IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ROBERT GODOY SAGASTA,
Appellant.

No. 2 CA-CR 2015-0251
Filed December 30, 2016

Appeal from the Superior Court in Pima County
No. CR20141487001
The Honorable Kenneth Lee, Judge
The Honorable Deborah Bernini, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
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By Mariette S. Ambri, Assistant Attorney General, Tucson
Counsel for Appellee

Steven R. Sonenberg, Pima County Public Defender
By Erin K. Sutherland, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Howard and Judge Staring concurred.

E S P I N O S A, Judge:

¶1 After a jury trial, Robert Sagasta was found guilty of possession of a dangerous drug and possession of drug paraphernalia. He was sentenced as a category three, repetitive offender to mitigated, concurrent prison terms, the longer of which was six years. On appeal, he contends the trial court erred by allowing a surveillance video to be presented to the jury and that hearsay statements resulted in fundamental error prejudicing his defense. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Tucker*, 205 Ariz. 157, n.1, 68 P.3d 110, 113 n.1 (2003). In October 2013, Desert Diamond Casino custodian A.F. found a "little baggie" with "crystal stuff in it" outside the casino's entrance while policing the area. She immediately informed casino security who contacted the Tohono O'odham Police Department ("TOPD"). While waiting for TOPD officers to arrive, security personnel contacted the casino "surveillance team" to determine how the baggie got there. After a casino surveillance supervisor reviewed security video footage, it was determined that an individual, later identified as Sagasta, had dropped the baggie as he was entering the casino.

¶3 The casino provided law enforcement a copy of video footage showing Sagasta dropping the suspected drugs as he entered the casino, but did not provide footage of casino personnel finding the dropped object or the time which had elapsed between the two events. Although the surveillance supervisor had reviewed the intervening footage and concluded that no one else touched the

baggie, he acknowledged that the failure to include "all the coverage" was a "mistake." When questioned by a TOPD officer, Sagasta denied the baggie was his.

¶4 After the baggie's contents tested positive for methamphetamine, Sagasta was charged with possession of a dangerous drug and possession of drug paraphernalia. He was tried in absentia, and the video footage provided to TOPD was played for the jury. Sagasta was found guilty on both charges, and sentenced as described above. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Surveillance Footage

¶5 Before trial, Sagasta moved to preclude the surveillance video, arguing it was irrelevant and misleading because it only showed Sagasta dropping a small white object on the ground and not the time that had elapsed between his entering the casino and a similar object being discovered in the same area by casino personnel. The trial court denied the motion, but granted a *Willits* instruction regarding the missing portion of the video.[1] Sagasta renews his arguments on appeal, and raises for the first time a claim that the video "violated the rule of completeness." In reviewing the trial court's pre-trial ruling on evidentiary issues, we consider only the evidence presented at the hearing, and will defer to any factual findings made. *State v. Kjolsrud*, 239 Ariz. 319, ¶ 8, 371 P.3d 647, 650 (App. 2016). We review a ruling on the admissibility of evidence for an abuse of discretion. *State v. Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d 865, 874 (2004).

¶6 In essence, it appears Sagasta's pre-trial motion stemmed from a misunderstanding of the evidence against him. Although his motion to preclude claimed that "[n]o witness w[ould] testify that they saw a continuous feed of recording at any time that

[1]*See State v. Willits*, 96 Ariz. 184, 191, 393 P.2d 274, 279 (1964) (jury entitled to draw adverse inference against state where reasonably accessible evidence with tendency to exonerate defendant not preserved).

would demonstrate that what [A.F.] found is the same as what was dropped by Mr. Sagasta," the state responded that the surveillance supervisor had in fact reviewed all the relevant surveillance footage, and would testify "the item located by [A.F.] was the item dropped by [Sagasta]."

¶7 At the hearing on Sagasta's motion to preclude the video, the supervisor explained he had begun his review of the video from the time he "g[o]t a call from security," "back to when the item was first dropped." When asked if he had "start[ed] from when it[was] located by either security or [A.F.], where it[was] located, [and] follow[ed] it back in time from that point," the supervisor responded, "[y]es, sir." And when confronted with an allegedly inconsistent statement made during an interview with defense counsel, the supervisor said he "should have been a little more clear," but stated he "did the review of the drugs." The court then asked some clarifying questions, and the witness indicated that although he did not "recall the exact casino personnel who picked up the drugs," he did watch the video backwards from the time he received the call until he saw when the item was dropped. Sagasta nonetheless argued that "missing" video had "apparent exculpatory value," based on his claim he was not the person who dropped the drugs. The trial court rejected that argument and permitted the surveillance video to be played at trial.

¶8 On appeal, Sagasta renews his claim that the "partial video" was not relevant as "there was no evidence presented that the object that appeared at [Sagasta]'s foot as he entered the casino was the same object discovered by [A.F.]." Under Rule 401, Ariz. R. Evid., evidence is relevant if it has any tendency to make a fact of consequence more or less probable. And a trial court has considerable discretion in determining the relevance and admissibility of evidence, which we will not disturb absent a clear abuse of that discretion. *State v. Bigger*, 227 Ariz. 196, ¶ 42, 254 P.3d 1142, 1154 (App. 2011). In this case, the surveillance supervisor testified he had backtracked through the extended surveillance footage, did not see anyone tampering with the object, nor did he see anyone else walk by that specific location. On this evidence,

there was no error in the trial court's determination that the surveillance video was relevant.

¶9 Sagasta next argues the trial court erred in admitting the video because it "likely misled the jury." Although relevant evidence may be excluded "if its probative value is substantially outweighed" by a danger of misleading or confusing the jury, Ariz. R. Evid. 403, no misleading evidence was presented in this case. Sagasta asserts "the video in question has no . . . direct line of proof" linking him to the drugs. But he discounts the surveillance supervisor's testimony that he had reviewed the surveillance footage and observed a casino employee picking up the baggie twenty to thirty minutes after he saw it dropped by Sagasta. Because the supervisor's testimony provides an adequate link such that the probative value of the video substantially outweighed any danger of misleading the jury, there was no violation of Rule 403.[2]

¶10 Finally, for the first time on appeal, Sagasta contends the partial video violated the rule of completeness, causing "unfair prejudice that outweighed any probative value." A suppression argument raised for the first time on appeal is reviewed only for fundamental error. *State v. Newell*, 212 Ariz. 389, ¶ 34, 132 P.3d 833, 842 (2006). Under Rule 106, Ariz. R. Evid., if a party introduces part of a recorded statement, "an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." In support of his argument that violation of the rule requires suppression, Sagasta relies on *State v. Steinle*, 237 Ariz. 531, ¶¶ 2-3, 16, 354 P.3d 408, 409, 411 (App. 2015), which upheld the trial court's exclusion, on Rule 106 grounds, of an excerpt of a video that purportedly showed the defendant stabbing the victim. That

[2]Although the trial court did not make express findings on either the relevancy or danger of unfair prejudice issues, Sagasta does not contend the lack of findings is reversible error. *See State v. Beasley*, 205 Ariz. 334, ¶ 15, 70 P.3d 463, 466 (App. 2003) ("explicit findings are not necessary when it is clear the necessary factors were argued, considered, and balanced by the trial court as part of its ruling").

opinion, however, was vacated by our supreme court,[3] which noted that Rule 106 is a rule of inclusion, not exclusion, and does not "direct the exclusion of evidence in any circumstance." *State v. Steinle*, 239 Ariz. 415, ¶ 10, 372 P.3d 939, 942 (2016).

¶11 Moreover, although Sagasta argues in his Opening Brief that "[t]he facts presented in this case are exactly like the facts presented in *Steinle*," his Reply Brief distinguishes *Steinle*, observing that the state was responsible for the failure to preserve the video in its entirety in that case. Here, based on evidence that the casino typically retained surveillance video for seven days, Sagasta argues that law enforcement "had time to request the missing footage but failed to do so for [an] unsatisfactory reason."

¶12 Sagasta acknowledges that "Rule 106 clearly no longer *per se* warrants preclusion of a cropped video under *Steinle*," but suggests "the sanction of preclusion . . . may still be applicable" when the Rule is violated by the government's own conduct. In support, Sagasta likens his case to *United States v. Yevakpor*, a decision in which a federal district court precluded a partial video of a border stop after government agents selected only incriminating footage and deleted the rest, knowing the footage would be used in prosecuting the case. 419 F. Supp. 2d 242, 244, 246-47, 251 (N.D.N.Y. 2006). But *Yevakpor* is inapposite. The surveillance video here was recorded by the casino, not the government, and the failure to preserve the extended recording occurred through mistake, not purposeful intent or neglect. Although, as Sagasta points out, TOPD could have returned to the casino to request the extended surveillance footage, the trial court has broad discretion to determine the admissibility of evidence and any sanction for violating procedural rules. *See Bigger*, 227 Ariz. 196, ¶ 42, 254 P.3d at 1154 (trial court has considerable discretion determining relevance and admissibility of evidence); *State v. Doolittle*, 155 Ariz. 352, 357, 746 P.2d 924, 929 (App. 1987) (trial court has broad discretion in determining appropriate sanctions). We see no error, let alone fundamental error, and no abuse of the trial court's discretion in

[3]Our supreme court vacated the *Steinle* decision on which Sagasta relies after his Opening Brief had been filed.

admitting the video and giving an adverse inference instruction to the jury pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

¶13 In sum, there is no support for Sagasta's assertions that no admissible evidence linked him to the found drugs and that the evidence should have been precluded as violating the rule of completeness. Accordingly, we conclude the trial court did not abuse its discretion in admitting the surveillance video.

Sufficiency of the Evidence

¶14 Sagasta next argues that testimony of methamphetamine being found in the same location where the surveillance video showed Sagasta dropping a small white object was inadmissible hearsay, and without that testimony, the evidence was insufficient to support his conviction. Because he raises this argument for the first time on appeal, we review only for fundamental error. *See State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993). However, a conviction not supported by sufficient evidence violates due process, *see Jackson v. Virginia*, 443 U.S. 307, 316 (1979), and constitutes fundamental error, *State v. Windsor*, 224 Ariz. 103, n.2, 227 P.3d 864, 865 n.2 (App. 2010). Sufficiency-of-the-evidence challenges are considered de novo, *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011), and are reviewed only to determine whether substantial evidence supports the verdicts, *State v. Hausner*, 230 Ariz. 60, ¶ 50, 280 P.3d 604, 619 (2012). "Substantial evidence" is that which reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt. *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 913-14 (2005).

¶15 At trial, A.F. testified she had found the drugs "on the ground" "next to the trash can" by the casino entrance. Defense counsel then showed her a photograph of the casino entrance, a still image taken from the surveillance video, and asked her to circle where she had discovered the baggie. A.F. circled a spot several feet from where the surveillance video showed Sagasta dropping the small white object. She also stated that some of the details had become "maybe a little fuzzy" over the past year and a half. The lead security officer then testified as to the location of the found

baggie, and marked on the same photograph a circle near Sagasta's feet indicating where she had been told the drugs were found.

¶16 On appeal, Sagasta argues the security officer's testimony was inadmissible hearsay, and thus could not be used to support his conviction. Without that testimony, which Sagasta characterizes as "the sole proof that the baggie [A.F.] located was the same object [he] apparently dropped," Sagasta maintains the evidence is insufficient to support his conviction. The state counters that even if the testimony were hearsay, there was "ample evidence at trial on the element of possession."[4] Specifically, the state points to the testimony of the surveillance supervisor as "direct evidence of [Sagasta's] possession of the methamphetamine."[5] Sagasta replies that the state is "manipulat[ing] the evidence," and argues that the portions of the record it cites "do not actually support the [s]tate's assertions," but "merely discuss[] typical protocol in similar situations, . . . not . . . an admission that [the surveillance supervisor] saw the video from the moment the baggie was picked up."

¶17 Sagasta's contention is not supported by the record. As noted earlier, in addition to the testimony cited by the state, the surveillance supervisor testified that after he was notified about the drugs, he "pulled up a camera" showing where they were located, and reviewed the footage "back to the time . . . [he] actually s[aw the drugs] dropped." He further testified that during his review, he was

[4] The state alternatively argues that the statements were properly admitted, but because we agree there was sufficient evidence to support Sagasta's possession of the methamphetamine regardless, we do not address this argument.

[5] The "direct evidence" cited by the state includes the surveillance supervisor's affirmative response to defense counsel's clarification that "today [he] testified that [he] actually watched the object on the floor until the security people came and picked it up and someone else is the person who watched [Sagasta] walking around the casino," as well as his affirmation that "it [was] obvious from the video that no one else touched the bag."

"verifying who ha[d] any interactions with the substance, if it's tampered with, [and] if anybody removes it in any way."

¶18 Sagasta nevertheless maintains it is unclear from the record "at what point in the recorded footage he actually began his review." The surveillance supervisor explained, however, at least three different times, that he had begun viewing the footage "from the time that [he] receive[d] a call that something's been found." His testimony, viewed in the requisite light, shows that he reviewed surveillance footage of the casino entrance when contacted by security, backtracked through the footage until he could identify the suspicious item found by casino personnel, and continued to backtrack to the point at which Sagasta could be seen dropping the item on the ground. *See State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004) (we view evidence in light most favorable to sustaining convictions and resolve inferences against defendant).

¶19 No evidence appears to support Sagasta's assertion that the surveillance supervisor "merely began his review from when he saw an object on the ground in the general area where it was reported to be." Nor is there support for Sagasta's suggestion that the supervisor did not ensure the item was not tampered with until collected by casino personnel. Rather, Sagasta's claims are refuted by the supervisor's uncontroverted testimony that it was "obvious from the video that no one else touched the bag."

¶20 At best, A.F.'s statement that she found the drugs near the trash can, and the surveillance supervisor's statement that no one touched the baggie after it had been dropped, present a conflict in the testimony. Although Sagasta urges that we reject the surveillance officer's testimony and accept A.F.'s testimony regarding the location of the drugs, inconsistencies and conflicts in the evidence are resolved by the jury, not by this court. *See State v. Rivera*, 210 Ariz. 188, ¶ 20, 109 P.3d 83, 87 (2005); *State v. Money*, 110 Ariz. 18, 25, 514 P.2d 1014, 1021 (1973). Sagasta has provided no credible basis for rejecting the surveillance supervisor's testimony, which in combination with the surveillance video and other witness testimony (excluding the arguably inadmissible hearsay), provides substantial admissible evidence which amply supports the guilty verdicts.

Disposition

¶21 Because the trial court did not err in admitting the surveillance video at trial, and because substantial evidence linked Sagasta to the drugs found by casino personnel, Sagasta's convictions and sentences are affirmed.