IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

THOMAS LARRY MCLEAN, *Appellant*.

No. 1 CA-CR 12-0717
FILED 12-17-2013

Appeal from the Superior Court in Maricopa County
No. CR2011-147566-003
The Honorable Cynthia Bailey, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Terry M. Crist

Counsel for Appellee

Maricopa County Legal Advocate's Office, Phoenix
By Kerri L. Chamberlin

Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Maurice Portley delivered the decision of the Court, in which Judge John C. Gemmill and Judge Kent E. Cattani joined.

P O R T L E Y, Judge:

¶1 Thomas Larry McLean appeals his conviction and sentence for possession for sale of narcotic drugs. For the following reasons, we affirm.

FACTS[1] AND PROCEDURAL HISTORY

¶2 On the morning of September 13, 2011, Phoenix police observed McLean engaging in the sale of illegal drugs. As part of a two-man operation, McLean collected money from buyers and then directed the buyers to collect the drugs from his partner. McLean and his partner were subsequently arrested, indicted as codefendants and were tried together.

¶3 At trial, Officer H. testified that he had observed McLean selling drugs. The jury subsequently found McLean guilty of one count of possession for sale of narcotic drugs. He was sentenced to the presumptive term of 15.75 years in prison and given credit for 422 days of presentence incarceration.

DISCUSSION

¶4 McLean argues that the trial court erred by denying his two requests for a mistrial after inadmissible evidence was admitted. On appeal, we review a motion for mistrial based on evidentiary issues for an abuse of discretion. *State v. Bible*, 175 Ariz. 549, 598, 858 P.2d 1152, 1201 (1993). An abuse of discretion exists if a decision is "manifestly unreasonable, or exercised on untenable grounds or for untenable

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[1] On appeal, we view "the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998).

reasons." *State v. Sandoval*, 175 Ariz. 343, 347, 857 P.2d 395, 399 (App. 1993). We are deferential to the trial court because it is in "the best position to evaluate 'the atmosphere of the trial, the manner in which the objectionable statement was made, and the possible effect it had on the jury and the trial.'" *Bible*, 175 Ariz. at 598, 858 P.2d at 1201 (quoting *State v. Koch*, 138 Ariz. 99, 101, 673 P.2d 297, 299 (1983)). Furthermore, absent a reasonable probability that the verdict would have been different, we will not reverse a conviction based on the admission of erroneous evidence. *State v. Hoskins*, 199 Ariz. 127, 142-43, ¶ 57, 14 P.3d 997, 1012-13 (2000) (supplemented by 204 Ariz. 572, 65 P.3d 953 (2003)).

I. **Prior Bad Act**

¶5 McLean argues that his first motion for mistrial should have been granted because Officer H. testified that McLean was a known drug dealer, which was an inadmissible prior bad act. Evidence of a defendant's prior bad acts or other crimes is inadmissible to demonstrate the defendant's bad character or that his or her actions were in conformity with that character. Ariz. R. Evid. 404(b); *State v. Valles*, 162 Ariz. 1, 4, 780 P.2d 1049, 1052 (1989).

¶6 Here, before trial, the court ruled in limine that any testimony about whether the police previously suspected McLean of illegally dealing drugs would be precluded, but it would allow testimony that the police recognized McLean from the area. At trial, the following exchange occurred between the prosecutor and Officer H:

> Q. Okay. What did you do when you reached that area?
>
> A. We — I was driving, and I happened to see some — what looked to me like some illegal drug activity going on in the alley, just south of Jefferson on 11th Avenue.
>
> Q. And why do you say that?
>
> A. I saw a subject that I recognized from the week before, who I was watching. And the person that I recognized, I suspected that he was selling illegal drugs.

¶7 McLean promptly moved for a mistrial. After excusing the jury and then considering arguments from both sides, the court ruled that Officer H.'s comment did not violate the previous ruling. The court found that the officer's answer referred separately to the fact: (1) that he recognized McLean from the previous week; and (2) that he currently suspected McLean of selling illegal drugs. There was nothing in the testimony just before the objection that indicated to the jury that the police suspected McLean had been selling drugs in the area or that he was a known drug dealer. Consequently, the trial court did not abuse its discretion by denying the motion for mistrial.

II. **Confrontation Clause**

¶8 McLean next argues that his second motion for a mistrial should have been granted because Officer H. provided testimony about the codefendant's admission in violation of McLean's Sixth Amendment right to confront a witness against him. Specifically, McLean contends that the officer's testimony "bootstrapped [McLean's] alleged criminal conduct to the co-defendant's inculpatory statements."

¶9 The Confrontation Clause of the U.S. Constitution guarantees a criminal defendant the right to confront a witness against him. U.S. Const. amend. VI; *see Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (stating that the Confrontation Clause is extended to the states by the Fourteenth Amendment). The general rule is that "where two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand. *Richardson*, 481 U.S. at 206. A codefendant's confession may be introduced in a joint trial, however, if the confession does not facially incriminate the other defendant, but only incriminates when connected to other evidence admitted at trial. *See id.*

¶10 Here, Officer H. testified to the following on direct examination regarding his interaction with the codefendant:

> Q: And so did you ask [the codefendant] some questions?
>
> A: Yes, I did.
>
> Q: What types of questions did you ask him?

A: *I asked him questions regarding the crack cocaine that was recovered. I asked him questions regarding his involvement with Mr. McLean.*

Q: With respect to what you had observed that day, did his answers correlate with what you had observed?

A: Yes.

Q: Did you ask him if he was selling crack cocaine?

A: Yes, I did.

Q: How did he respond?

A: He responded, "Yeah."

(Emphasis added.) McLean moved for a mistrial because he was mentioned in relation to the codefendant's illegal activity. The court denied the motion, acknowledging that Officer H. was "walking a fine line," but he had not actually testified as to McLean's actions.

¶11 McLean's Sixth Amendment right to confrontation of a witness was not violated. The testimony given before the objection involved the officer's conversation with the codefendant and the codefendant's involvement in drug sales. There was not testimony that the codefendant stated that McLean was involved in drug sales. Instead, the officer testified that that the codefendant admitted to selling drugs, but the officer never stated that the codefendant said that McLean was involved in the drug sales.

¶12 Furthermore, and to ensure that the testimony was properly used, the court gave the "mere presence" instruction. The instruction stated that "[g]uilt cannot be established by the defendant's mere presence at a crime scene, mere association with another person at a crime scene or mere knowledge that a crime is being committed." The instruction reminded the jurors that the State needed to prove its case against McLean beyond a reasonable doubt based on evidence produced at trial and not mere association or innuendo. *See State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006) ("We presume that the jurors followed the court's instructions."). As a result, and given the other evidence produced at

trial, the trial court did not abuse its discretion in denying McLean's motion for mistrial.

CONCLUSION

¶13 For the foregoing reasons, we affirm.

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