IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

RONNY BRENT YELLOWHORSE, *Appellant*.

No. 1 CA-CR 12-0377

FILED 11-26-2013

Appeal from the Superior Court in Coconino County
No. S0300CR201100479
The Honorable Joseph J. Lodge, Judge (Retired)

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Myles A. Braccio

Counsel for Appellee

White Law Offices, Flagstaff
By Wendy F. White

Counsel for Appellant

MEMORANDUM DECISION

Judge Margaret H. Downie delivered the decision of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge Jon W. Thompson joined.

Downie, Judge:

¶1 Ronny Brent Yellowhorse appeals his convictions and sentences for possession of dangerous drugs for sale, misconduct involving weapons, criminal littering, and three counts of possession of drug paraphernalia. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and -4033(A).

FACTS AND PROCEDURAL HISTORY

¶2 The criminal charges at issue arose from an investigation into suspected drug sales at two Flagstaff motel rooms occupied by Yellowhorse. Police officers ultimately arrested Yellowhorse on criminal littering charges, and in searching his pockets, found a half-ounce of methamphetamine, a scale containing methamphetamine residue, and a drug sales ledger. During a search of the second motel room rented by Yellowhorse, officers found baggies containing methamphetamine residue, a methamphetamine pipe, and a shotgun. In recorded jail telephone calls following his arrest, Yellowhorse acknowledged that he sold drugs to support himself and his family and stated that he knew the shotgun would get him in trouble.

DISCUSSION

I. Admission of Hearsay

¶3 Yellowhorse argues that the trial court abused its discretion and violated his rights under the Confrontation Clause of the Sixth Amendment by admitting an out-of-court statement made by an unavailable witness to the effect that he had purchased methamphetamine from Yellowhorse. Officers stopped that individual after he left Yellowhorse's second motel room and discovered methamphetamine in his possession. When an officer inquired where he had obtained the drug, the man responded that he had purchased it at the

motel "from a male named Ronny for $20," though he later changed the location of the sale and the name of the seller to "Rodney."

¶4 The trial court found that the declarant was an unavailable witness based on the State's avowal that, if called, he would assert his Fifth Amendment right against self-incrimination. The court further found that the statement was "not hearsay," apparently because it believed the statement was one against interest under Rule 804(b)(3), Arizona Rules of Evidence ("Rule").

¶5 The State concedes, and we agree, that the statement was testimonial hearsay; thus, its admission violated Yellowhorse's rights under the Confrontation Clause. *See Crawford v. Washington*, 541 U.S. 36, 68 (2004). We assume for the sake of argument that the court also erred in admitting this statement over defendant's hearsay objection.[1] However, neither the constitutional violation nor the evidentiary error requires reversal of Yellowhorse's convictions.

¶6 Yellowhorse objected below on the grounds that the statement was hearsay and that he would be unable to cross-examine the declarant. His objections were sufficient to preserve not only the claim of evidentiary error, but also the alleged violation of his confrontation rights. To demonstrate that the error in admitting the statement was harmless, the state accordingly must establish beyond a reasonable doubt that the statement's admission "did not contribute to or affect the verdict or sentence." *State v. Henderson,* 210 Ariz. 561, 567, ¶ 18, 115 P.3d 601, 607 (2005) .

¶7 The evidence that Yellowhorse possessed methamphetamine for sale was so overwhelming that we can say, beyond a reasonable doubt, that the challenged statement did not affect the verdict. Yellowhorse did not testify at trial, but his defense was that the

---

[1] We are unpersuaded by the State's cursory argument that the statement was made "while or immediately after" the declarant perceived the event, such that it qualified as a "present sense impression." Nor was the portion of the statement that the drugs were purchased "from a male named Ronny" admissible as a statement against interest. "Rule 804(b)(3) `does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory.'" *State v. Nieto*, 186 Ariz. 449, 455, 924 P.2d 453, 459 (App. 1996). The portion of the statement that the methamphetamine was purchased "from a male named Ronny" was not self-inculpatory.

State had failed to prove he intended to sell the methamphetamine he admittedly possessed. At the time of his arrest, though, Yellowhorse not only possessed an amount of methamphetamine far in excess of the amount ordinarily obtained for personal use, but he also possessed a scale with methamphetamine residue on it and a drug sales ledger. And during taped telephone calls from the jail, Yellowhorse himself bragged about being a drug dealer in Flagstaff and volunteered details consistent with the information contained in the sales ledger. On this record, admission of the declarant's statement that he purchased methamphetamine "from a male named Ronny" did not affect the guilty verdict regarding possession of methamphetamine for sale.

II. **Refusal to Allow Search**

¶8 Yellowhorse also contends the trial court erred by admitting testimony that he refused consent to search his person and the first motel room and by permitting the prosecutor to reference his refusals in her opening statement and closing argument. Because Yellowhorse failed to timely object to the prosecutor's arguments or to the testimony, he bears the burden of proving that the court not only erred, but that the error was fundamental and prejudicial. *See Henderson*, 210 Ariz. at 568, ¶ 22, 115 P.3d at 608.

¶9 A court errs by permitting the State to introduce, as evidence of guilt, a defendant's invocation of his Fourth Amendment rights, and then to argue that the defendant invoked those rights because he knew police officers would find contraband. *State v. Stevens*, 228 Ariz. 411, 417, ¶ 16, 267 P.3d 1203, 1209 (App. 2012); *see also State v. Palenkas*, 188 Ariz. 201, 211-12, 933 P.2d 1269, 1279-80 (App. 1996). Yellowhorse concedes that the prosecutor here did not explicitly argue that his invocation of Fourth Amendment rights demonstrated his guilt. In closing argument, the prosecutor made one passing reference to Yellowhorse's refusal to permit a search, after repeatedly noting in her opening statement that it was Yellowhorse's right to refuse. Yellowhorse argues, though, that the jury could draw an improper inference of guilt, citing *United States v. Prescott*, 581 F.2d 1343, 1352 (9th Cir. 1978) ("[W]hether the argument is made or not, the desired inference may be well drawn by the jury. . . . It is . . . why the evidence is inadmissible in the case of a refusal to let the officer search."). But even assuming *arguendo* that the court erred, Yellowhorse has failed to meet his burden of establishing that the error was either fundamental or prejudicial.

¶10 Yellowhorse's possession of a half-ounce of methamphetamine and a drug scale, which formed the basis for two of the six counts, was never in dispute. In fact, after the officer arrested him, Yellowhorse commented, "[D]id you really think I was going to hand over a half-ounce of meth to you guys?" Yellowhorse was not asked, and thus did not refuse, consent to search the second motel room where the pipe, shotgun, and baggies with residue giving rise to three of the counts were found; police obtained a search warrant for that room. On this record, we cannot conclude that evidence regarding the invocation of Fourth Amendment rights deprived Yellowhorse of a fair trial or that the verdict was affected by the challenged testimony and argument.

CONCLUSION

¶11 For the foregoing reasons, we affirm Yellowhorse's convictions and sentences.

Ruth A. Willingham · Clerk of the Court
FILED: mjt