FILED BY CLERK
NOV 16 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. OCTAVIO MANUEL SANCHEZ LUNA, Appellant.	2 CA-CR 2009-0027 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200800525

Honorable Donna M. Beumler, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann
Tucson
Attorneys for Appellee

Ronald Zack
Tucson
Attorney for Appellant

B R A M M E R, Judge.

¶1 Octavio Manuel Sanchez Luna appeals his conviction and sentence for felony flight from a pursuing law enforcement vehicle. He argues the trial court erred in denying his request for jury instructions on duress and necessity, in finding admissible evidence that Luna was on probation at the time of the charged offense, and in submitting to the jury a special sentence-enhancement interrogatory before it had found him guilty of the charged offense. We affirm.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to sustaining Luna's conviction and sentence. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On February 27, 2008, police officer Derek Osburn saw a vehicle fail to stop at an intersection. Osburn decided to make a traffic stop and turned on his police cruiser's emergency lights. The vehicle entered and exited a parking lot without stopping, at which point Osburn turned on his cruiser's sirens. Osburn pursued the vehicle into a mobile home park at a speed in excess of forty-five miles per hour. The vehicle fishtailed as it made a turn in the park, but stopped soon thereafter. The passenger got out of the car and fled. The driver, Luna, immediately put his hands above his head and out the window. Osburn arrested Luna and took him into custody. Luna was indicted for unlawful flight from a pursuing law enforcement vehicle in violation of A.R.S. § 28-622.01. A jury found Luna guilty and also determined he had been on probation at the time of the offense. The trial court sentenced Luna to the presumptive, 2.25-year prison term. This appeal followed.

Discussion

¶3 Luna first contends the trial court erred in denying the jury instructions on duress and necessity he had requested before trial. Because these affirmative defenses made relevant Luna's motive to flee, the court found admissible evidence that Luna was on probation at the time of the charged offense. At the conclusion of the trial, the court denied Luna's requested jury instructions on duress and necessity as not supported by the evidence.

¶4 We review de novo whether requested jury instructions, individually and in their entirety, accurately state the law, and review the court's refusal to give them for an abuse of discretion. *See State v. Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d 265, 268 (2007). A party is not entitled to an instruction that is inaccurate, misleading, or confusing, in whole or in part. *State v. Mitchell*, 204 Ariz. 216, ¶ 22, 62 P.3d 616, 620 (App. 2003) ("When a requested instruction is good in part and bad in part, the court is not required to separate the good from the bad, and the refusal to give such an instruction is not an abuse of discretion."); *State v. Valenzuela*, 114 Ariz. 81, 84, 559 P.2d 201, 204 (App. 1977). A party is entitled to an instruction on any theory of the case that reasonably is supported by the evidence.[1] *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995). "The

[1]At least one court has stated broadly that "a defendant is entitled to a justification instruction if it is supported by 'the slightest evidence.'" *State v. Hussain*, 189 Ariz. 336, 337, 942 P.2d 1168, 1169 (App. 1997) (noting slightest evidence standard in context of justification for use of force), *citing State v. Dumaine*, 162 Ariz. 392, 404, 783 P.2d 1184, 1196 (1989) (applying slightest evidence standard in context of self defense). It is irrelevant here, however, whether this broad statement also was intended to apply in the

failure to give an instruction is not reversible error unless it is prejudicial to the defendant and the prejudice appears in the record." *State v. Rosas-Hernandez*, 202 Ariz. 212, ¶ 31, 42 P.3d 1177, 1185 (App. 2002).

¶5 As Luna concedes, his requested jury instruction on the burden of proof for affirmative defenses misstated A.R.S. § 13-205. Contrary to the state's contention, however, this improper instruction did not render "the totality of [Luna's] requested instructions fundamentally erroneous." *See Mitchell*, 204 Ariz. 216, ¶ 22, 62 P.3d at 620 (noting trial court can refuse specific instruction if "good in part and bad in part"); *Valenzuela*, 114 Ariz. at 84, 559 P.2d at 204 (same). The state does not dispute that Luna's requested jury instruction on duress and necessity accurately reflected A.R.S § 13-412(A) and A.R.S. § 13-417(A), respectively. We agree that the proposed instructions accurately reflect the law, but conclude the trial court did not abuse its discretion by refusing to give these instructions because they were not supported by the evidence.

¶6 The duress defense provides that a person is justified in acting in a manner that would otherwise constitute an offense "if a reasonable person would believe he was compelled to [act]" because of "the threat or use of immediate physical force against his person . . . which . . . could result in serious physical injury." § 13-412(A). The necessity defense similarly provides that criminal conduct is justified "if a reasonable

---

context of a duress or necessity defense. Luna presented no evidence to support his requested instructions.

person was compelled to [act] . . . and the person had no reasonable alternative to avoid imminent public or private injury greater than the injury that might reasonably result from the person's own conduct." § 13-417(A).

¶7 Luna contends the following facts reasonably support the inference he had acted under duress or out of necessity: (1) Luna initially appeared as if he would stop when he pulled into the parking lot; (2) he only came to a stop when the passenger fled; (3) after the passenger fled, Luna cooperated with police; and (4) Luna told Osburn that his passenger had threatened him to not stop. These facts do not support a reasonable inference that Luna had acted while under duress or out of necessity.[2] The only weapon the evidence suggests possibly could have been involved was the vehicle itself, which Luna asserts the passenger could have used to cause an accident. He makes this claim despite that he had been the one driving and the passenger had made no threat or effort to cause an accident. Indeed, there was no evidence from which the jury could infer the passenger had threatened to use force of any kind. *See* § 13-412(A). Nor was there evidence of the possibility of imminent public or private injury. *See* § 13-417(A). The trial court did not abuse its discretion in refusing Luna's requested instructions on the basis they were not supported by the evidence.

[2]Our conclusion is reinforced by Osburn's trial testimony about Luna's other statements to him. Osburn testified that Luna had told him his passenger simply had warned Luna, "don't stop." Luna also told Osburn, however, that the passenger had not threatened him with a gun, knife, or any other weapon.

¶8 Luna next contends the trial court erred in finding admissible evidence that Luna was on probation for a prior felony conviction at the time of the charged offense. Before trial, Luna had argued for the admission of his prior statements to Osburn that Luna's passenger had threatened him to not stop and that is why he had fled. The court found the statements admissible, but cautioned Luna that such statements would make his motive to flee relevant under Rule 404(b), Ariz. R. Evid., including the fact he was then on probation. Luna objected to admission of his probationary status as prejudicial and excludable under Rule 403, Ariz. R. Evid. The court agreed evidence of Luna's probationary status was prejudicial, but ultimately ruled it would be admissible if Luna were to present evidence of his statements to Osburn that the passenger had threatened him, which Luna did. After Luna elicited his prior statements from Osburn, the state called Luna's probation officer who testified about Luna's prior felony conviction and that Luna was on intensive probation supervision at the time Osburn stopped him. Luna now complains the court erred in permitting the probation officer to testify. Simply put, the gravamen of Luna's grievance is that the court permitted him to present a weak defense.

¶9 Initially, we must determine the standard by which we review the issue Luna raises here. The state argues, and Luna concedes, that because he failed to object to the probation officer's testimony, he has not preserved his argument on appeal and we must review his claim only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). However, based on Rule 403, Luna

had objected before trial to the admission of evidence of his probationary status. In order to preserve an issue on appeal, a defendant must make a "specific and timely objection at trial," *State v. Hamilton*, 177 Ariz. 403, 408, 868 P.2d 986, 991 (App. 1993), sufficient to permit the trial court to consider the issues and render an informed ruling. *See State v. Paris-Sheldon*, 214 Ariz. 500, n.7, 154 P.3d 1046, 1055 n.7 (App. 2007). Luna's pretrial objection was specific and timely, and the trial court thoroughly considered the issue, even cautioning Luna from "open[ing] the door to . . . what is probably very prejudicial evidence that he's, in fact, on felony probation." Accordingly, we review this issue under an abuse of discretion standard, *see State v. Connor*, 215 Ariz. 553, ¶ 32, 161 P.3d 596, 606 (App. 2007), and apply harmless-error analysis. *See State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). Error is harmless "if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict." *Id*. It is the state's burden to show that error is harmless. *Id.*

¶10 The trial court did not abuse its discretion in finding admissible evidence of Luna's probationary status. The admissibility of other-act evidence under Rule 404(b) is governed by four provisions of the Arizona Rules of Evidence:

> (1) The evidence must be admitted for a proper purpose under Rule 404(b); (2) the evidence must be relevant under Rule 402; (3) the trial court may exclude evidence if its probative value is substantially outweighed by the potential for unfair prejudice under Rule 403; and (4) the court must give an appropriate limiting instruction if requested under Rule 105.

State v. Lee, 189 Ariz. 590, 599, 944 P.2d 1204, 1213 (1997).

¶11 Evidence of motive is a proper purpose for admitting evidence under Rule 404(b). All relevant evidence is admissible, unless otherwise provided, and evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence" more or less probable. Ariz. R. Evid. 401, 402. Relevant evidence is not unduly prejudicial, even if it is harmful, unless it "'has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror.'" *Lee*, 189 Ariz. at 599-600, 944 P.2d at 1213-14, *quoting State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997); *see also* Ariz. R. Evid. 403.

¶12 Luna's probationary status was highly probative of his motive to flee from Osburn, admissible under Rules 401, 402, and 404(b). The evidence was not excludable under Rule 403 because, even though harmful, its value was not substantially outweighed by the danger of unfair prejudice. As the trial court explained, Luna's decision to present evidence supporting his duress and necessity defenses opened the door to admission of this evidence of motive. Although Luna argues the court caused the evidence to be unduly prejudicial when it erroneously denied his requested jury instructions, his failure thereafter to present sufficient evidence to entitle him to those instructions was his strategic error, not attributable to the court.

¶13 Luna additionally argues the trial court erred by not instructing the jury that a prior felony conviction or probationary status is not an indication of guilt, despite his failure to request such an instruction be given below. Similarly, he also complains the court erred when it failed to instruct the jury to consider the probation officer's testimony

only with regard to sentencing. He so argues, notwithstanding his failure to request such instructions and that the jury could consider his probationary status as evidence of his motivation to flee. Luna's failure to seek an instruction on the limited use of a prior conviction or probationary status waives any right to the instruction, and the trial court's failure sua sponte to so instruct the jury does not constitute fundamental error. *State v. Taylor*, 127 Ariz. 527, 529-31, 622 P.2d 474, 476-78 (1980).

¶14 Luna finally contends the trial court violated Rule 19.1, Ariz. R. Crim. P., when it conflated the guilt and sentencing phases of trial and gave the jury what he asserts is a "highly suggestive" special interrogatory on sentence enhancement. Before trial, the state alleged Luna had been on probation at the time of the charged offense, a non-capital sentencing allegation required to be found by the jury. *See* A.R.S. § 13-708(C);[3] *Blakely v. Washington*, 542 U.S. 296, 301-02 (2004); *State v. Molina*, 211 Ariz. 130, ¶ 19, 118 P.3d 1094, 1099 (App. 2005). Because the jury properly had heard evidence of Luna's probationary status during the course of the trial, the court understandably conflated the guilt and sentencing phases and offered the jury a special interrogatory, inviting it to determine whether Luna was on probation at the time of the charged offense. Luna does not dispute that he did not object to the conflation of the two

[3]Significant portions of the Arizona criminal sentencing code have been renumbered, effective "from and after December 31, 2008." *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For ease of reference and because the renumbering included no substantive changes, *see* 2008 Ariz. Sess. Laws, ch. 301, § 119, we refer in this decision to the current section numbers rather than those in effect at the time of Luna's offense.

phases of the trial, nor did he object to the court's special interrogatory. Accordingly, we review only for fundamental error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Id*. ¶ 19, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

¶15 Rule 19.1(b) prescribes the procedures applicable when the state has alleged a prior felony conviction for sentence-enhancing purposes or, in a non-capital case, sentencing factors that are not elements of the charged offense and must be found by the jury:

> (1) The trial shall proceed initially as though the sentencing allegations were not alleged. When the indictment, information or complaint is read all reference to prior offenses or sentencing allegations shall be omitted. During the trial of the case no instructions shall be given, reference made, nor evidence received concerning the non-capital sentencing allegations required to be found by the jury of the prior offenses, except as permitted by the rules of evidence.
>
> (2) If the verdict is guilty, the issue of non-capital sentencing allegations required to be found by the jury shall then be tried, unless the defendant has admitted to the allegation. The trial court shall determine the allegation of prior conviction.

¶16 At the outset, we note the trial court did not err under Rule 19.1(b) by permitting during the guilt phase of Luna's trial reference to his probationary status because the court found such reference was permitted by the rules of evidence in a non-sentence enhancement context. *See* Ariz. R. Crim. P. 19.1(b)(1). However, Rule 19.1(b)(2) implicitly seems to require trial bifurcation, even when reference properly has been made to or evidence correctly has been received by the jury on a sentencing allegation because it permits the jury to determine non-capital sentencing allegations only if and after the defendant is found guilty. Despite this implicit construction, we are also guided by the principle that "[t]he purpose of the rules of criminal procedure is to protect fundamental rights of the individual and to promote simplicity in procedure and the elimination of delay and unnecessary expense." *State ex rel. McDougall v. Mun. Court*, 160 Ariz. 324, 326, 772 P.2d 1177, 1179 (1989); *see also* Ariz. R. Crim. P. 1.2. In addition, Rule 19.1 is designed "to prevent the jury from being swayed by knowledge of past convictions when deciding the defendant's guilt or innocence of the present charge." *State ex rel. Collins v. Superior Court*, 161 Ariz. 392, 394, 778 P.2d 1288, 1290 (App. 1989). But, Rule 19.1(b) does not require bifurcation when a prior conviction or sentencing allegation is an element of the charged offense because "evidence of the underlying crime or specified conduct cannot be precluded as irrelevant or unfairly prejudicial." *State v. Geschwind*, 136 Ariz. 360, 363, 666 P.2d 460, 463 (1983). Analogously, Rule 19.1 ought not require bifurcation when the jury permissibly has heard evidence of a non-capital sentencing allegation because bifurcation will not eliminate any

sway the evidence had on the jury and the allegation cannot be characterized as irrelevant or unfairly prejudicial. *See* Ariz. R. Crim. P. 19.1(b); *Geschwind*, 136 Ariz. at 363, 666 P.2d at 463; *Collins*, 161 Ariz. at 394, 778 P.2d at 1290.

¶17 We need not decide this issue, however, because we conclude that even if the trial court were required to bifurcate the guilt and sentencing trial phases, Luna has failed to demonstrate prejudice. Luna did not dispute at trial that he had fled from a pursuing law enforcement vehicle. His sole defenses were that he had fled under duress and necessity, defenses for which he failed to present sufficient evidence to warrant jury instructions. Reference to his prior felony conviction and probationary status were permitted by the rules of evidence, and were in fact invited by Luna's trial strategy. In short, there was overwhelming evidence establishing Luna's guilt and any sway the prior conviction or probationary status had on the jury was plainly negligible. *See Collins*, 161 Ariz. at 394, 778 P.2d at 1290; *see also State v. Gallegos*, 178 Ariz. 1, 11, 870 P.2d 1097, 1107 (1994) (no prejudice when "[o]verwhelming evidence in the record" of defendant's guilt).

¶18 Similarly, the special interrogatory the court provided was not so flawed as to constitute fundamental error. The interrogatory asked the jury to check a blank space indicating whether Luna "was" or "was **NOT** on probation at the time of the commission of th[e] offense." It did not specify that the jury was to decide this issue only if it found Luna guilty of the underlying offense. *See* Ariz. R. Crim. P. 19.1(b) ("[i]f the verdict is guilty" jury shall "then" determine non-capital sentencing allegation). Although Luna

asserts the interrogatory thus implicitly assumed he was guilty of the charged offense, the court had instructed the jury that it must "start with the presumption that the defendant is innocent." We presume jurors follow the instructions they are given. *State v. Dunlap*, 187 Ariz. 441, 461, 930 P.2d 518, 538 (App. 1996). Thus, although the interrogatory should have made clear that the jury only need answer it if the jury found Luna guilty, this error did not deny Luna a fair trial or take away a right essential to his defense and did not constitute fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. Moreover, as we discussed above, the evidence of Luna's guilt was overwhelming. *See Gallegos*, 178 Ariz. at 11, 870 P.2d at 1107; *cf. Collins*, 161 Ariz. at 394, 778 P.2d at 1290.

Disposition

¶19 For the foregoing reasons, we affirm Luna's conviction and sentence.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge