IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JAMES TODD FITCH, III, *Appellant*.

No. 1 CA-CR 15-0262
FILED 5-24-2016

Appeal from the Superior Court in Maricopa County
No. CR2012-164098-001
The Honorable Dawn M. Bergin, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Alice Jones
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Christopher V. Johns
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Jon W. Thompson delivered the decision of the Court, in which Judge Maurice Portley and Judge Patricia K. Norris joined.

T H O M P S O N, Judge:

¶1 James Todd Fitch, III, appeals his convictions for trafficking in stolen property in the second degree and burglary in the second degree. Fitch argues the evidence was insufficient to support his burglary conviction and that the prosecutor engaged in misconduct during closing argument. He further argues the trial court erred when it failed to sanitize a prior felony conviction, when it determined the existence of that conviction itself, and when it denied Fitch's motion to sever. For the reasons that follow, we affirm Fitch's convictions.

I. Background

¶2 Fitch burglarized a home and sold some of the stolen property the next day. We address the evidence in more detail below. A jury found Fitch guilty as charged and the trial court sentenced him to two concurrent terms of 6.5 years' imprisonment. Fitch now appeals. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2003), 13-4031 (2010) and 13-4033 (2010).

II. Sufficiency of the Evidence of Burglary

¶3 Fitch first argues the evidence was insufficient to support his conviction for burglary in the second degree. "A person commits burglary in the second degree by entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or any felony therein." A.R.S. § 13-1507(A) (2012). Fitch argues the evidence was insufficient because no forensic evidence connected him to the burglary, no witness identified him as the burglar and descriptions of the vehicle parked outside the residence during the burglary were inconsistent.

¶4 "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (citation omitted). "To set aside a jury verdict for insufficient

evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶5 "We construe 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) (citation omitted). In our review of the record, we resolve any conflict in the evidence in favor of sustaining the verdict. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). We do not weigh the evidence, however. That is the function of the jury. *See id*.

¶6 The ten-year-old son (the son) of the burglarized family walked home from school at 3:00 p.m. on the day of the burglary. He lived four houses from school and usually arrived home at approximately 3:05 p.m. His mother was not at home when he arrived, and he was unable to turn his key in the lock of the front door. The only way this had occurred in the past was when someone inside the house prevented the lock from turning. The son then attempted to open the garage door but was unable to do so. Just after the son attempted to open the garage door, a man carrying a black duffle bag appeared, walked past the son and said, "Your buddies are in the backyard waiting for you." The son was afraid to go into the back yard because he believed friends of the man might be there. The son watched the man walk to a white car that was parked in the street in front of the house. The son described the man as a white male who was sixteen to eighteen years old, approximately five feet ten inches tall and approximately 150 pounds wearing a "gray hoodie." Fitch is a white male who was twenty-one years old on the date of the burglary and was five feet nine inches tall and weighed approximately 170 lbs. The son could not identify Fitch from a photographic lineup, however, and could not identify him in the courtroom.

¶7 The son entered the garage through an unlocked side door and entered the house through an unlocked interior door. Ordinarily, the family dog was "wound up" and would jump and bark in excitement when the son got home from school. The son, however, found the dog cowering upstairs. The son picked up the dog and hid under a table in a corner and attempted to call his mother. When the son was unable to reach his mother, he waited under the table.

¶8 The mother arrived home at approximately 3:20 p.m. and found her son hiding under the table. The family discovered that an "Xbox" game console, game controller and games were missing from the house.

They also discovered that the contents of a black duffle bag they kept in the garage had been dumped on the garage floor and the duffle bag was missing. The day after the burglary, Fitch sold the stolen game console, controller and one videogame at a pawnshop for $82. Investigators recovered some but not all of the stolen property and returned it to the family.

¶9 The son described the car the man walked to as a white "1990s year type" with faded and chipped paint. Fitch owned a white 1995, four-door Lincoln Town Car with a fake convertible top and chipped paint. The son identified Fitch's car as the car he saw the man walk to. A neighbor across the street saw a "strange car" parked in front of the victims' house at approximately 3:00 p.m. on the date of the burglary and identified Fitch's car as the car she saw. The day of the burglary, the son's older brother also left school at 3:00 p.m. and walked to a friend's house. As he did so, he looked down the street and saw a faded-white car with a top unlike the rest of the car parked in front of the family's house. The older brother also identified Fitch's car as the car he saw.

¶10 The evidence was sufficient to support Fitch's conviction for burglary. First, Fitch possessed and sold property taken from the victims' home the afternoon of the previous day. Arizona has long recognized that "[t]he possession of recently stolen property when taken with other inculpatory evidence will support a conviction." *State v. Jackson*, 101 Ariz. 399, 401, 420 P.2d 270, 272 (1966). Second, the state presented additional corroborating evidence that supported Fitch's conviction. *See id.* Three witnesses identified Fitch's car as the car they saw parked in front of the house at the time of the burglary. Photographs of Fitch's car show that his car is distinctive.[1] That the witnesses did not initially give the exact same description of the car is of no matter; they each ultimately recognized and identified Fitch's car. It was for the jury to weigh the evidence and determine the credibility of the witnesses and the accuracy of their testimony. *State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995). We cannot determine what a jury should have believed. *State v. Bronson*, 204 Ariz. 321, 328, ¶ 34, 63 P.3d 1058, 1065 (App. 2003). Finally, contrary to Fitch's argument on appeal, the state was not required to present eye-witness evidence that Fitch commit the burglary or forensic evidence connecting him to the burglary. "The probative value of evidence is not reduced because it is circumstantial." *State v. Murray*, 184 Ariz. 9, 31, 906 P.2d 542, 564 (1995). The State may establish guilt for an offense by circumstantial evidence alone. *State v. Burton*, 144 Ariz. 248, 252, 697 P.2d

[1] The trial court also noted Fitch's car was "distinctive."

331, 335 (1985). The evidence here was sufficient to permit a reasonable jury to find beyond a reasonable doubt that Fitch committed the burglary.

III. Prosecutorial Misconduct

¶11 Fitch argues the prosecutor engaged in misconduct during her rebuttal argument when she stated, "The detective and their team did a good job[,]" and "The [s]tate submits that the detectives did a good job in this case." Fitch argues these statements improperly vouched for the law enforcement witnesses.

¶12 "Two forms of impermissible prosecutorial vouching exist: (1) when the prosecutor places the prestige of the government behind its witness, and (2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony." *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993) (citation omitted). Fitch, however, did not object to these statements. The failure to object to alleged prosecutorial misconduct waives the issue absent fundamental error. *State v. Wood*, 180 Ariz. 53, 66, 881 P.2d 1158, 1171 (1994). "To establish fundamental error, [a defendant] must show that the error complained of goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 568, ¶ 24, 115 P.3d 601, 608 (2005). If a defendant establishes fundamental error, the defendant must still demonstrate the error was prejudicial. *Id*. at ¶ 26. In our determination of whether a prosecutor's conduct amounts to fundamental error, we focus our inquiry on the probability the conduct influenced the jury, and whether the conduct denied the defendant a fair trial. *Wood*, 180 Ariz. at 66, 881 P.2d at 1171.

¶13 We find no error, fundamental or otherwise. We view a prosecutor's argument in the context of the arguments of the defendant. *State v. Kerekes*, 138 Ariz. 235, 239, 673 P.2d 979, 983 (App. 1983). Fitch argued the state's case was based on "assumptions, assumptions, assumptions[,]" conjecture, speculation and guessing, and that the state relied "on a backwards investigation" by investigators. He argued the easiest way for investigators to solve the case was to not be very diligent, not look at every single lead, not do everything they could to investigate the case fairly, but to decide to investigate the case "backwards." Fitch argued investigators put on "blinders" and targeted Fitch for no other reason than he possessed stolen property; this behavior was unacceptable; and "That's not how we do things. That's not how we run an investigation because it's still our community." Fitch argued investigators could have

done more, such as talk to neighbors and other people in the community, look for surveillance from security cameras in the area and follow up more. But instead, in Fitch's words, they "wanted to solve a case easy" and took shortcuts. He asked, "And you have to really think, is this how we want our police agencies to investigate cases?" Finally, Fitch argued investigators did not take proper steps when they showed witnesses pictures of Fitch's car. He argued investigators should have showed witnesses a photographic lineup of many different cars the same way they would with a lineup of suspects, and that they knew showing witnesses only pictures of Fitch's car would be very suggestive.

¶14 It was only after Fitch made these arguments that the state argued in rebuttal:

> The detective and their team did a good job. They pulled three prints, they swabbed for DNA, and they were thorough. Which is it? When it's convenient for the defense, he tells you that they did a great job. When it's inconvenient he tells you that they did a crappy job. Did they do a good job or a bad job? The [s]tate submits that the detectives did a good job in this case. They followed their protocols and they found the person responsible for both crimes.

These statements were not improper because they were a fair rebuttal to Fitch's closing argument. *See State v. Duzan*, 176 Ariz. 463, 468, 862 P.2d 223, 228 (App. 1993) ("Prosecutorial comments which are fair rebuttal to comments made initially by the defense are acceptable."). Finally, the trial court instructed the jury that the lawyers' comments are not evidence. A trial court can cure error that arises from improper vouching by instructing the jury that what the attorneys say is not evidence. *State v. Payne*, 233 Ariz. 484, 512, ¶ 109, 314 P.3d 1239, 1267 (2013).

IV. Admission of Fitch's Prior Conviction for Aggravated Assault

¶15 During the aggravation phase of trial, the jury found that Fitch committed the offenses while released from confinement for a prior felony conviction. This made the presumptive sentence the minimum sentence the trial court could impose for each offense. A.R.S. § 13-708(C) (2012).

¶16 Fitch argues the trial court erred when it admitted evidence that Fitch's prior conviction was for aggravated assault. Fitch argues the nature of the offense was irrelevant and unfairly prejudicial. He argues the trial court should have redacted that information from the Department of

Corrections "pen pack" the state used to prove Fitch's release status. Fitch told the trial court, however, that he had no objection to the admission of the pen pack. Further, Fitch did not object to the jury instruction that expressly informed the jury the prior offense was for aggravated assault, nor did he object when a witness testified the prior conviction was for aggravated assault. Therefore, we review only for fundamental error.

¶17 We find no fundamental error because Fitch has failed to prove admission of the nature of his prior felony conviction prejudiced him in any way. First, the trial court admitted the evidence during the aggravation phase after the jury had already determined Fitch's guilt. Second, the evidence had no effect on Fitch's sentence, regardless of any effect this evidence may have had on the jury's determination of the existence of other aggravating circumstances. Burglary in the second degree and trafficking in stolen property in the second degree are both class 3 felonies. A.R.S. § 13-1507(B) (2012); A.R.S. § 13-2307(C) (2012). Fitch was a "category 2 repetitive offender" because of his prior felony conviction. *See* A.R.S. § 13-703(B)(2) (2012). The presumptive sentence for a class 3 felony for a category two repetitive offender is 6.5 years' imprisonment. A.R.S. § 13-703(I). As noted above, Fitch could receive no less than the presumptive sentence for each offense because he was on release at the time he committed the offenses. Therefore, the trial court imposed the minimum sentence available for each offense, and the jury's exposure to the nature of Fitch's prior felony conviction caused him no prejudice.

V. The Trial Court's Determination of the Existence of a Prior Felony Conviction

¶18 Fitch next argues the trial court erred when it determined Fitch had a prior felony conviction rather than submit that issue to the jury. We find no error because a trial court may determine the existence of a prior conviction. "*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (emphasis added). The United States Supreme Court has "repeatedly affirmed this rule." *Southern Union Co. v. United States*, 132 S. Ct. 2344, 2350 (2012).

VI. Denial of Severance

¶19 As the final issue on appeal, Fitch argues the trial court erred when it denied his motion to sever the offenses. Fitch contends that "the jury would have considerable difficulty in compartmentalizing the

evidence" and that the court's admission of evidence of both offenses in a single trial was unfairly prejudicial. The trial court found the state properly joined the offenses because the offenses were based on the same conduct or were otherwise connected together in their commission. The court further found severance was not necessary for a fair determination of guilt or innocence and that evidence of each offense was admissible to prove the other.

¶20 "We review the denial of [a motion for] severance for abuse of discretion." *State v. Garland*, 191 Ariz. 213, 216, ¶9, 953 P.2d 1266, 1269 (App. 1998). We make our determination based on the evidence before the trial court at the time the defendant made the motion. *State v. Blackman*, 201 Ariz. 527, 537, ¶ 39, 38 P.3d 1192, 1202 (App. 2002). "Severance of joined offenses is required as a matter of right if the offenses are only joined by virtue of their same or similar nature; otherwise, they may be severed at the trial court's discretion." *Garland*, 191 Ariz. at 216, ¶8, 953 P.2d at 1269; Ariz. R. Crim. P. 13.4(b). Severance is also required when necessary to promote a fair determination of guilt or innocence. Ariz. R. Crim. P. 13.4(a); *State v. Van Winkle,* 186 Ariz. 336, 338-339, 922 P.2d 301, 304-305 (1996). "We apply a two step analysis in which we first determine if the joinder and denial of severance were proper under Rules 13.3 and 13.4. If the charges should have been severed, then we determine whether the error requires reversal. The denial of severance is reversible error only if the evidence of other crimes would not have been admitted at trial for an evidentiary purpose anyway." *Garland*, 191 Ariz. at 216, ¶ 9, 953 P.2d at 1269 (internal quotes and citations omitted).

¶21 The trial court did not abuse its discretion when it denied the motion to sever. The state may join two or more offenses if they "are otherwise connected together in their commission." Ariz. R. Crim. P. 13.3(a)(2). When two or more offenses "are aimed at furthering a single criminal objective, [] the offenses generally will constitute the 'same occasion.'" *State v. Sheppard*, 179 Ariz. 83, 85, 876 P.2d 579, 581 (1994) (citation omitted). Fitch entered a residence, took property from within that residence and sold the property the next day. The burglary and the trafficking in stolen property were "aimed at furthering a single criminal objective" of stealing property to sell for money. *See id*. The offenses were, therefore, sufficiently "connected together in their commission" that the state could properly join them pursuant to Rule 13.3(a)(2).

¶22 Severance was also not required because evidence of each offense was admissible to prove the other offense. Again, "[a] person commits burglary in the second degree by entering or remaining

unlawfully in or on a residential structure with the intent to commit any theft or any felony therein." A.R.S. § 13-1507(A). A person commits trafficking in stolen property in the second degree if the person "recklessly traffics in the property of another that has been stolen." A.R.S. § 13-2307(A). The definition of "traffic" includes to sell or transfer stolen property to another person or possess stolen property with the intent to sell, transfer or otherwise dispose of the property of another person. A.R.S. § 13-2301(B)(3) (2012). "'Recklessly' means, with respect to a result or to a circumstance described by a statute defining an offense, that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." A.R.S. § 13-105(10)(c) (2012).

¶23 Evidence that Fitch possessed and ultimately sold property taken from the residence the previous day was admissible to prove Fitch was the person who entered the residence unlawfully with the intent to commit a theft or felony therein. Evidence that Fitch entered the residence unlawfully and took property from within was admissible to prove that Fitch recklessly sold or transferred stolen property to another person or recklessly possessed stolen property with the intent to sell, transfer or otherwise dispose of the property of another person. There is nothing in the record to suggest that admission of evidence of both offenses in a single trial was unfairly prejudicial or that severance of the offenses was otherwise necessary to promote a fair determination of guilt or innocence.

¶24 Finally, the trial court instructed the jury it must decide each count separately uninfluenced by its decision on any other count and that the state must prove each element of each offense beyond a reasonable doubt. "A defendant is not prejudiced by a denial of severance where the jury is instructed to consider each offense separately and advised that each must be proven beyond a reasonable doubt." *State v. Johnson*, 212 Ariz. 425, 430, ¶ 13, 133 P.3d 735, 740 (2006) (quoting *State v. Prince*, 204 Ariz. 156, 160, ¶ 17, 61 P.3d 450, 454 (2003)).

VII. Conclusion

¶25 We affirm Fitch's convictions and sentences.