outside Maricopa County, and insufficient evidence established that Defendant's home was located within one mile of Maricopa County. *See* A.R.S. § 13-109(B)(5) ("If an offense is committed on the boundary of two or more counties or *within one mile of such a boundary*, trial of the offense may be held in any of the counties concerned . . . .") (emphasis added)). We summarily reject this argument.

¶14 First, the superior court clearly had jurisdiction over this case. Ariz. Const. art. 6, §§ 13, 14 (superior courts "constitute a single court" that has jurisdiction over criminal cases); *State v. Marks*, 186 Ariz. 139, 142, 920 P.2d 19, 22 (App. 1996) ("[T]he superior court is not a system of jurisdictionally segregated departments but rather a 'single unified trial court of general jurisdiction.'") (quoting *Marvin Johnson, P.C. v. Myers*, 184 Ariz. 98, 102, 907 P.2d 67, 71 (1995)).

¶15 Second, to the extent Defendant's jurisdictional challenge is more properly deemed an issue relating to personal jurisdiction or venue, he has waived this issue by not timely raising it. *Marks*, 186 Ariz. at 142, 920 P.2d at 22 ("A defendant waives an objection based on lack of personal

jurisdiction . . . by failing to object 'no later than 20 days prior to trial.'") (quoting Ariz. R. Crim. P. 16.1(b)). Defendant is therefore not entitled to relief absent fundamental error, which places on Defendant the burden to establish prejudice. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005). He makes no argument as to how the locus of trial in Maricopa County prejudiced him. Consequently, Defendant fails to establish reversible error.

III. THE STATE'S MOTION TO AMEND THE INDICTMENT

¶16 Finally, Defendant argues the trial court's order allowing the state to amend Count 1 violated Arizona Rule of Criminal Procedure 13.5(b) and his Sixth Amendment right "to be informed of the nature and cause of the accusation." We review for an abuse of discretion. *State v. Johnson*, 198 Ariz. 245, 247, ¶ 4, 8 P.3d 1159, 1161 (App. 2000) (citation omitted).

¶17 A technical or formal defect in an indictment may be remedied by amendment. Ariz. R. Crim. P. 13.5(b). A defect is technical or formal if it does not change the nature of the offense charged or prejudice the defendant in any way. *State v. Jones*, 188 Ariz. 534, 544, 937 P.2d 1182, 1192 (App. 1996) (citation omitted). Defendant contends the elements of the amended charge -- shoplifting -- differed from the elements of the original charge -- shoplifting (continuing criminal episode)

-- and thereby changed the nature of the offense. In support, he cites *State v. Freeney*, 223 Ariz. 110, 219 P.3d 1039 (2009).

¶18 *Freeney* is not applicable here. The court in *Freeney* addressed the assault offenses that are set forth in different subsections of A.R.S. § 13-1203 and concluded they are distinct crimes. The court reasoned that, "[w]hen the elements of one offense materially differ from those of another -- even if the two are defined in subsections of the same statute -- they are distinct and separate crimes." *Id.* at 113, ¶ 16, 219 P.3d at 1042. The theft statute, however, does not establish different and distinct crimes of theft. Rather, theft – unlike assault – is a unitary offense in Arizona. *Compare* A.R.S. § 13-1802 *with* A.R.S. § 13-1203; *see also State v. Paredes-Solano*, 223 Ariz. 284, 290 n.6, ¶ 14, 222 P.3d 900, 906 (App. 2009) (distinguishing unitary offense of theft from subsections of assault statute, which define different crimes); *State v. Brokaw*, 134 Ariz. 532, 535, 658 P.2d 185, 188 (App. 1982) ("[Section 13-1902] defines a single crime, theft, and provides that the classification of the offense for punishment purposes is to be determined by the value of the stolen property or services.").

¶19 Here, amending Count 1 did not change the nature of the offense. The amendment merely lowered the classification of the offense by decreasing the value of the shoplifted items, and

it did away with the element regarding the frequency of alleged incidences necessary to find a "continuing criminal episode." Accordingly, the amendment did not deprive Defendant of his constitutional right to notice. The amendment was proper under Rule 13.5(b).

¶20 Moreover, Defendant has the burden to establish actual prejudice from the amended charge. *See Johnson*, 198 Ariz. at 248, 8 P.3d at 1162. His assertion that he was prejudiced because "nothing in the record . . . demonstrate[s] that [Defendant] had any other prior notice of the amended elements of the offense" is insufficient.

CONCLUSION

¶21 For the reasons discussed above, Defendant's convictions and sentences are affirmed.

/s/
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PETER B. SWANN, Presiding Judge

CONCURRING:

/s/
_____
MICHAEL J. BROWN, Judge

/s/
_____
JON W. THOMPSON, Judge