IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JEREMY SHANE DAVIS,
Appellant.

No. 2 CA-CR 2015-0224
Filed August 16, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20133106001
The Honorable Casey F. McGinley, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy Pignatella Cain, Assistant Attorney General, Tucson
Counsel for Appellee

Steven R. Sonenberg, Pima County Public Defender
By Michael J. Miller, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

E C K E R S T R O M, Chief Judge:

¶1 After a jury trial, Jeremy Davis was convicted of first-degree murder and sentenced to natural life in prison. He now appeals, raising multiple claims of trial error. For the following reasons, we affirm.

Factual and Procedural Background

¶2 Shortly after midnight on May 1, 2013, Davis arrived at a strip club with two friends, H.S. and R.R. The club's security camera captured images of the three men as they arrived and departed. All three men were wearing white T-shirts and black baseball caps. R.R. was wearing long pants, while H.S. and Davis were wearing shorts. Davis was wearing black sneakers with white soles,[1] and H.S. was wearing shoes that were mostly white. While at the club, Davis flirted with a dancer named L.C. She gave her cell phone number to the three men, and they left the club shortly before 2:00 a.m. H.S. and R.R. left in a white car. Davis left in a different white car and drove in a different direction than the other men.

¶3 Between 2:00 and 3:32 a.m., Davis had multiple phone calls with H.S. and R.R. Each man also made several calls to L.C. She testified that she could not remember who, specifically, she had spoken to on the phone, but that they asked her if she wanted "[t]o hang out." Later that night, L.C.'s boyfriend, R.L., answered the phone, saying, "Who is this? Why are you calling my girlfriend?" R.L., a member of the Bloods gang, called the person on the phone "Blood," which is a derogatory word to call a member of the Crips

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[1] The security camera footage only provided an image of Davis's left foot.

gang. Davis was a member of the Crips gang. R.L. told L.C. he was going to a store "to go fight these mother fuckers."

¶4 While R.L. was standing in front of the store, a white sedan with a sun roof pulled up in front of the store. A witness testified he thought the car looked like a white Impala. The shooter might have called R.L. "cuz," which is a disrespectful thing to say to a member of the Bloods gang. The front passenger got out of the car, took a few steps forward, then got back in the car. The rear passenger got out of the car, fired a gun at R.L., ran back to the car, and the car drove away. Although the footage from the store's surveillance camera showed that both the front passenger and rear passenger were wearing white T-shirts and dark shorts, the front passenger's shoes appeared to be white, and the rear passenger's shoes looked black. R.L. fell into the doorway of the store, where he died. Police received a 9-1-1 call about the incident at 3:42 a.m. There were no phone calls between Davis and either H.S. or R.R. between 3:32 a.m. and 3:57 a.m.

¶5 The detective investigating the case obtained the records for L.C.'s phone and discovered the phone calls between L.C., Davis, H.S., and R.R. She then found out that H.S.'s sister owned a white Impala. That Impala had a sun roof, and H.S.'s sister, L.S., told the detective she had loaned the car to her brother. Based on information given by L.C., the detective believed the events at the strip club were relevant to the murder. The detective compared footage from the strip club to the footage of the shooting and came to the conclusion that Davis had been the shooter.

¶6 Nearly two months after the murder, police located Davis at an apartment complex in east Tucson. After Davis was apprehended, police searched the apartment where he was found. In the apartment, police found a number of pages that appeared to have been torn from a notebook in a trash can in the kitchen.

¶7 Davis was tried, convicted, and sentenced as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1) and (2).

Sufficiency of the Evidence

¶8 Davis first claims the evidence was insufficient to convict him of first-degree murder. Our review of the sufficiency of evidence is de novo. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). We view the facts in the light most favorable to sustaining the verdict, *State v. Payne*, 233 Ariz. 484, ¶ 93, 314 P.3d 1239, 1264 (2013), and we will not reverse unless there is no substantial evidence to support the jury's verdict, *State v. Young*, 223 Ariz. 447, ¶ 12, 224 P.3d 944, 947 (App. 2010). Substantial evidence is evidence that a reasonable person could accept as sufficient to support a finding of guilt beyond a reasonable doubt. *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 913-14 (2005).

¶9 Davis first claims the evidence is insufficient to support a finding that he was even present in the car during the shooting, noting that he left the strip club in a separate vehicle. He claims there is no evidence showing that he reunited with H.S. and R.R. later that night. However, the phone records showed that the three men remained in frequent contact throughout the night. Furthermore, the phone records showed the approximate location of all three men throughout the night by revealing which cellular tower their phones had used. These records showed that Davis left the east side of Tucson and headed toward central Tucson and the store where R.L. was shot around the time of the murder and that he was in proximity to H.S. This evidence, although circumstantial, was sufficient for the jury to conclude Davis was in the car that arrived at the store. *See State v. Goudeau*, 239 Ariz. 421, ¶ 169, 372 P.3d 945, 985 (2016) ("In determining whether substantial evidence supports a conviction, we consider both direct and circumstantial evidence . . . .").

¶10 The closest question in the case was the identity of the shooter. Because the security footage was not clear enough to show distinctive facial features, the state relied on distinctions in clothing to determine which man had been the shooter. R.R. was wearing long pants, as seen in the images from the strip club. But the shooter and the front passenger were both wearing shorts, which excluded R.R. as a suspect. The key distinction between the shooter and the front passenger was shoe color. Although the shoes cannot be

clearly seen in the footage, there is a visible difference between the lighter-colored shoes worn by the front passenger and the darker-colored shoes worn by the shooter. H.S.'s shoes were lighter colored or white, whereas Davis's shoes appeared to be black with a white sole.

¶11 As Davis points out, certain physical evidence contradicted this theory of the case. The state's theory of the case put R.R. as the driver, H.S. as the front passenger, and Davis as the rear passenger and the shooter. H.S.'s DNA[2] was found on the driver's side of the vehicle, and Davis's DNA was found on the front passenger headrest. To the extent this evidence contradicted the state's evidence, that was an issue for the jury to resolve, and it did not render the evidence insufficient as a matter of law. *See State v. Gay*, 108 Ariz. 515, 517, 502 P.2d 1334, 1336 (1972) ("Conflicts in the evidence are for the jury to resolve, and after they have been resolved by a verdict we will not upset them if there is substantial evidence in support of the conviction."); *State v. Munoz*, 114 Ariz. 466, 469, 561 P.2d 1238, 1241 (App. 1976) (in determining whether substantial evidence supports conviction, appellate court does not "substitute its judgment on the facts for that of the jury"). Because we must view the evidence in the light most favorable to sustaining the conviction, *see Payne*, 233 Ariz. 484, ¶ 93, 314 P.3d at 1264, we cannot conclude the evidence presented here was insufficient as a matter of law.

Witness Testimony

¶12 Davis next challenges the admission of testimony by a police detective that Davis's shoe, as seen in the surveillance footage of the strip club, was similar to the shoes worn by the shooter, as seen in the store's surveillance video. Davis claims this testimony was improper lay-witness testimony under Rule 701, Ariz. R. Evid., because it was neither "rationally based on the detective's perception" nor "helpful to . . . determining a fact in issue." He also claims the testimony improperly gave a conclusion about the ultimate issue in the case. "Admissibility of evidence is within the

[2]Deoxyribonucleic acid.

discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *State v. King*, 180 Ariz. 268, 275, 883 P.2d 1024, 1031 (1994).

¶13 Davis argues the detective's testimony was not helpful to the jury because the jury could see for itself whether the shoes worn by the shooter were the same as the shoe he was wearing at the strip club, an objection he also made at trial. But the testimony did not serve the sole purpose of identifying Davis as the shooter. It was given in the context of the detective describing the course of her investigation and how she had come to view Davis as the chief suspect. At trial, Davis contended the detective had focused her investigation on him and had failed to properly investigate other suspects, in particular the other people in the car. This testimony explained why the detective had believed Davis was the shooter and did not fully investigate other suspects, and that explanation could be helpful to the jury.

¶14 But even assuming this testimony was erroneously admitted, the admission was harmless. In *State v. Amaya-Ruiz*, two non-expert witnesses were permitted to testify that a footprint found near the victim's body was similar to "the tread pattern of [the] defendant's tennis shoe." 166 Ariz. 152, 167-68, 800 P.2d 1260, 1275-76 (1990). Our supreme court concluded that because "[t]he jury was permitted to compare a photograph of the bloody footprint to the shoe worn by [the] defendant," any error in the admission of the testimony was "necessarily harmless." *Id.* at 168, 800 P.2d at 1276. Likewise, here, the jury had the opportunity to compare the image of Davis's shoe from the strip club to the shoes worn by the shooter, as seen in the store's security footage. Davis has not provided any basis for distinguishing his case from *Amaya-Ruiz*. We therefore conclude any error was harmless.

¶15 Davis's arguments that the shoe comparison was not within the detective's rational perception and impermissibly drew a conclusion as to the ultimate legal issue in the case were not made at trial, and, so as to these claims, he has forfeited review absent

fundamental, prejudicial error.[3] *See* Ariz. R. Evid. 103(a)(1)(B); *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005).

¶16 "The requirement that proffered opinion testimony be rationally based on the witness's perception means simply that the opinion must be one that a reasonable person normally could form based on the perceived facts." *Johnson v. United States*, 116 A.3d 1246, 1249 (D.C. 2015), *quoting Dunn v. State*, 919 N.E.2d 609, 612 (Ind. Ct. App. 2010). "[W]itnesses . . . can testify about degrees of light or darkness, sound, size, weight, and distance." Thomas A. Mauet & Warren D. Wolfson, *Trial Evidence* § 4.7 (2016). Davis claims the detective could not have concluded that the shoes worn by the shooter were Davis's because "[t]he quality of the image is simply too poor to serve as the rational basis for any conclusion." However, while the clarity of the video is far from ideal, there is a clear distinction between the shoes worn by the front-seat passenger and those worn by the back-seat passenger, as discussed above. This distinction is sufficient to say that the detective could rationally perceive that the shoes worn by the shooter as shown in the store's security footage were similar to the shoe worn by Davis.

¶17 Davis also challenges this testimony on the ground that it impermissibly went to the ultimate issue in the case and invaded the province of the jury. "An opinion is not objectionable just because it embraces an ultimate issue." Ariz. R. Evid. 704(a). An opinion that is admissible under the rules governing opinion testimony is admissible, even though it embraces the ultimate issue in the case, so long as it does not "tell a jury how to decide a case." *State v. Sosnowicz*, 229 Ariz. 90, ¶¶ 17, 25, 270 P.3d 917, 922, 924 (App. 2012). The detective's testimony that the shoes worn by the shooter were similar to that worn by Davis did go to the identity of the shooter, but it did not go so far as to invade the province of the jury. As discussed above, it met the criteria for admission under

[3] The state claims Davis has not sufficiently argued fundamental error. We disagree. Davis explained why he believes the error was fundamental and prejudicial, and he included appropriate citations of law and record. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi).

Rule 701 because it was "based on the witness's perception" and "helpful to clearly understanding the witness's testimony" as to her motivation for focusing on Davis as the primary suspect. Davis has not met his burden of demonstrating this testimony was fundamental, prejudicial error.

Journal Writings

¶18 Davis next claims the trial court erred in admitting the notebook pages found at the apartment where he was apprehended. He claims there was not sufficient authentication, the notes were not relevant, and the notes constituted "inadmissible other act evidence."

¶19 Rule 901, Ariz. R. Evid., governs authentication of evidence. Under this rule, the party seeking to admit the evidence "must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Ariz. R. Evid. 901(a). In making this determination, "[t]he trial court 'does not determine whether the evidence is authentic, but only whether evidence exists from which the jury could reasonably conclude that it is authentic.'" *State v. King*, 226 Ariz. 253, ¶ 9, 245 P.3d 938, 942 (App. 2011), *quoting State v. Lavers*, 168 Ariz. 376, 386, 814 P.2d 333, 343 (1991).

¶20 Officers found the notebook papers in question in a trash can in the kitchen of the apartment where police located Davis. On one of the papers, the phrase "I came from Tennessee back [in] 97" was written. Davis is originally from Tennessee, although the date of his arrival in Arizona was not established. Another paper read, "I be chomping up game with the homies about how to duck the phones and Marshals, because they on me."[4] During the search of the apartment, police found broken cell phones.

¶21 Davis contends the foundation is insufficient because the papers were found in an apartment rented to someone named

[4]A police detective testified this was the content of the note, although the document itself appeared to read: "I be choppin up game with the homies bout how to duck the phonies and marshalls cuz they on me."

Brian Seifert, the state presented no evidence of how long Davis had been in the apartment, and the state did not produce any evidence that the handwriting belonged to him.

¶22 In *State v. Fisher*, the defendant was the manager of an apartment complex owned by the victim. 141 Ariz. 227, 235, 686 P.2d 750, 758 (1984), *abrogated on other grounds as recognized by State v. Wilson*, 237 Ariz. 296, ¶ 12, 350 P.3d 800, 803 (2015). Police found a receipt book containing carbon copies of receipts issued to the building's tenants. *Id.* at 242, 686 P.2d at 765. Most of the receipts were marked with "MB," the initials of the victim, but several were not. *Id.* This evidence was admitted to support the claim that the defendant had killed the victim for the rent money. *Id.* The defendant challenged the admission on the basis that there was no evidence the initials had been written by the victim, but the court concluded the evidence was admissible, noting that the receipt book had been taken from a desk in the defendant's apartment and concluding that the lack of handwriting comparison "affected the weight rather than the admissibility of the evidence." *Id.*

¶23 Here, likewise, the notes were found in the apartment where Davis was located. Although the apartment in this case did not actually belong to Davis, the reference to Tennessee lent additional support to the inference that the notebook pages belonged to Davis. Accordingly, there was sufficient evidence to support a finding that the papers were written by Davis. *See* Ariz. R. Evid. 901(a). That Davis's name was not on the lease, and another person's name was, went to the weight rather than the admissibility of the evidence. *Cf. State v. Carriger*, 123 Ariz. 335, 339, 599 P.2d 788, 792 (1979) (where no witness positively identified diamond and watch as part of jewelry store's inventory, that went to weight and not admissibility).

¶24 Davis also claims the notebook pages were not relevant. "Relevant evidence is evidence that has any tendency to make the existence of any fact in dispute more or less probable." *State v. Connor*, 215 Ariz. 553, ¶ 30, 161 P.3d 596, 605 (App. 2007). Evidence showing consciousness of guilt is relevant evidence. *See State v. Kemp*, 185 Ariz. 52, 59, 912 P.2d 1281, 1288 (1996). Davis's papers

contained the reference to avoiding capture noted above, and another line stating, "They wana throw me in a cell I aint wit it."

¶25 Davis argues that these writings were not admissible because the pages were incomplete and the evidence suggested that the portions of the papers that were incriminating had been burned. Davis essentially claims that if the pages had evidentiary value, he would have destroyed them. Davis has not cited, and we cannot find, any support for the proposition that a defendant destroying part of a piece of evidence renders the remainder inadmissible.

¶26 Davis also claims the writings were not relevant because they were rap lyrics rather than admissions. "[E]vidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *State v. Tucker*, 215 Ariz. 298, ¶ 47, 160 P.3d 177, 192 (2007), *quoting* Ariz. R. Evid. 401.[5] "The threshold for relevance is a low one . . . ." *State v. Roque*, 213 Ariz. 193, ¶ 109, 141 P.3d 368, 396 (2006). If, as the state claims, the writings were admissions, they were relevant. If, as Davis argued, the writings were rap lyrics, they were not relevant. But how to characterize this evidence, and what weight to give it, were questions for the jury. *See State v. Lehr*, 201 Ariz. 509, ¶¶ 24-25, 38 P.3d 1172, 1180 (2002).

¶27 Davis further claims that the writings constituted impermissible other-act evidence under Rule 404(b), Ariz. R. Evid., and were unfairly prejudicial under Rule 403, Ariz. R. Evid. He claims that "[w]riting rap lyrics is likely to give rise to a decision based on emotion," arguing that the jury might have convicted Davis because he was the type of person who wrote rap lyrics. At the outset, we note that it was Davis, and not the state, who characterized these writings as rap lyrics. Assuming arguendo that writing rap lyrics can be considered an "other . . . act[]" for purposes of Rule 404(b), the writings were not admitted for the purpose of

[5]*Tucker* quotes the version of Rule 401 in effect before it was amended for stylistic purposes. *See* Ariz. R. Evid. 401 cmt. to 2012 amend.

showing that Davis was the type of person who wrote rap lyrics and was therefore likely to be violent, but for showing consciousness of guilt. *See* Ariz. R. Evid. 404(b) ("evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith" but such evidence is admissible for other purposes); *cf. State v. Settle*, 111 Ariz. 394, 396, 531 P.2d 151, 153 (1975) (evidence defendant threatened witness admissible to show consciousness of guilt).

¶28 Davis also argues this evidence should have been excluded under Rule 403 because the danger of unfair prejudice outweighed the probative value. Davis objected on this ground to the trial court, but the court does not appear to have explicitly addressed this contention. We agree with Davis that this evidence was not highly probative. The notes can plausibly be characterized as rap lyrics, particularly given that they are in context with a number of other writings that rhyme and appear lyrical in nature. We also agree with the state that it was not highly prejudicial. To the extent the jury might have decided Davis was a violent person because he wrote rap music, other evidence already established that Davis was a member of a street gang. Under Rule 403, the danger of unfair prejudice must "substantially outweigh[]" the probative value for the evidence to be excluded. *See State v. Davolt*, 207 Ariz. 191, ¶ 63, 84 P.3d 456, 474 (2004). Such is not the case here. Accordingly, we conclude the trial court did not abuse its discretion in admitting the notebook papers.

New Trial

¶29 Davis's final claim of error concerns the trial court's denial of his motion for new trial. At trial, when Davis asked the main police investigator in the case if she had collected DNA from R.R., she replied that she had not. Davis asked if R.R. was currently in custody, and the detective said that she was not sure. She explained that R.R. had been in custody at some point, but that she did not know whether he had been released on bond. She also stated that "when [she] knew he was in custody he was in San Diego."

¶30 Davis filed a motion for new trial pursuant to Rule 24.1(c)(5), Ariz. R. Crim. P., claiming the detective's testimony was probably false, as the detective had been involved in the investigation of R.R. for a different homicide. At the hearing on the motion, Davis's counsel argued it was "absolutely inconceivable that [the detective] didn't know that [R.R.] was still in custody." The trial court denied the motion, saying it could not conclude the detective had testified falsely. We review a trial court's decision on a motion for new trial for an abuse of discretion. *State v. Parker*, 231 Ariz. 391, ¶ 74, 296 P.3d 54, 71 (2013).

¶31 On appeal, Davis claims he "did not receive a fair trial because [the detective] lied about knowing the location of [R.R.]." But Davis has not pointed to any evidence conclusively proving the detective committed perjury. The question of whether the detective actually did know R.R.'s whereabouts came down to one of credibility. The credibility of a witness, of course, is a question for the fact-finder. *See In re Pima Cty. Juv. Action No. 63212-2*, 129 Ariz. 371, 374-75, 631 P.2d 526, 529-30 (1981). Davis has not explained how the trial court abused its discretion in making this factual determination, and we therefore find no abuse of discretion occurred.

¶32 For the first time on appeal, Davis contends that, pursuant to *Brady*[6] and *Giglio*,[7] "[t]he prosecutor should have disclosed the fact that R[.R.] was in jail for six months before trial because the defense could have used it to impeach [the detective] with the lack of thoroughness in her investigation." Because Davis did not raise this issue at trial, he has forfeited review absent fundamental, prejudicial error. *Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08. Davis has not met his burden of demonstrating such error occurred. *See id.*

¶33 Davis argues that, had he known R.R. was in custody in Pima County, he could have used the information to demonstrate

[6]*Brady v. Maryland*, 373 U.S. 83 (1963).

[7]*Giglio v. United States*, 405 U.S. 150 (1972).

that the detective's investigation was entirely inadequate. But the detective admitted she did not know where R.R. was, and she never claimed she had made any efforts to find him in this case. If the detective had claimed she attempted to locate R.R. and was unsuccessful, evidence that R.R. was in fact in custody in Pima County would significantly undermine such testimony. But the fact that R.R. would have been easy to locate does not undermine the detective's testimony that she did not know his location. Accordingly, we conclude Davis has not demonstrated this was fundamental, prejudicial error.

Disposition

¶34 For the foregoing reasons, we affirm Davis's conviction and sentence.