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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THE STATE OF ARIZONA, Appellee, v. DOUGLAS BANKS LESLIE, Appellant.	2 CA-CR 2010-0058 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20084769

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED AS MODIFIED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Michael J. Miller
Tucson
Attorneys for Appellant

H O W A R D, Chief Judge.

¶1 Following a jury trial, appellant Douglas Leslie was convicted of arson of an occupied structure, and misdemeanor criminal damage and endangerment involving a substantial risk of physical injury. He was sentenced to seven years in prison for arson and time served for the criminal damage and endangerment convictions. He argues on appeal that his convictions should be reversed because the trial court erred by not suppressing some incriminating statements and by refusing to give a requested jury instruction. In the alternative, he argues that his case should be remanded due to sentencing error. Because the trial court did not err or abuse its discretion, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). While his apartment was on fire, Leslie was seen leaving with a large suitcase. He later was found, with the suitcase, in a local park. He was arrested and charged with several crimes arising from the fire. His suitcase and its contents were collected by the police, but the only item available at trial was a flashlight—the rest of the contents were placed in prisoner property and, for reasons not apparent in the record, not produced at trial.

¶3 Prior to trial, Leslie moved to suppress incriminating statements made to various police officers and detectives. The statements he made to the first officer were admitted at trial, but certain other statements were suppressed. Following his conviction and sentencing, Leslie appealed.

Motion to Suppress

¶4 Leslie first argues the trial court abused its discretion by admitting statements he made to the first officer who talked with him. He contends the statements should have been suppressed because he was in custody and being interrogated without having been read the *Miranda*[1] warnings. "[W]e review a trial court's decision whether to grant a motion to suppress for an abuse of discretion." *State v. Kinney*, 225 Ariz. 550, ¶ 13, 241 P.3d 914, 919 (App. 2010). We defer to the court's findings of fact, *State v. Lopez*, 198 Ariz. 420, ¶ 7, 10 P.3d 1207, 1208 (App. 2000), but we review de novo the ultimate legal issue, *State v. Navarro*, 201 Ariz. 292, ¶ 12, 34 P.3d 971, 974 (App. 2001).

¶5 Police officers may question a person in a public place as part of a consensual encounter if "a reasonable person would understand that he or she can refuse to answer." *State v. Box*, 205 Ariz. 492, ¶ 22, 73 P.3d 623, 629 (App. 2003). A consensual encounter becomes an investigative detention when, under the totality of the circumstances, a reasonable person would not have felt free to leave. *State v. Childress*, 222 Ariz. 334, ¶ 11, 214 P.3d 422, 426 (App. 2009). But officers are not required to give the *Miranda* warnings during an investigative detention. *See Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984) ("The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that Terry stops are subject to the dictates of Miranda."); *see also State v. Spreitz*, 190 Ariz. 129, 143-44, 945

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

P.2d 1260, 1274-75 (1997) (relying in part on *Berkemer* to hold investigative traffic stop not subject to *Miranda*). An officer's request or review of identification alone does not transform a consensual encounter into an investigative detention, although the encounter might become an investigative detention under some circumstances if the officer retains the identification for a prolonged period of time or if the retention is "'accompanied by some other act compounding an impression of restraint.'" *State v. Hummons*, 225 Ariz. 254, ¶ 6, 236 P.3d 1201, 1203 (App. 2010), *quoting United States v. Tavolacci*, 895 P.2d 1423, 1425-26 (D.D.C. 1990).

¶6 Additionally, whether a person is arrested "'turns upon an evaluation of all the surrounding circumstances to determine whether a reasonable person, innocent of any crime, would reasonably believe that he was being arrested.'" *Navarro*, 201 Ariz. 292, ¶ 20, 34 P.3d at 976, *quoting State v. Winegar*, 147 Ariz. 440, 448, 711 P.2d 579, 587 (1985). Factors to determine what a reasonable person would believe include "the officer's display of authority, the extent to which the defendant's freedom was curtailed, and the degree and manner of force used." *State v. Acinelli*, 191 Ariz. 66, 69, 952 P.2d 304, 307 (App. 1997).

¶7 We therefore examine Leslie's interaction with the officer to determine whether he was in custody for purposes of the *Miranda* warnings. In reviewing a trial court's decision on a motion to suppress, we consider only the evidence presented at the suppression hearing and view the facts in the light most favorable to upholding the court's ruling. *State v. Teagle*, 217 Ariz. 17, ¶ 2, 170 P.3d 266, 269 (App. 2007). The

investigating officer drove his car onto the grass about twenty-five feet away from Leslie. He then approached Leslie, identified himself, and asked to see Leslie's identification. Leslie produced his passport, and the officer began writing down the information. The officer testified at the hearing that, as he was writing down the information, he asked Leslie "if he was okay." Leslie said "he had gone to the police department wanting to know if he was in any trouble the night prior." In response to the officer's questions, Leslie said that "there had been a fire in his apartment the night prior [and] . . . he didn't think anyone got hurt" and that no one had been inside the apartment. At that point, the officer returned to his vehicle with Leslie's identification and conducted a computer check; another officer confirmed that police were attempting to locate Leslie. The officer then returned to Leslie and asked him if he would be willing to speak to some detectives. Leslie agreed to do so, and the officer did not ask him any more questions about the fire until the detectives arrived.

¶8 Here, Leslie made all of the incriminating statements to the officer during a brief interaction. The officer asked his initial question while he was writing down the information from Leslie's passport. He asked Leslie a total of five, short questions before returning to his vehicle to research the information provided. Leslie concedes that the location of the encounter, a park, and the length of the interaction "do not strongly indicate [he was in] custody." The officer's review of Leslie's identification during a brief interaction in a public place does not constitute an investigative detention, let alone

custody for purposes of the *Miranda* warnings. *See Hummons*, 225 Ariz. 254, ¶ 6, 236 P.3d at 1203.

¶9 Leslie contends without support, however, that he was in custody because the officer drove his marked police car onto the grass near Leslie and because the officer identified himself as a police officer. Leslie cites no authority, and we find none, stating that the presence of a police car suggests a person may be in custody. Officers regularly use police cars for transportation in the course of their duties. And they frequently identify themselves as police officers without placing anyone in custody. The officer in this case had even more reason to identify himself because he suspected that Leslie was visually impaired. Because Leslie was not in custody, or even detained, the trial court did not err in denying his motion to suppress.

Denial of *Willits* Instruction

¶10 Leslie next argues the trial court erred by denying his request for a *Willits*[2] instruction because the state did not preserve the items in his suitcase. He contends that, without being able to show the items to the jury, he could not meaningfully challenge the state's assertions that the suitcase contained items valuable to him and that leaving his apartment with a suitcase full of valuables is evidence that tends to show he planned the fire. We review for an abuse of discretion a trial court's refusal to give a *Willits* instruction. *State v. Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d 75, 93 (1999).

[2]*State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

¶11 "A *Willits* instruction is appropriate when the state destroys or loses evidence potentially helpful to the defendant." *State v. Lopez*, 163 Ariz. 108, 113, 786 P.2d 959, 964 (1990). In order to merit a *Willits* instruction, a defendant must show: (1) "the state failed to preserve material evidence that was accessible and might tend to exonerate him" and (2) the failure to preserve the evidence resulted in prejudice to the defendant. *Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d at 93. And "*Willits* instructions ordinarily concern physical evidence which was used in the perpetration of the alleged crime." *State v. Broughton*, 156 Ariz. 394, 399, 752 P.2d 483, 488 (1988). "Evidence must possess exculpatory value that is apparent before it is destroyed." *State v. Davis*, 205 Ariz. 174, ¶ 37, 68 P.3d 127, 133 (App. 2002).

¶12 The officer testified he kept the flashlight with the ash on it in evidence but allowed the rest to be put in prisoner property so it could be returned to Leslie. Leslie has not shown the suitcase and its remaining contents had any apparent exculpatory value at that time.

¶13 Moreover, we conclude the trial court did not abuse its discretion because the failure to preserve the evidence did not prejudice Leslie. Although, except for the flashlight, the actual contents of the suitcase were not available at trial, a police officer testified about the suitcase's contents. He also testified Leslie had told him some of the items were valuable and he intended to sell them on the Internet. And Leslie neither objected to this characterization nor challenged it on cross-examination. Furthermore, a photograph of the open suitcase showing some of its contents was admitted into evidence

by Leslie. In light of the evidence presented at trial regarding the contents of the suitcase, we cannot conclude Leslie was prejudiced by not having the actual items to show the jury. Therefore, the court did not abuse its discretion by refusing to give a *Willits* instruction. *See Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d at 93.

Enhanced Sentence

¶14 Leslie next contends the trial court erred by enhancing his sentence when it found, pursuant to *State v. Gatliff*, 209 Ariz. 362, 102 P.3d 981 (App. 2004), that the arson was of a dangerous nature because fire is a dangerous instrument. The court in *Gatliff* held that fire is inherently dangerous in arson of an occupied structure and, therefore, a "separate jury finding of dangerousness is not required." 209 Ariz. 362, ¶¶ 16-17, 102 P.3d at 984. Nevertheless, Leslie argues that *Gatliff* was wrongly decided because the jury is required to make the finding of dangerousness and because fire is not inherently a dangerous instrument.

¶15 Although *Gatliff* was decided by Division One, both divisions of this court "constitute a single court." A.R.S. § 12-120(A). And we will not disagree with decisions by another division "'unless we are convinced that the prior decisions are based upon clearly erroneous principles, or conditions have changed so as to render these prior decisions inapplicable.'" *Scappaticci v. Sw. Sav. & Loan Ass'n*, 135 Ariz. 456, 461, 662 P.2d 131, 136 (1983), *quoting Castillo v. Indus. Comm'n*, 21 Ariz. App. 465, 471, 520 P.2d 1142, 1148 (1974). Leslie has not persuaded us the reasoning in *Gatliff* is unsound.

Consequently, the trial court did not err by enhancing Leslie's sentence due to the use of a dangerous instrument.

Restitution

¶16 Finally, Leslie contends that, because he was convicted of criminal damage of less than $250,[3] the trial court erred by awarding more than $70,000 in restitution. We review for an abuse of discretion a court's restitution order, viewing the evidence in the light most favorable to sustaining it. *State v. Lewis*, 222 Ariz. 321, ¶ 5, 214 P.3d 409, 411-12 (App. 2009).

¶17 When a person is convicted, "the court shall require the convicted person to make restitution . . . in the full amount of the economic loss as determined by the court." A.R.S. § 13-603(C). The trial court may order a hearing on restitution in order to obtain

[3]Leslie was charged with criminal damage of more than $10,000, a class four felony. At the close of the state's case, the trial court found there was not substantial evidence of the amount of damage and granted Leslie's motion for a judgment of acquittal on the amount. In doing so, the court explained the verdict form would include criminal damage generally, without a specified amount. The jury found Leslie guilty of criminal damage, and he was sentenced for a class one misdemeanor. However, criminal damage is a class one misdemeanor only if the amount of damage is between $250 and $1,000. A.R.S. § 13-1602(B)(5). If the amount of damage is $250 or less, criminal damage is a class two misdemeanor. § 13-1602(B)(6). Because the court acquitted Leslie on the amount of damage and because the jury found Leslie guilty of criminal damage without referring to an amount, Leslie was convicted of criminal damage, a class two misdemeanor. *Cf. State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992) (when there is "discrepancy between the oral pronouncement of sentence and a minute entry, a reviewing court must try to ascertain the trial court's intent by reference to the record"). Accordingly, to conform to the court's ruling and intent, the sentencing minute entry is amended to reflect that Leslie's conviction for criminal damage is a class two misdemeanor.

more evidence and may base its decision on "evidence or information introduced or submitted to the court before sentencing or any evidence previously heard by the judge during the proceedings." A.R.S. § 13-804(G), (I). Thus, if insufficient evidence has been submitted on the amount of restitution at trial, the court may review additional evidence prior to sentencing. *See State v. Fancher*, 169 Ariz. 266, 268, 818 P.2d 251, 253 (App. 1991) ("Restitution is part of the sentencing process . . . ."). Additionally, "restitution orders in excess of amounts alleged in charging documents on which convictions were based have been affirmed." *Id.* The conviction sets forth culpability and punishment, but restitution is designed to make the victim whole rather than to punish. *Id.*

¶18 Here, the trial court determined no evidence of the amount of criminal damage had been introduced and granted a judgment of acquittal on that issue. It later received additional information on the amount of economic loss to the victims in the presentence report. On the basis of the evidence admitted during the sentencing proceedings, the court ordered Leslie to pay restitution to the victims as required in § 13-603(C).

¶19 Leslie alleges that the jury's verdict indicated that it "determined that the value of the damage was $250 or less." However, neither the jury instructions, nor the verdict form, nor the jury's oral finding of guilt includes any reference to an amount. And even if the jury had made such a finding, it would not limit the amount of restitution required to make the victims whole. *See Fancher*, 169 Ariz. at 268, 818 P.2d at 253. Furthermore, the trial court did not connect the restitution amount to any one of Leslie's

convictions. And Leslie fails to meaningfully support his assertion that a jury's determination of the amount of criminal damage necessarily would cap restitution for arson. Thus, the court did not abuse its discretion by awarding restitution based on evidence admitted during the sentencing proceeding.

Conclusion

¶20 Leslie's conviction for criminal damage is modified to indicate that it is a class two misdemeanor. We otherwise affirm Leslie's convictions and sentences.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge