IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JOHN JOSEPH MARTINEZ, *Appellant*.

No. 1 CA-CR 15-0485
FILED 7-12-2016

Appeal from the Superior Court in Maricopa County
No. CR2014-138099-001
The Honorable Peter C. Reinstein, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Jillian Francis
Counsel for Appellee

The Poster Law Firm PLLC, Phoenix
By Rick D. Poster
Counsel for Appellant

MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Patricia A. Orozco joined.

K E S S L E R, Judge:

¶1 John Joseph Martinez ("Defendant") appeals his convictions and sentences for one count of disorderly conduct and two counts of misconduct involving weapons. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY[1]

¶2 On July 11, 2014, Defendant held a handgun while at an apartment shared by his friends. He pointed the weapon at R.W. before firing it out a window. Defendant left the apartment with the gun and returned about ten minutes later.

¶3 Defendant then began handling a different handgun and pointed it at several people. He aimed at B.H.'s head and pulled the trigger. B.H. ducked and felt the bullet "whiz past [her] face." Before leaving the apartment, Defendant handed B.H. the gun and said, "[P]ut your prints on it. I can't get caught here." Police officers later apprehended Defendant and took him into custody. After informing Defendant of his *Miranda*[2] rights, an officer interviewed him.

¶4 The State charged Defendant with attempted second degree murder ("Count 1"), aggravated assault ("Count 2"), disorderly conduct ("Count 3"), and, alleging Defendant was prohibited from possessing firearms, two counts of misconduct involving weapons ("Counts 4 and 5"). At trial, without objection, the State introduced into evidence a redacted copy of Defendant's recorded interview with police ("Exhibit 50"). At the

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1 "We view the facts in the light most favorable to upholding the verdicts and resolve all reasonable inferences against the defendant." *State v. Harm*, 236 Ariz. 402, 404 n.2, ¶ 2 (App. 2015) (citing *State v. Valencia*, 186 Ariz. 493, 495 (App. 1996)).

2 *Miranda v. Arizona*, 384 U.S. 436 (1966).

close of the State's case, Defendant unsuccessfully moved for acquittal on all counts pursuant to Rule 20 of the Arizona Rules of Criminal Procedure ("Rule 20").

¶5 The jury acquitted Defendant on Counts 1 and 2 but found him guilty on the remaining counts. The court imposed a combination of prison terms totaling eighteen years. Defendant timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2016), 13-4031 (2010), and -4033(A)(1) (2010).[3]

DISCUSSION[4]

I. Invocation of Right to Counsel

¶6 Defendant argues the court erred in admitting Exhibit 50. He contends the evidence of his interrogation should have been precluded because he invoked his right to counsel, thereby rendering his subsequent statements inadmissible.

¶7 When a defendant fails to object to the admission of evidence, we review for fundamental error. *See* Ariz. R. Crim. P. 21.3(c); *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005). Under fundamental error review, Defendant "bears the burden to establish that (1) error exists, (2) the error is fundamental, and (3) the error caused him prejudice." *State v. James*, 231 Ariz. 490, 493, ¶ 11 (App. 2013) (internal quotations and citation omitted).

¶8 Although a suspect has a constitutional right against self-incrimination, including the right to counsel during custodial interrogation, *Miranda v. Arizona,* 384 U.S. 436, 478-79 (1966), "law enforcement officers may continue questioning until and unless the suspect *clearly* requests an attorney," *Davis v. United States,* 512 U.S. 452, 461 (1994) (emphasis added). "Not every reference to an attorney must be construed by police as an invocation of the suspect's right to counsel." *State v. Ellison*, 213 Ariz. 116, 126-27, ¶ 26 (2006). "[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be

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[3] We cite the current version of applicable statutes when no revisions material to this decision have since occurred.

[4] On appeal, Defendant argued, but later withdrew, a contention that the trial court erred in denying his Rule 20 motion pertaining to Counts 4 and 5. Therefore, we do not discuss that issue.

invoking the right to counsel, . . . precedents do not require the cessation of questioning." *Id.* (quoting *Davis*, 512 U.S. at 459).

¶9 Here, the relevant portion of Exhibit 50 reveals the following:

> [Officer]: (reads *Miranda* warnings aloud) Do you understand these rights?
>
> [Defendant]: So, I have done this before and since I have a lawyer so that's all I'm saying.
>
> [Officer]: I'm just asking . . . did you understand (both talk over each other)
>
> [Defendant]: So can I call him real fast so he can be present? So that's what it is.
>
> [Officer]: Yeah, you are welcome to do that, that's pretty much what it says. And my question to you I guess is, do you understand that is your right?
>
> [Defendant]: And saying we just got a lawyer and we informed him . . .
>
> [noticeable break in video reveals possible editing]
>
> [Officer]: Here's what I gotta make sure I'm understanding from you though. Ok. By telling me that you will talk to me and answer my questions, you said you've retained the services of a lawyer [Defendant mumbles], and knowing that, knowing that he's allowed to be present during these questions, are you saying that you're willing to talk to me without that lawyer here?
>
> [Defendant]: I'm willing to hear you out, yes. Definitely that and if why need be, that's why I said, I would have called him right now, I'm sure he'd come but . . . yeah, I wanna know, I do want to know. I wanna know what's going on.
>
> [Officer]: That's easy enough. And obviously, if that changes at any time, you are welcome to let me know.
>
> [Defendant]: (incoherent mumbling) I would love for you to fill me in.

Defendant proceeded to answer questions and offer inconsistent statements regarding his involvement in the incident at his friends' apartment.

¶10 The foregoing reveals that Defendant did not clearly and unequivocally invoke his right to counsel. Instead, Defendant stated that he had a lawyer. Although his words, "So can I call him real fast so he can be present?" might be construed as a request for counsel, the question was in response to the officer asking Defendant whether he understood he had a right to counsel. Coupled with Defendant's statement, "So that's what it is[,]" the "request" for counsel was instead his affirmation that he understood his rights. At best, the "request" is ambiguous, which explains the officer's immediate attempt to clarify whether Defendant wanted to proceed with the interview without his lawyer. Defendant then clearly asserted that he wanted to proceed to learn "what's going on." Defendant's statement that he "would have" called counsel is also not sufficient.

¶11 Because Defendant did not unambiguously and unequivocally request his counsel's presence, the officer was not obligated to cease the interview, and the court was not required to *sua sponte* suppress Exhibit 50. *See Miranda,* 384 U.S. at 473-74 (noting interrogation must cease when suspect requests counsel); *see also Davis*, 512 U.S. at 462 (holding suspect's statement, "[m]aybe I should talk to a lawyer" was an equivocal request for counsel).

¶12 Defendant also appears to argue that the absent portions of the redacted recorded interview contain an unequivocal request by Defendant for counsel. Defendant however did not object to the redacted recording in the trial court. Because Defendant did not do so, the court did not conduct an evidentiary hearing to determine whether Defendant properly invoked his right to counsel. Absent a record of such a hearing, we are unable to evaluate what, if any, evidence outside of Exhibit 50 supports or precludes its admission. *See State v. Wilson*, 95 Ariz. 372, 373 (1964) ("We have repeatedly held that we will review only those matters which appear in the records of the trial court."); *see also State v. Fornof*, 218 Ariz. 74, 76, ¶ 8 (App. 2008) (stating that in reviewing a superior court's denial of a motion to suppress, "we consider only the evidence presented at the suppression hearing and view it in the light most favorable to upholding the trial court's factual findings.") (citing *In re Ilono H.*, 210 Ariz.

473, 474, ¶ 2 (App. 2005)). On this record, we are unable to discern error, fundamental or otherwise.[5]

II. Prosecutorial Misconduct

¶13 Defendant argues the prosecutor misstated the law when, during closing arguments, she stated: "But as we walk through the elements you will see it's not something that needs to be proven beyond a reasonable doubt." Defendant contends that by making this statement, the prosecutor "impermissibly lowered the [State's] burden of proof to an unconstitutional standard." We disagree with this characterization of the statement.

¶14 Immediately preceding the comment purportedly "lowering" the State's burden, the prosecutor stated:

> The final [instruction] before we go into the actual charges is on . . . page 19. *It says that the State need not prove motive but you may consider motive or lack thereof in coming to your verdict.* When we start talking about the charges and the facts and the evidence that go to these different charges, based on everything that you have heard, there certainly isn't a real clear motive for why he would be firing a gun in the room, but luckily it's not going off and it discharges out of the window. Not even really for why he's pointing the gun around to everybody and choose to go fire ultimately at [B.H.]. Certainly, we heard that there is this other pending case in Pinal County going on, and that there was a subpoena a that [sic] [B.H.] was supposed to testify or at least was listed as a witness . . . so certainly that's something going on. We mentioned that the defendant was maybe in a bad mood or having a hard time with his girlfriend or wife so maybe he [w]as upset about that. I think it's been made clear as the evidence has unfolded that it really is that he just holds human life so cheap that at that moment if he decides to point a gun at somebody, then these [sic] what he's going to do. If at that point he decides he wants to shoot at that person's head, then that's what he is going to do. So certainly that's

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[5] In a separate order, we denied Defendant's motion to supplement the record with the unredacted recording of the interview. Neither the denial of that motion nor our decision today precludes Defendant from seeking relief pursuant to Ariz. R. Crim. P. 32 for his trial counsel's failure to object to the redacted recording.

> something to be considered. *But as we walk through the elements you will see it's not something that needs to be proven beyond a reasonable doubt.*

(Emphasis added).

¶15 Considering the challenged statement in context, it is clear the prosecutor was not arguing the State was not required to prove the elements of the charged offenses beyond a reasonable doubt; instead, she was merely, and correctly, reminding the jury that motive, although a relevant consideration, was not an element that required such proof to secure a conviction. *See State v. Hunter*, 136 Ariz. 45, 50 (1983) ("Motive is not an element of the crime of murder."). Accordingly, no legal error occurred.

CONCLUSION

¶16 Defendant's convictions and sentences are affirmed.