IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

VICTOR MIGUEL VILLALOBOS, *Appellant*.

No. 1 CA-CR 15-0861
FILED 2-21-2017

Appeal from the Superior Court in Maricopa County
No. CR 2013-442104-001 DT
The Honorable Jerry Bernstein, Commissioner

AFFIRMED

COUNSEL

Attorney General's Office, Phoenix
By Robert A. Walsh
Counsel for Appellant

Maricopa County Public Defender's Office, Phoenix
By Nicholaus Podsiadlik
Counsel for Appellee

MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Randall M. Howe and Judge Lawrence F. Winthrop joined.

T H O M P S O N, Judge:

¶1 Victor Miguel Villalobos (defendant) appeals from his conviction for voyeurism, a class 5 felony. Finding no error, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 Fourteen-year old M.D. was shopping at Goodwill with her mother and sister. The two girls were laughing and trying on clothes for approximately a half hour. As she was standing in her underwear and starting to put on her pants to leave, M.D. noticed a man's hand holding a mirror under the partial wall between her dressing room and the neighboring one. She screamed. Her sister immediately opened M.D.'s dressing room door and, through the door opening, M.D. saw a man in a yellow shirt and gray ponytail leaving the area.

¶3 M.D.'s mother (mother) arrived, opened the door to the neighboring dressing room, and found a lanyard and keys. Goodwill employees identified defendant as a frequent customer and pointed out his van in the parking lot. Inside the van mother found a bank statement with the name Victor Villalobos on it. When mother saw a man in a yellow shirt and gray ponytail walking across the parking lot, she got in her car and drove after him. Mother confronted defendant and, in response, he stated "I didn't hurt her." Defendant walked away and mother called the police. On the front seat of defendant's car, police found the 4x6 mirror M.D. had seen in the dressing room.

¶4 The next day an officer stopped by defendant's home. Defendant was asked to voluntarily step outside. When the officer asked "do you know why I am here" the defendant immediately stated "I didn't mean to hurt the girl. I didn't mean to scare the girl." Defendant clarified by stating "over at the Goodwill." The police crime lab found defendant's DNA on both the keys and the mirror. At one point before trial,

defendant entered into plea negotiations. The negotiations ended abruptly when defendant collapsed; he later decided to proceed to trial.

¶5 Defendant was found guilty by a jury of voyeurism and was sentenced to a presumptive term of two years' imprisonment. Defendant timely appealed.

DISCUSSION

¶6 The voyeurism statute, Arizona Revised Statutes (A.R.S.) § 13-1424 (2010), reads in pertinent part:

> A. It is unlawful to knowingly invade the privacy of another person without the knowledge of the other person for the purpose of sexual stimulation.
> ...
> C. For the purposes of this section, a person's privacy is invaded if both of the following apply:
> 1. The person has a reasonable expectation that the person will not be photographed, videotaped, filmed, digitally recorded or otherwise viewed or recorded.
> 2. The person is photographed, videotaped, filmed, digitally recorded or otherwise viewed, with or without a device, either:
> (a) While the person is in a state of undress or partial dress.

¶7 On appeal, defendant raises three issues:

> 1. whether the trial court erred in failing to give the jury a requested "attempt" instruction;
>
> 2. whether, when the trial court referred to 14-year-old M.D. as "the victim," defendant was deprived of an impartial tribunal and the presumption of innocence; and
>
> 3. whether the prosecutor committed prosecutorial misconduct in making his closing argument.

¶8 Defendant first asserts that he was entitled to a jury instruction for attempted voyeurism, a class 6 felony. He argues attempted voyeurism is necessarily a lesser-included of voyeurism. He further argues that no evidence showed he actually "viewed" the victim as required by A.R.S. § 13-1424(C)(2).

¶9 We review the trial court's denial of a requested jury instruction for an abuse of discretion. *State v. Anderson*, 210 Ariz. 327, 343, ¶ 60, 111 P.3d 369, 385 (2005). Here, defendant presented a misidentification defense and the trial court declined to give the instruction stating this wasn't an attempt situation, because he was "either guilty or not guilty." After a review of the record, we find no abuse of discretion in the denial of an attempt jury instruction. *See State v. Wall*, 212 Ariz. 1, 4, ¶ 18, 126 P.3d 148, 151 (2006) (where evidence supports an attempt instruction, defendant is entitled to one even if he has presented an "all or nothing" defense). No evidence suggests, that while defendant held the mirror in the girl's dressing room so he could view her, that he did not actually view her. When immediately questioned defendant said "I didn't hurt her" not "I didn't view her." As the Supreme Court stated in *Wall*, "It is not enough that, as a theoretical matter, the jury might simply disbelieve the state's evidence on one element of the crime because this would require instructions on all offenses theoretically included in every charged offense." *Id.* (citation and internal quotation marks omitted).

¶10 Defendant next argues that three times before opening statements, in front of the jury, the trial court referred to M.D. as "the victim" and that reference denied him a fair trial and constitutes prejudicial fundamental error. We disagree. First, as defendant himself points out, he failed to object at the time. *See State v. Bearup*, 221 Ariz. 163, 168, ¶ 21, 211 P.3d 684, 689 (2009) (explaining where defendant fails to object he bears the burden of showing fundamental prejudicial error). Second, defendant cites no Arizona case law that a judge's use of the word "victim" indicates a biased judge or the denial of a fair trial. Third, his citation to *Fritzinger v. State*, 10 A.3d 603 (Del. 2010), is factually distinguishable from the instant situation. In *Fritzinger*, defendant asserted that there was no crime committed, thus the victims were alleged victims, whereas here no one disputes that M.D. was the victim of a crime, only who the responsible party was. *Id.* at 610.

¶11 Finally, defendant asserts that the prosecutor engaged in misconduct during the closing argument that amounted to fundamental prejudicial error. Specifically, he asserts that when the prosecutor told the jury that "he even said he was guilty," it must have referred to confidential statements made during defendant's change of plea negotiations and thus violates rules of evidence, his due process rights and the confrontation clause. Again, defendant failed to object at the time and has waived all but fundamental prejudicial error. *Bearup*, 221 Ariz. at 168, ¶ 21, 211 P.3d at 689. Our review of the record clearly

demonstrates that the prosecutor was referring to the two inculpatory statements defendant made to mother and to the officer who came to his front door. The section preceding the section of argument to which defendant refers says "We have statements of the defendant that implicate him from two different people." We have reviewed the record and find no misconduct in the prosecutor's closing statements.

CONCLUSION

¶12 For the above stated reasons, defendant's conviction and sentence are affirmed.

AMY M. WOOD • Clerk of the Court
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