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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RICHARD DAVID HAYNES, Appellant.	2 CA-CR 2008-0137 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200701134

Honorable Boyd T. Johnson, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
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E C K E R S T R O M, Presiding Judge.

¶1 After a jury trial appellant Richard Haynes was convicted of promoting prison contraband in the form of a deadly weapon or dangerous instrument. The trial court sentenced him to an enhanced, fourteen-year prison term, to be served consecutively to the one he is currently serving. He argues on appeal that the court erred when it found his statement to a criminal investigator to have been voluntary and that his sentence is illegal because the indictment did not specify the dangerous nature of the offense. For the following reasons, Haynes's conviction and sentence are affirmed.

¶2 We view the evidence in the light most favorable to upholding the jury's verdict. *State v. Miller*, 215 Ariz. 40, ¶ 2, 156 P.3d 1145, 1146 (App. 2007). In April 2007, a supervising officer of the Arizona Department of Corrections (ADOC) stopped Haynes as he was being escorted to the shower. After determining that Haynes's cell and towel had not been searched according to ADOC policy, the supervisor grabbed Haynes's towel and "discovered a homemade weapon rolled up inside." The weapon was an eight-inch shank composed of a plastic bag and a piece of metal that had been removed from a light fixture in one of the cells; the metal portion of the shank appeared to have been sharpened. The supervising officer testified Haynes did not appear surprised at the discovery of the weapon in the towel.

¶3 A criminal investigator for ADOC testified affirmatively that the shank found in Haynes's possession was "capable of causing death or serious bodily injury" and that it was sharp enough to pierce a person's flesh. The investigator found a piece of metal missing

from the light fixture in the cell in which Haynes had previously been housed. The metal in the shank matched the piece missing from the light fixture. The investigator also found scrape marks on the floor of Haynes's cell that were "consistent with the application of a metal device against that floor."

¶4 The investigator interviewed Haynes about possessing the shank after first reading him the *Miranda* warnings from a card.[1] At a pretrial voluntariness hearing, the investigator testified that, during the interview, he had made Haynes no promises and had offered him nothing in return for his statement. Although Haynes was in restraints during the interview, the investigator spoke to him in a conversational tone. He testified Haynes had not asked for an attorney at any time during the interview.

¶5 Haynes testified he had asked for a lawyer during the interview but continued to answer questions without one because he was promised no charges would be filed if he told the investigator where he had acquired the weapon. The court found Haynes's statements had been voluntary and allowed the investigator to testify at trial that Haynes had admitted possessing the weapon for protection.

¶6 Haynes argues his conviction should be reversed because his confession was secured by promises that rendered his statements involuntary. We will uphold the trial court's findings on the voluntariness of a confession as long as they are supported by sufficient evidence. *State v. Rhymes*, 129 Ariz. 56, 57, 628 P.2d 939, 940 (1981). Although

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

there is a presumption of involuntariness that applies to confessions, the state makes a prima facie case for admission of a confession when the officer testifies it was secured without the use of threats, coercion, or promises of immunity or a less severe penalty. *State v. Boggs*, 218 Ariz. 325, ¶ 44, 185 P.3d 111, 121 (2008); *State v. Jerousek*, 121 Ariz. 420, 424, 590 P.2d 1366, 1370 (1979). And, it is ultimately for the trial court to resolve any conflict between the testimony of a defendant and a law enforcement officer. *State v. Tapia*, 159 Ariz. 284, 288, 767 P.2d 5, 9 (1988).

¶7 Because the investigator testified that he secured Haynes's statements without promises, coercion, or threats, the state made a prima facie case that the confession was voluntary. *See, e.g.*, *Boggs*, 218 Ariz. 325, ¶ 44, 185 P.3d at 121. Haynes has presented no evidence beyond his own testimony that he was promised no charges would be filed that suggests his will was overborne by the investigator's actions. *See State v. Newell*, 212 Ariz. 389, ¶ 39, 132 P.3d 833, 843 (2006) (court determines whether under totality of circumstances defendant's will overcome). Haynes relies on the fact he had originally not been searched but then the officer found the shank, which he characterizes as "too odd to be a mere coincidence." He also emphasizes that the investigator did not obtain a written waiver of rights or record the interview, events which "would have established conclusively what transpired before [Haynes] gave a confession." Although those factors might constitute circumstantial evidence bearing on the officer's credibility, neither demonstrates that under the totality of the circumstances Haynes's confession was coerced. *See* A.R.S. § 13-3988(B)

(listing factors for trial courts to consider in determining voluntariness); *State v. Hoskins*, 199 Ariz. 127, ¶ 29, 14 P.3d 997, 1007 (2000) (statement voluntary when record revealed no coercive or deceitful police practices, no mental or physical infirmity, and no attempt to undermine "rational intellect or free will"); *State v. Hatfield*, 173 Ariz. 124, 126, 840 P.2d 300, 302 (App. 1992) (enumerating factors—such as age of accused, his level of intelligence, whether he was advised of constitutional rights, and length of detention—used to determine whether accused's will overborne). Because the trial court was entitled to credit the investigator's testimony over Haynes's conflicting claim he was promised no charges would be brought and because neither the circumstances of the original search nor the investigator's failure to record the interview themselves demonstrate Haynes's will was overborne during the interview, the court did not abuse its discretion in finding Haynes's confession voluntary.

¶8 Haynes also argues his sentence is illegal because the state failed to give him proper notice of the dangerous nature of the offense. Because he did not object to any defect in the indictment below, we review the issue solely for fundamental error and resulting prejudice.[2] *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005);

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[2]The state argues he has forfeited the issue, relying on *State v. Anderson*, 210 Ariz. 327, 111 P.3d 369 (2005), and Rule 13.5(e), Ariz. R. Crim. P., which provides: "No issue concerning a defect in the charging document shall be raised other than by a motion filed in accordance with Rule 16." However, Haynes has requested that we review for fundamental error, which this court has previously conducted when the issue involved a defect in the indictment. *See State v. Cons*, 208 Ariz. 409, ¶ 3, 94 P.3d 609, 611 (App. 2004). And, in *Anderson*, which was decided two months before *Henderson*, the court found the claim waived but only after having essentially performed a fundamental-error analysis. 210 Ariz. 327, ¶ 19, 111 P.3d at 378. Thus, we will address the issue.

State v. Cons, 208 Ariz. 409, ¶ 3, 94 P.3d 609, 611 (App. 2004). Under A.R.S. § 13-2505(A)(3), a person commits the offense of promoting prison contraband by knowingly making, obtaining, or possessing contraband while confined in a correctional facility. Section 13-2505(C) provides that, "if the contraband is a deadly weapon, dangerous instrument or explosive," the person has committed a class two felony; contraband other than drugs or marijuana renders the offense a class five felony.

¶9 Haynes relies solely on *State v. Lee*, 185 Ariz. 549, 917 P.2d 692 (1996), to support his argument that the dangerousness of a felony must be alleged in the indictment and specifically found by the jury before it may be used as a factor to enhance a sentence. But, in *Lee*, "the offense as alleged did not necessarily require proof of dangerousness, nor was there a jury finding in th[at] regard." *Id.* at 560, 917 P.2d at 703. Here, in contrast, there was a jury finding of dangerousness that established the offense as a class two felony. Haynes contends, however, that "the indictment failed to specify that the contraband was a deadly weapon or dangerous instrument," essentially because it did not refer to the subsection of the statute that differentiates between ordinary prison contraband and a deadly weapon or dangerous instrument, § 13-2505(C).

¶10 But we can find nothing in *Lee*, or any other Arizona law, that would require the state to allege the dangerousness of contraband by citing a particular statutory subsection. The indictment charging Haynes specifically identifies the contraband as a shank and states that he is being charged with a class two felony. Those parts of the indictment gave Haynes

clear notice that he had been charged with possessing dangerous contraband. *See State v. Schwartz*, 188 Ariz. 313, 319, 935 P.2d 891, 897 (App. 1996) (purpose of indictment is notice to defendant); *cf. State v. Waggoner*, 144 Ariz. 237, 239, 697 P.2d 320, 322 (1985) (reference in indictment to enhancement statute adequate notice of state's intent to seek enhanced sentence). And, even had it been error not to allege the pertinent subsection in the indictment, Haynes suffered no prejudice because he received actual notice of the allegation of dangerousness. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607-08.

¶11 Haynes's conviction and sentence are affirmed.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge