IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 06/12/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

STATE OF ARIZONA,	)	No. 1 CA-CR 12-0103
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
GEORGE DENTON WEATHERFORD,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Pima County

Cause Nos. CR20092354-001 & CR20094105-001

The Honorable Jane L. Eikleberry, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Myles A. Braccio, Assistant Attorney General
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender — Tucson
By Robb P. Holmes, Assistant Legal Defender
Attorneys for Appellant

G O U L D, Judge

¶1 George Denton Weatherford appeals his convictions and sentences for first degree burglary and theft in Pima County Superior Court Cause No. CR20094105-001 and four counts of aggravated driving under the influence, two counts of endangerment, two counts of criminal damage, one count of unlawful flight from pursuing law enforcement vehicle, and two counts of misconduct involving weapons in Pima County Superior Court Cause No. CR20092354-001. Weatherford argues that he was denied the right to a unanimous verdict on one of the endangerment counts due to a duplicitous charge. He also argues that the trial court erred by denying his motion to dismiss for violation of his speedy trial rights and by granting the State's motion to preclude third-party culpability evidence. For the reasons that follow, we affirm.

Discussion

A. Duplicitous Charge for Endangerment

¶2 The victims on the two counts of endangerment were two Tucson police officers who came into contact with Weatherford outside a bar. In speaking with the officers, Weatherford admitted to drinking too much, and a taxi was called to take him home. Shortly after Weatherford had left in the taxi, the taxi returned and the driver informed the officers that he had let Weatherford out a few blocks down the street because Weatherford stated he did not have money to pay for the taxi. Believing

Weatherford might return and attempt to drive home, the officers remained outside the bar.

¶3 A few minutes later, the officers observed Weatherford driving a truck out of the bar parking lot towards them. The truck accelerated and almost hit the patrol car in which Officer H.M. was seated. The two officers gave chase and after a brief pursuit, Weatherford spun off the roadway, stalling his truck. The officers stopped their patrol cars in front of the truck and exited with weapons drawn. Weatherford restarted his truck and headed back onto the highway, almost hitting both officers in the process. As the officers again began to give chase, they heard an explosion and saw a shower of sparks up ahead. When the officers arrived at the location, they found Weatherford's truck had struck a utility pole. Weatherford fled from the truck on foot, but was eventually located hiding in some nearby bushes.

¶4 During closing argument, the prosecutor informed the jurors they could find Weatherford guilty on the endangerment count pertaining to Officer H.M. based on Weatherford's conduct in either almost hitting the officer after restarting his truck when he spun off the roadway or his conduct in almost hitting the officer's patrol car as Weatherford exited the bar parking lot. The guilty verdict returned by the jury on this count did

not specify what conduct was found to constitute the offense of endangerment.

¶5 On appeal, Weatherford argues the State's presentation of evidence of two separate acts to support conviction on this endangerment count constituted a duplicitous charge and created the possibility of a non-unanimous verdict. Because Weatherford failed to raise this issue in the trial court, our review is limited to fundamental error. *State v. Henderson*, 210 Ariz. 561, 568, ¶ 26, 115 P.3d 601, 608 (2005). To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error caused him prejudice. *Id.* at 567, ¶ 20, 115 P.3d at 607.

¶6 A defendant has the right to a unanimous jury verdict in a criminal case. Ariz. Const. art. 2, § 23; Ariz. Rev. Stat. ("A.R.S.") section 21-102 (2002). When an indictment refers only to one criminal act but multiple alleged criminal acts are introduced to prove a charge as occurred here, one of the risks is the possibility that the jurors might not unanimously agree on the specific act committed by the defendant in finding the defendant guilty of the offense. *State v. Klokic*, 219 Ariz. 241, 244, ¶ 12, 196 P.3d 844, 847 (App. 2008). In such a circumstance, the trial court should employ remedial measures to insure the defendant receives a unanimous verdict. *Id.* at ¶ 14. "It must either require 'the [S]tate to elect the act which it

alleges constitutes the crime, or instruct the jury that they must agree unanimously on a specific act that constitutes the crime before the defendant can be found guilty.'" *Id.* (quoting *State v. Schroeder*, 167 Ariz. 47, 54, 804 P.2d 776, 783 (App. 1990) (Kleinschmidt, J., concurring)). The trial court did neither in the present case. These remedial measures are not required, however, "in those instances in which all the separate acts that the State intends to introduce into evidence are part of a single criminal transaction." *Id.* at ¶ 15.

¶7 In determining whether separate acts are part of the same transaction, we examine whether the "acts form part of one and the same transaction, and as a whole constitute but one and the same offense." *Id.* at 245, ¶ 17, 196 P.3d at 848 (quoting *State v. Counterman*, 8 Ariz. App. 526, 531, 448 P.2d 96, 101 (1968)). We also consider the defense presented by the defendant to ascertain whether different defenses were urged as to the separate acts such that the jury might have applied a defense to one act but not the other, and vice versa, thereby creating the possibility of a non-unanimous jury verdict. *Id.* at 246-48, ¶¶ 24–30, 196 P.3d at 849-51. "[I]f the defendant offers different defenses to each act or there is otherwise a reasonable basis for distinguishing between them," the acts may not be considered part of the same transaction. *Id.* at 248, ¶ 32, 196 P.3d at 851.

¶8 Weatherford's conduct in endangering Officer H.M. with his truck was part and parcel of the same transaction as the two acts occurred relatively close in time as part of Weatherford's continuing effort to prevent the officers from stopping him from driving while under the influence. In *State v. Solano*, 187 Ariz. 512, 520, 930 P.2d 1315, 1323 (App. 1996), this court held that evidence of two separate encounters during which the defendant pointed a weapon at the victims before and after a vehicle chase was part of the same transaction and therefore did not require a prosecutorial election or a jury instruction on unanimity. As in *Solano*, Weatherford's conduct in endangering Officer H.M. as he fled from the bar and again after he spun out and stalled was part of one continuous episode and constituted a single offense.

¶9 Where a defendant presents differing defenses to the separate acts, remedial measures must be employed even if the acts arise from the same criminal episode. *Klokic*, 219 Ariz. at 249, 196 P.3d at 852. Unlike in *Klokic*, where the defendant asserted different justifications for each time he pointed his handgun at the victim, the sole defense by Weatherford to the endangerment count was that he did not endanger the officer with his truck, *i.e.*, the State failed to meet its burden of proving the offense beyond a reasonable doubt. On this record, Weatherford has failed to establish error, let alone fundamental

error, by the trial court in not employing remedial measures to ensure the jury was unanimous on exactly when Weatherford endangered Officer H.M. with his truck.

¶10 Further, even if the lack of remedial measures by the trial court was error, Weatherford is unable to establish that he was prejudiced by the error. Whether a defendant can make the requisite showing of prejudice depends on the facts of his particular case. *Henderson*, 210 Ariz. at 569, ¶ 28, 115 P.3d at 609. Here, the jury found Weatherford guilty of endangerment beyond a reasonable doubt with respect to the second officer based on Weatherford's conduct in almost hitting this officer as he drove back onto the highway after spinning out and stalling his truck. Given the undisputed evidence that Weatherford drove toward and almost hit both officers on this occasion, we find that there is no reasonable possibility of the jury reaching a different result on the endangerment count in regards to Officer H.M. if the trial court had limited the endangerment count pertaining to Officer H.M. to only this act or had instructed on the requirement of unanimity.

B. Denial of Motion to Dismiss

¶11 Prior to trial, Weatherford moved to dismiss the charges based on alleged violations of his speedy trial rights under Arizona Rule of Criminal Procedure 8.3 and the United States and Arizona Constitutions. Weatherford argued that,

because he was in pretrial custody in Maricopa County on other, unrelated charges when he was indicted on the charges in the instant matter, Rule 8.3(b) required that he be tried within ninety days of his request for a speedy trial. The State opposed the motion on the grounds that the time limits for Weatherford's Rule 8 speedy trial rights were governed by the provisions of Rule 8.2, not Rule 8.3. The trial court ruled that Rule 8.3 did not apply to Weatherford's situation and denied the motion based on a finding that the Rule 8.2 time limits had not been violated.

¶12 On appeal, Weatherford does not contest the trial court's finding that there was no violation of the Rule 8.2 time limits, but argues that the trial court erred in denying his speedy trial claim under Rule 8.3(b). Claims of speedy trial violations are generally reviewed for abuse of discretion, *State v. Spreitz*, 190 Ariz. 129, 136, 945 P.2d 1260, 1267 (1997), but the question of the applicable provision of Rule 8 is an issue of law we review *de novo*. *State v. Burkett*, 179 Ariz. 109, 111, 876 P.2d 1144, 1146 (App. 1993).

¶13 We find no error in the ruling by the trial court that Rule 8.3 was inapplicable to Weatherford's situation. As its title indicates, Rule 8.3 addresses the "[r]ight to speedy trial of persons in prison within or without the state." Rule 8.3(b) applies to persons who are "imprisoned in this state," and like

Rule 8.3(a), which pertains to prisoners without the state, its time limits are inapplicable to a detainee "until he begins to serve any sentence imposed upon a conviction in the custody state." *State v. Loera*, 165 Ariz. 543, 546, 799 P.2d 884, 887 (App. 1990); *see also State ex rel. Berning v. Davis*, 191 Ariz. 189, 190, 953 P.2d 933, 934 (App. 1997) (holding that Rule 8.3 applies to "persons imprisoned for other crimes," while Rule 8.2 "sets forth the time limits for all other defendants, including those in pretrial custody"). Weatherford was not a prisoner serving a sentence on a conviction when he made his request for a speedy trial, but rather in custody in Maricopa County as a pretrial detainee. Accordingly, the trial court correctly ruled that his right to a speedy trial under Rule 8 was governed by the time limits set forth in Rule 8.2, not Rule 8.3.

¶14 Weatherford additionally contends the State violated his rights to a speedy trial under the United States and Arizona Constitutions. Both the United States and Arizona Constitutions guarantee the right to a speedy trial. U.S. Const. amend. VI; Ariz. Const. art. 2, § 24. Neither, however, requires that the trial be held within a specific period of time. *Spreitz*, 190 Ariz. at 139, 945 P.2d at 1270. Whether delay in the start of trial is sufficient to reverse a conviction is determined using the four factors articulated in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reason for the

delay; (3) whether there has been a demand for a speedy trial; and (4) whether the defendant suffered any prejudice. *Spreitz*, 190 Ariz. at 139, 945 P.2d at 1270. In weighing these factors, the most important is prejudice to defendant, while the least important is the length of the delay. *Id.* at 139–40, 945 P.2d at 1270–71. The length of delay is measured by the "interval between accusation and trial." *Doggett v. United States*, 505 U.S. 647, 651–52 (1992).

¶15 Considering these four factors, we find no violation of Weatherford's constitutional speedy trial rights. The time from the first indictment to trial was seventeen months, which is sufficient to trigger inquiry into the other *Barker* factors. *Doggett*, 505 U.S. at 652 n.1. Weatherford did make a demand for a speedy trial. Responsibility for the delay, however, can be attributed to both the State and Weatherford. A substantial portion of the pretrial delay was due to Weatherford's pending charges in Maricopa County and his counsel's need for additional time to prepare for trial, but there was also a six week delay in the proceedings occasioned by the State's failure to arrange for a writ of habeas corpus to secure Weatherford's presence in Pima County for arraignment. But most significantly, Weatherford has failed to establish any actual prejudice resulting from pretrial delay. He rests his claim of prejudice almost exclusively on the "important policy reasons" for speedy

trials on DUI charges indentified in *Hinson v. Coulter*, 150 Ariz. 306, 723 P.2d 655 (1986). As Weatherford acknowledges, however, *Hinson* has been overruled. *State v. Mendoza*, 170 Ariz. 184, 823 P.2d 51 (1992). In the absence of any showing of prejudice to his ability to present a defense, we conclude that there was no violation of Weatherford's constitutional rights to a speedy trial. *State v. Zuck*, 134 Ariz. 509, 515, 658 P.2d 162, 168 (1982).

C. Preclusion of Third-Party Culpability Evidence

¶16 Weatherford argues the trial court erred in excluding evidence he claims tended to show third-party culpability with respect to the burglary and theft charges. We review a ruling on the admissibility of third-party culpability evidence for abuse of discretion. *State v. Davis*, 205 Ariz. 174, 178, ¶ 23, 68 P.3d 127, 131 (App. 2002); *see also State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990) ("The trial court has considerable discretion in determining the relevance and admissibility of evidence, and we will not disturb its ruling absent a clear abuse of that discretion.").

¶17 The burglary and theft charges stemmed from the burglary of a residence while the owners were away. The State moved to preclude testimony from a neighbor that four or five days prior to the burglary she saw "a suspicious looking person, a scruffy Caucasian male in his twenties," knocking on doors in

the neighborhood, asking if the owners wanted him to paint house numbers on the curb. In making his offer of proof, defense counsel told the trial court this was the only time the neighbor saw this person, and "she didn't see him on the day of the [burglary]." The trial court granted the motion to preclude, ruling that the proposed testimony "only raise[d] a remotely possible ground of suspicion against another individual for this burglary," and was therefore "not sufficient evidence of third-party culpability to allow it to be admitted."

¶18 A criminal defendant has the constitutional right to present a complete defense, which includes offering evidence of third-party culpability. *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006). However, "a defendant may not, in the guise of a third-party culpability defense, simply 'throw strands of speculation on the wall and see if any of them will stick.'" *State v. Machado*, 226 Ariz. 281, 284 n.2, 246 P.3d 632, 635 n.2 (2011) (quoting *State v. Machado*, 224 Ariz. 343, 357 n.11, ¶ 33, 230 P.3d 1158, 1172 n.11 (App. 2010)). Instead, any such evidence is relevant if it "tend[s] to create a reasonable doubt as to the defendant's guilt." *State v. Gibson*, 202 Ariz. 321, 324, ¶ 16, 44 P.3d 1001, 1004 (2002). Given the total absence of any evidence connecting the man observed by the neighbor to the burglary, the proposed testimony offered by Weatherford constituted "no more than '[v]ague grounds of suspicion.'"

State v. Bigger, 227 Ariz. 196, 209, ¶ 43, 254 P.3d 1142, 1155 (App. 2011) (quoting *State v. Fulminante*, 161 Ariz. 237, 252, 778 P.2d 602, 617 (1988)). Under these circumstances, we cannot say the trial court abused its discretion in excluding the evidence. *See Bigger*, 227 Ariz. at 209, ¶ 44, 254 P.3d at 1155 (finding no abuse of discretion in excluding third-party culpability evidence where timing of incident not sufficiently connected to time of murder).

Conclusion

¶19 For the foregoing reasons, Weatherford's convictions and sentences are affirmed.

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ANDREW W. GOULD, Judge

CONCURRING:

/S/
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JOHN C. GEMMILL, Presiding Judge

/S/
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PETER B. SWANN, Judge