IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JONATHAN MICHAEL MCGINLEY, *Appellant*.

No. 1 CA-CR 15-0187
FILED 2-9-2017

Appeal from the Superior Court in Maricopa County
No. CR2012-123462-001
The Honorable Robert E. Miles, Judge (Retired)

AFFIRMED

COUNSEL

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

Jonathan Michael McGinley
Appellant

Maricopa County Public Defender's Office, Phoenix
By Tennie B. Martin
Advisory Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Chief Judge Michael J. Brown and Judge Patricia A. Orozco joined.[1]

T H U M M A, Judge:

¶1 Jonathan Michael McGinley appeals his convictions and resulting sentences for armed robbery and aggravated assault. Because McGinley has shown no reversible error, his convictions and sentences are affirmed.

FACTS[2] AND PROCEDURAL HISTORY

¶2 One day in April 2012, McGinley approached a cash register clerk in a Tempe liquor store and demanded money. He threatened the clerk with a handgun and, after receiving more than $450, started to leave. The clerk picked up a baseball bat and yelled at McGinley to stop. McGinley turned around and fired the gun, narrowly missing the clerk, and fled.

¶3 Police quickly responded, but did not immediately locate McGinley. A few days later, the clerk was working at a nearby convenience store and noticed a customer that appeared similar to McGinley. The clerk called police, and, as an officer accessed the store's surveillance video, told the officer "I don't think it's him, but I want to make sure." A detective compared surveillance video from the liquor store robbery and the convenience store and determined the customer was not the person who robbed the liquor store.

¶4 Based on the victim's description of the robber, police later identified two people of interest. Further investigation revealed neither

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[1] The Honorable Patricia A. Orozco, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article 6, Section 3 of the Arizona Constitution.

[2] This court views the facts "in the light most favorable to sustaining the verdict, and resolve[s] all reasonable inferences against the defendant." *State v. Rienhardt*, 190 Ariz. 579, 588-89 (1997).

suspect committed the robbery. An anonymous tip eventually led police to McGinley, and an officer presented the victim with a six-picture photographic line-up. The victim immediately identified McGinley.

¶5 A grand jury indicted McGinley on armed robbery, a Class 2 felony and dangerous offense, and aggravated assault, a Class 3 felony and dangerous offense. McGinley represented himself at trial, and continues to do so on appeal. Although he elected not to testify, McGinley argued that the victim misidentified him as the robber, McGinley also challenged the adequacy of the police investigation.

¶6 The jury found McGinley guilty of both offenses. The court imposed consecutive prison terms, greater than the presumptive, of 12 years for armed robbery and 8.5 years for aggravated assault. This court has jurisdiction over McGinley's timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1), 13-4031 and 13-4033(A)(2017).[3]

DISCUSSION

I. McGinley Has Shown No Fundamental Error By The Superior Court Not Sua Sponte Appointing An "Identification Expert."

¶7 McGinley argues the superior court erred in denying his "oral motion requesting the appointment of an Identification Expert to assist the defense," "submitted" on September 18, 2012. According to McGinley, such an expert:

> could have spoken informatively to the quirks and shifts in the witness[']s memory. Also an expert could have used facial recognition measurement to make scientific comparison of the [convenience store] subject with the robber. A defense expert could also have assisted the defendant, and the jury, in putting relevant perspective of the problematic factor of [the victim's] weak, and untreated, vision trouble.

¶8 The record, however, does not reflect that McGinley requested the appointment of an "identification expert" at any time in this

[3] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

case. Therefore, review on appeal is limited to fundamental error. *See* Ariz. R. Crim. P. 21.3(c); *State v. Henderson*, 210 Ariz. 561, 567 ¶¶ 19-20 (2005). "Accordingly, [McGinley] '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) (citations omitted).

¶9 McGinley has offered no authority for the proposition that the superior court was required to sua sponte appoint an "identification expert." Moreover, McGinley meaningfully cross-examined the clerk regarding the clerk's vision "impairment," which required him to wear eyeglasses, and the "quirks and shifts" in his testimony. Accordingly, McGinley has shown no error, much less fundamental error that resulted in prejudice. *James*, 231 Ariz. at 493 ¶ 11.

II. McGinley Has Shown No Error Based On His Wearing, Pursuant To Jail Policy, A Security Vest During Trial.

¶10 McGinley was in custody leading up to and during trial. During a pre-trial conference, McGinley acknowledged "the jail policy . . . [w]ith respect to the Taser belt," but expressed concern that it would be visible to the jury during trial and cause him unnecessary "pressure" due to the belt's "lethal[ity.]" The court denied his request to proceed without the belt, noting McGinley would wear a "very thin . . . vest" under his shirt and adding "you can't tell that it's on." McGinley responded that he "appreciate[d] that option," but maintained his objection on grounds of "mental duress." When the court again overruled the objection, stating, "I'm sure the deputy won't use it unless he needs to," McGinley responded, "I'm assured. I'm reassured."

¶11 Immediately before voir dire began, the court asked McGinley whether he was "able to get around okay." McGinley replied, "Yes, sir. I don't think we have any problem with -- we can stand. It looks good. It's low profile, the Taser vest is. So we don't have to sit." McGinley raised no objections or concerns regarding the vest for the remainder of trial.

¶12 On appeal, McGinley argues the superior court erred in requiring him to wear a Taser belt during trial. Without citing to the record or supporting authority, McGinley asserts:

> The defendant was [self-represented] and was unable to remain alert and mindful of the proceedings, and was discouraged from being as vocal and active as he would liked to have been. Modern lore is rife with stories of people who have been killed by police Tasers, and of Taser-belts being remotely activated by random devices. The defendant, under constant fear and anxiety of being electrocuted, was rendered docile, timid, and ineffectual.

McGinley contends being required to wear the Taser belt denied him a fair trial and his constitutional right to equal protection.

¶13 McGinley's arguments are not persuasive. McGinley wore a security vest at trial, which the record establishes he was comfortable wearing in front of the jury, and he felt "assured" that the vest would not be improperly activated. The record does not show that McGinley "was rendered, docile, timid, and ineffectual" as a result of some perceived fear of the belt's improper use. Indeed, the record reflects that McGinley aggressively and confidently examined witnesses, successfully objected to testimony and made lucid, analytical arguments to the court and the jury. On this record, McGinley has shown no reversible error in the requirement that he wear a security vest during trial.

III. McGinley Has Shown No Reversible Error Addressing Evidence Regarding Prior Convictions Of Investigative Leads.

¶14 For the two investigative leads that police ultimately determined were not suspects, the superior court allowed McGinley to establish that police were led to the individuals based, in part, on their criminal histories. However, the court did not allow McGinley to inquire into the nature of their prior convictions. McGinley argues that he should have been allowed to do so because such evidence was relevant to his "third-party culpability" defense.[4] This court reviews such an evidentiary

[4] McGinley failed to notify the State before trial that he intended to present a third-party culpability defense as is required by the applicable rules. *See* Ariz. R. Crim. P. 15.2(b), (d).

ruling for an abuse of discretion. *State v. McGill*, 213 Ariz. 147, 156 ¶ 40 (2006); *State v. Sucharew*, 205 Ariz. 16, 21 ¶ 9 (App. 2003).

¶15 McGinley's argument fails because the superior court properly concluded that evidence of the investigative leads' prior convictions was irrelevant to his misidentification defense. Relevant evidence is evidence having "any tendency to make a fact more or less probable than it would be without the evidence" when "the fact is of consequence in determining the action." Ariz. R. Evid. 401. The nature of the investigative leads' prior convictions had no tendency to make the accuracy of the robbery victim's identification of McGinley more or less probable. The superior court thus properly determined that the evidence was not relevant to a determination of McGinley's guilt. McGinley has shown no abuse of discretion.

IV. McGinley Has Shown No Error Regarding Aggravating Circumstances.

¶16 Because McGinley used a handgun during the commission of the offenses, he was subject to sentence enhancement under A.R.S. § 13-704(A). *See State v. Greene*, 182 Ariz. 576, 580 (1995) (noting "an element of the underlying offense can also be used to trigger sentence enhancement"). He also was subject to aggravated sentences based on the following aggravating circumstances found by the jury: the offenses involved the threatened infliction of serious physical injury, the offenses were committed as consideration or expectation for the receipt of anything of pecuniary value and the offenses caused financial harm to the victim. *See* A.R.S. § 13-701(D)(1), (6), (9).

¶17 Without citing authority, McGinley argues the superior court erred in using the aggravating circumstances found by the jury to impose sentences greater than the presumptive. He contends the aggravating circumstances are elements of, or "elementally inherent to," armed robbery and aggravated assault.[5] This court reviews de novo purported errors of

[5] McGinley also argues the court's reliance on the three aggravating circumstances to impose sentences greater than the presumptive for both convictions "violates the prohibition against double punishment per A.R.S. § 13-116." Enhancement of a sentence, which increases the entire range of possible punishment for each class of an offense, differs from aggravation, which raises a particular sentence within the permissible range. *State v. Alvarez*, 205 Ariz. 110, 112 n.1 ¶ 4 (App. 2003). Moreover, section 13-116

law, whether an aggravating circumstance is an element of the offense and whether the aggravating circumstance supports an aggravated sentence. *State v. Virgo*, 190 Ariz. 349, 352 (App. 1997).

¶18 In relevant part, a person commits robbery by taking the property of another against their will by force, with intent to coerce surrender of the property or prevent resistance. A.R.S. § 13-1902(A). A person commits armed robbery if, in the course of committing robbery, the person is armed with a deadly weapon or uses or threatens to use a deadly weapon. A.R.S. § 13-1904(A).

¶19 None of the aggravating circumstances considered by the court are elements of armed robbery. For example, threatened infliction of serious physical injury may be found not to exist, yet a jury could nonetheless properly determine a defendant is guilty of armed robbery if it determines that the defendant, while armed with a deadly weapon, used force to intentionally take another's property through coercion. The conclusion is the same regarding the pecuniary gain aggravator. A defendant properly may be convicted of armed robbery regardless of his or her expectation to obtain something of monetary value. To illustrate, a defendant may unlawfully take another's animal to serve as a pet, or food to satisfy hunger. And financial harm to a victim also is not an element necessary to secure a conviction for armed robbery. If, for example, the victim recovers property that was previously taken against his or her will, financial harm may not exist. Yet the person who committed the armed robbery may nonetheless properly be found guilty of the offense.

¶20 Similarly, none of the aggravating circumstances considered by the court are elements of aggravated assault. As relevant here, aggravated assault is committed by using a deadly weapon to intentionally place another person in reasonable apprehension of imminent physical injury. A.R.S. §§ 13-1203(A)(2), -1204(A)(2). Although reasonable apprehension of *physical injury* is an element of the offense, threatened infliction of *serious physical injury* is not. Indeed, by statute, the Legislature expressly distinguishes physical injury from serious physical injury. *Compare* A.R.S. § 13-105(33) *with* § 13-105(39). And aggravated assault can

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does not implicate double jeopardy principles in the context of enhanced or aggravated sentences. *See Greene*, 182 Ariz. at 580 ("The prohibition against double punishment in § 13-116 was not designed to cover sentence enhancement.").

be committed without the expectation of receiving something of pecuniary value or causing financial harm to the victim.

¶21 Because the aggravating circumstances found by the jury were not elements of the charged offenses, they properly could be relied on in sentencing McGinley. Accordingly, McGinley has shown no error.

V. The Superior Court Properly Imposed Consecutive Sentences.

¶22 McGinley contends his consecutive sentences are unlawful under A.R.S. § 13-116 because the armed robbery and aggravated assault arose "from the same act," an issue this court reviews de novo. *State v. Urquidez*, 213 Ariz. 50, 52 ¶ 6 (App. 2006). "An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." A.R.S. § 13-116. This court analyzes whether crimes are one act permitting only concurrent sentences, or multiple acts permitting consecutive sentences, under a three-part test adopted in *State v. Gordon*, 161 Ariz. 308, 315 (1989). The first step requires "considering the facts of each crime separately, subtracting from the factual transaction the evidence necessary to convict on the ultimate charge," and determining whether "the remaining evidence satisfies the elements of the other crime." *Id.* The second step is to "consider whether, given the entire 'transaction,' it was factually impossible to commit the ultimate crime without also committing the secondary crime." *Id.* Third, the court "consider[s] whether the defendant's conduct in committing the lesser crime caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime." *Id.*

¶23 Applying these factors shows that the armed robbery and aggravated assault offenses were two separate acts, thereby subjecting McGinley to consecutive sentences under § 13-116. First, the evidence supporting the armed robbery establishes McGinley threatened the clerk by brandishing a handgun and forced him to hand over $450 from the cash register. Putting this evidence aside, McGinley also aimed and fired the gun at the clerk, narrowly missing him, thereby intentionally putting the clerk in reasonable apprehension of imminent physical injury. Second, it was factually possible to commit the armed robbery without committing the aggravated assault. Had McGinley walked away without firing the gun at the clerk, he would not have committed aggravated assault. Finally, by firing the weapon at the clerk, McGinley caused the clerk to suffer a greater risk of harm -- being killed or seriously injured -- than the risk inherent in the armed robbery where McGinley did not fire the gun.

¶24 Accordingly, the court did not err in sentencing McGinley to consecutive terms of imprisonment.

CONCLUSION

¶25 McGinley's convictions and sentences are affirmed.

AMY M. WOOD • Clerk of the Court
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