IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

HOPE EZEIGBO, *Appellant*.

No. 1 CA-CR 15-0605
FILED 11-28-2017

Appeal from the Superior Court in Maricopa County
No. CR2011-008033-004; CR2011-123789-005
The Honorable Sherry K. Stephens, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Terry M. Crist, III
Counsel for Appellee

The Stavris Law Firm, PLLC, Scottsdale
By Christopher Stavris
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Samuel A. Thumma delivered the decision of the Court, in which Acting Presiding Judge Peter B. Swann and Judge Patricia A. Orozco[1] joined.

T H U M M A, Chief Judge:

¶1 Hope Ezeigbo appeals his convictions and sentences for numerous felony offenses as a result of his involvement in a nationwide drug trafficking organization. Ezeigbo argues the superior court erred by (1) using dual juries to try him together with three co-defendants; (2) allowing a State's in-custody witness to wear "business attire" while testifying; (3) admitting other-act evidence; (4) admitting a summary chart and (5) denying a post-verdict motion to dismiss and for new trial. Because he has shown no error, Ezeigbo's convictions and sentences are affirmed.

FACTS[2] AND PROCEDURAL HISTORY

¶2 Following a four-month wiretap investigation, the State charged Ezeigbo and others with multiple offenses related to their participation in a nationwide drug trafficking organization (DTO). Ezeigbo, a delivery person employed by a package delivery company, would, while on his route, collect boxes of marijuana from Warren Braithwaite and Conrad and Clarence Tull in the Phoenix area and ship the boxes to various locations in the eastern United States. Ezeigbo also would identify incoming packages containing thousands of dollars in cash and deliver the packages to Braithwaite and the Tulls. The individuals used coded language during conversations to coordinate the times and locations for the deliveries.

[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 VI, Section 3 of the Arizona Constitution.

[2] This court views the facts in the light most favorable to upholding the verdicts and resolves all reasonable inferences against Ezeigbo. *See State v. Harm*, 236 Ariz. 402, 404 n.2 ¶ 2 (App. 2015) (citing *State v. Valencia*, 186 Ariz. 493, 495 (App. 1996)).

¶3 Braithwaite made anonymous tips to law enforcement, thereby initiating the investigation. Braithwaite later pled guilty to two felony offenses and agreed to concurrent five-year prison terms. As part of Braithwaite's plea agreement, he testified for the State at the trial of Ezeigbo, the Tulls and another co-defendant Sherry Washington. A 37-day trial was held using dual juries: Panel A considered the charges against the Tulls and found the Tulls' guilty of numerous offenses, and Panel B considered the charges against Washington and Ezeigbo and returned guilty verdicts as to Washington and Ezeigbo.[3]

¶4 Panel B found Ezeigbo guilty of the following felony offenses: illegal control of an enterprise; assisting a criminal street gang; two counts of conspiracy to commit sale or transportation of marijuana (two pounds or more); seven counts of money laundering in the second degree; 14 counts of use of wire communication or electronic communication in drug related transactions; 10 counts of sale or transportation of marijuana (two pounds or more); sale or transportation of marijuana (less than two pounds) and conspiracy to commit money laundering in the second degree. The court sentenced Ezeigbo to a combination of concurrent and consecutive prison terms for a combined total of 18.5 years. Ezeigbo timely appealed, and this court has jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1), 13-4031, and -4033(A)(1) (2017).[4]

DISCUSSION

I. Ezeigbo Has Not Shown The Joint Trial, Using Dual Juries, Was An Abuse Of Discretion.

¶5 Ezeigbo argues the superior court erred in trying him together with the Tulls and Washington using dual juries. According to Ezeigbo, the Tulls' appearance during trial in jail clothes, coupled with Washington's waiver of her right to be present at trial, prejudiced him. This court reviews

[3] This court previously affirmed the Tulls' and Washington's convictions and sentences. *See State v. Tull*, 1 CA-CR 15-0591, 2017 WL 3082038 (Ariz. App. July 20, 2017) (mem. dec.); *State v. Washington*, 1 CA-CR 14-0808, 2017 WL 1325212 (Ariz. App. Apr. 11, 2017) (mem. dec.); *State v. Tull*, 1 CA-CR 14-0622, 2016 WL 6599547 (Ariz. App. Nov. 8, 2016) (mem. dec.).

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

the issues for an abuse of discretion. *Hedlund v. Sheldon*, 173 Ariz. 143 (1992) (dual juries); *State v. Cruz,* 137 Ariz. 541, 544 (1983) (severance).

¶6 In a case with multiple defendants, "joint trials are the rule rather than the exception." *State v. Murray*, 184 Ariz. 9, 25 (1995). The Arizona Supreme Court has approved the use of dual juries in criminal trials, reasoning "trial judges have inherent power and discretion to adopt special, individualized procedures designed to promote the ends of justice in each case that comes before them." *Hedlund*, 173 Ariz. at 146 (internal quotation marks and citation omitted).[5] When deciding whether to order separate trials for co-defendants, a court must "balance the possible prejudice to the defendant against interests of judicial economy." *Cruz,* 137 Ariz. at 544. When, as here, the failure to sever trial is challenged, the defendant "must demonstrate compelling prejudice against which the trial court was unable to protect." *Id.* Courts generally examine the nature and quantum of evidence and the trial defenses in determining whether a defendant will be sufficiently prejudiced to require a separate trial. *Id.* at 544-46.

¶7 Ezeigbo does not argue trial evidence regarding his co-defendants' guilt, or the trial defenses, unduly prejudiced him. He also provides no authority for the proposition that a co-defendant's behavior or decision to not be present at trial results in prejudice. Here, after describing the dual jury procedure, the superior court informed the potential jurors during voir dire that the Tulls had chosen to wear jail clothes during trial, and Washington waived her right to be present. None of the individuals who served as jurors indicated these factors would affect their deliberations. Moreover, the court cured any possible resulting prejudice by instructing the juries in final instructions to consider the charges separately as to each defendant "as if that defendant were being tried alone" and to determine the facts only from the evidence presented in court without influence "by sympathy or prejudice." Ezeigbo's jury is presumed to have followed these instructions, *see Murray*, 184 Ariz. at 25, and Ezeigbo has made no showing to the contrary. Finally, with respect to judicial economy, the length of the trial weighed heavily in favor of using dual juries. Accordingly, considering Ezeigbo's failure to establish prejudice and in the interest of judicial efficiency, Ezeigbo has shown no abuse of

[5] *Hedlund* overruled *State v. Lambright*, 138 Ariz. 63 (1983), which held that use of dual juries was improper as a local rule that was not authorized by the supreme court. *Hedlund*, 173 Ariz. at 144-46. Accordingly, Ezeigbo's reliance on *Lambright* is misplaced.

discretion in the decision to try Ezeigbo and his co-defendants in a joint trial using dual juries.

II. Ezeigbo Has Not Shown The Manner Of Braithwaite's Testimony Was In Error.

¶8 Braithwaite, who was in custody at the time of trial, testified while wearing civilian clothes. Ezeigbo objected, arguing Braithwaite had "no right to dress out" and that he had no advance notice and asked the court to order Braithwaite to wear jail clothes. After confirming the State would not "keep from the jury" Braithwaite's custodial status, the court overruled the objection.

¶9 Ezeigbo argues the court abused its discretion in not compelling Braithwaite to wear jail clothing while testifying.[6] Ezeigbo summarily asserts, without providing substantive argument, that the failure of the court to do so "circumvented [the] safeguards inherent in [Arizona Rule of Evidence] 611" and resulted in prejudice. Ezeigbo also asserts, "[t]he party proffering the witness should bear the burden of making a timely request that the incarcerated witness be permitted to testify in dressed-down clothing and the failure to make such a request should be considered a waiver of that right." Ezeigbo has shown no error.

¶10 Ezeigbo admits that no known authority exists to support his arguments. When Ezeigbo objected at trial, a representative from the sheriff's office explained to the court that no policy prohibits an inmate from dressing in civilian clothes when testifying. Further, the State made clear during Braithwaite's direct testimony that he was in custody and had been so continually since he was arrested approximately three years earlier. Under these circumstances, Ezeigbo has shown no abuse of discretion.

III. Ezeigbo Has Shown No Abuse Of Discretion In The Superior Court Allowing Other-Act Evidence.

¶11 Ezeigbo argues the superior court erred by denying his motion to preclude a witness for the State, Kevin Mucthison, from testifying about other-act evidence. *See* Ariz. R. Evid. 404(b). This court reviews the

[6] In his opening brief, Ezeigbo argues he requested a mistrial based on Braithwaite wearing civilian clothes. The record, however, reveals Washington moved for a mistrial, but that Ezeigbo did not join in that motion.

admission of other-act evidence under Rule 404(b) for an abuse of discretion. *State v. Beasley,* 205 Ariz. 334, 337 ¶ 14 (App. 2003).

¶12 Although "evidence of other crimes, wrongs, or acts is not admissible to prove [a defendant's] . . . character . . . in order to show action in conformity therewith," such evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." Ariz. R. Evid. 404(b). Ezeigbo challenges the following testimony:

> Mucthison . . . testified that between 2000 and 2003 he was involved in shipping marijuana from Arizona to the east coast . . . . He acknowledged knowing [J.C.] and her (now deceased) husband, [T.] Mucthison met [T.] when Mucthison was working in the custom–car business in Phoenix, back in 2000, 2001. [T.] would bring in his cars for Mucthison to customize and repair . . . . During 2000 to 2003, Mucthison and [T.] became involved in shipping marijuana (in boxes) from Arizona to the east coast. He met [Ezeigbo] through [T.] [Ezeigbo] was a [delivery] driver[,] and Mucthison's employer at the time . . . was located on [Ezeigbo's] . . . route.

Again, Ezeigbo has shown no abuse of discretion.

¶13 Contrary to Ezeigbo's argument, this testimony was not used "to prove the character of a person in order to show action in conformity therewith." Ariz. R. Evid. 404(b). The testimony regarding Ezeigbo explained how Mucthison met him. Accordingly, this testimony was not precluded by Rule 404(b) or the corresponding procedural rule applicable to other-act evidence. *See* Ariz. R. Crim. P. 15.1(b)(7). Nor has Ezeigbo shown that such evidence was inadmissible under Rule 403.

IV. Ezeigbo Has Shown No Abuse Of Discretion In The Admission Of A Summary Chart.

¶14 Ezeigbo argues the superior court erred by admitting in evidence a chart pursuant to Ariz. R. Evid. 1006. The case agent created the chart to summarize 41 seized or photographed packages that were also admitted into evidence. The chart indicated the date a box was seized or photographed, the shipper and recipient and, if the box was seized, its

contents. According to Ezeigbo, the chart "was not truly summary evidence but more of a police report," and, therefore, inadmissible hearsay. Ezeigbo also contends the chart was inadmissible under Rule 1006 because the boxes and photographs themselves were admitted into evidence. This court reviews the admission of evidence for an abuse of discretion. *State v. Ayala*, 178 Ariz. 385, 387 (App. 1994).

¶15 Under the Arizona Rules of Evidence, a party

> may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

Ariz. R. Evid. 1006. "A witness may summarize the information contained in voluminous reports or records as long as the information contained in the documents would be admissible and the documents are made available to the opposing party for their inspection." *Rayner v. Stauffer Chem. Co.*, 120 Ariz. 328, 333–34 (App. 1978).

¶16 The superior court properly admitted the chart. The chart was not a police report merely because its author was a police officer, and Rule 1006 does not impose a limitation on police officers summarizing voluminous records. Rule 1006 also does not prohibit summarizing items that are admitted in evidence. Indeed, as Ezeigbo acknowledges, the chart is cumulative; thus, even if the court erred in admitting the chart, Ezeigbo cannot establish resulting prejudice. *See, e.g., State v. Shearer*, 164 Ariz. 329, 340 (App. 1989) (holding introduction of inadmissible evidence was harmless error when cumulative to and consistent with other evidence). Ezeigbo does not challenge the admissibility of the boxes or photographs summarized in the chart, and he does not claim they were unavailable for him to examine. He also does not contend the chart inaccurately summarizes the evidence. Accordingly, Ezeigbo has failed to show an abuse of the court's discretion. *See also United States v. Anekwu*, 695 F.3d 967, 982 (9th Cir. 2012) ("Although we do not approve of receiving summary exhibits of material already in evidence, we have not reverse[d] for that reason. We have also elsewhere recognized a district court's discretion . . . to admit summary exhibits for the purpose of assisting the jury in

evaluating voluminous evidence.") (internal quotations and citations omitted).

V. Ezeigbo Has Shown No Abuse Of Discretion In The Denial Of His Post-Verdict Motions.

¶17 Ezeigbo argues the superior court erred in denying his post-trial motions to dismiss and for new trial. Those motions were based on an assertion that the State engaged in misconduct and violated *Brady v. Maryland*, 373 U.S. 83, 87 (1963) by failing to disclose an e-mail exchange between the prosecutor and Braithwaite's counsel. This court has previously addressed this same issue and concluded there was no abuse of discretion. *See Tull*, 1 CA-CR 15-0591, 2017 WL 3082038, at *6 ¶ 28 n.8; *Washington*, 1 CA-CR 14-0808, 2017 WL 1325212, at *3-4 ¶¶ 10-15. Ezeigbo has shown no principled reason to depart from that conclusion.

CONCLUSION

¶18 Ezeigbo's convictions and sentences are affirmed.

AMY M. WOOD • Clerk of the Court
FILED: AA