

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JEREMY MICHAEL MOONEY, *Appellant*.

No. 1 CA-CR 16-0659
FILED 12-12-2017

Appeal from the Superior Court in Maricopa County
No. CR2013-458291-001
The Honorable Virginia L. Richter, Commissioner

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

Maricopa County Public Defender, Phoenix
By Lawrence Blieden
Counsel for Appellant

MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Thomas C. Kleinschmidt¹ joined.

T H O M P S O N, Judge:

¶1 Jeremy Michael Mooney (defendant) appeals his conviction and sentence for one count of possession or use of a dangerous drug. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 In April 2013, during the course of investigating defendant for domestic violence, members of the Tempe Police Department's Criminal Apprehension and Surveillance Team pulled over a vehicle in which defendant was a passenger. The vehicle belonged to and was driven by defendant's girlfriend, W.M., to whom the report of domestic violence related. Once defendant had exited the vehicle, Tempe Police Officer Richard Valencia placed him in handcuffs and searched him. W.M. remained in the vehicle, and one detective remained near the driver's seat to supervise her while Officer Valencia conducted the search. Officer Valencia opened defendant's wallet to check his identification. It is unclear whether Officer Valencia found the wallet on defendant's person during the search or was directed by defendant as to the wallet's location in the vehicle. After confirming defendant's identity, Officer Valencia placed the wallet in a plastic Ziploc bag to be transported with defendant to the Tempe City Jail.

¶3 Upon arrival at the jail, Officer Valencia conducted a more thorough search of the wallet and found a "micro Ziploc baggie of a white crystal substance." Laboratory tests later confirmed the baggie contained twenty-one milligrams of methamphetamine. The state charged defendant with one count of possession or use of a dangerous drug, a class 4 felony.

¹ The Honorable Thomas C. Kleinschmidt, 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.

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¶4 Prior to trial, defendant filed a motion in limine to exclude testimony regarding the “recent domestic violence incident” for which he had been pulled over, arguing that any such evidence was irrelevant to the possession charge. Defendant added that even were the evidence to be found relevant, its probative value was substantially outweighed by its prejudicial effect. The state agreed in its response, acknowledging that the “facts regarding defendant’s involvement in the domestic violence incident [were] not directly relevant to possession of dangerous drug charges.”

¶5 On the day of trial, however, defendant withdrew the motion. Directly contrary to his earlier argument, defendant contended that testimony regarding the underlying incident was relevant and necessary, because the evidence showed the reason for his placement in custody as well as the presence of a “strained relationship” between a third party, W.M., and defendant.² The state argued that the domestic violence allegation was irrelevant to defendant’s possession of drugs and moved the court to exclude any testimony as to the incident. The court granted the state’s motion to exclude the evidence.

¶6 Defendant subsequently waived his right to a jury trial, and after a bench trial was found guilty as charged. At sentencing, the court found defendant had four prior felony convictions. The court sentenced defendant to the presumptive term of ten years, with 221 days of presentence incarceration credit. Defendant timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1)(2016); 13-4031 (2010), and -4033(A)(1)(2010).

DISCUSSION

¶7 Defendant argues that the trial court erred in excluding testimony regarding the domestic violence incident, which he characterizes on appeal as third-party culpability evidence. Yet defendant failed to raise

² Specifically, defendant’s counsel argued that “[b]ecause . . . we have a third party that was with [defendant] upon the stop that will be discussed during . . . trial. And that goes on its face to exactly what the issues were or what . . . may have been a significant issue, and given the fact that there is a third party that may be relevant. And then number two, it may be relevant as far as it would show . . . there was on its face a strained relationship with the third party in the vehicle and [defendant]”

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a third-party culpability defense below³ and failed to argue for admission of the evidence on that basis. While defendant argued that the domestic violence incident was relevant to show a “strained relationship with the third party,” W.M., this language is insufficient to indicate his intent to introduce the evidence in support of a third-party culpability defense.

¶8 Because defendant failed to raise a third-party defense and failed to argue for admission of the evidence on that basis below, we review for fundamental error only. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005). To prevail under fundamental error review, a defendant must show both that fundamental error exists and that the error caused the defendant prejudice. *Id.* at ¶ 20. Fundamental error is “error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not have possibly received a fair trial.” *Id.* at 19 (internal quotation omitted). The burden of persuasion is on the defendant. *Id.*

¶9 Arizona Rules of Evidence 401-403 govern the admissibility of third party culpability evidence. *State v. Gibson*, 202 Ariz. 321, 323, ¶ 12 (2002). The court first must determine whether the evidence is relevant under Rules 401 and 402 and, if relevant, must then evaluate the evidence under the balancing test laid out in Rule 403. *Id.* at ¶ 13. Evidence of third party culpability is relevant as long as it “*tend[s]* to create a reasonable doubt as to the defendant’s guilt.” *Id.* at 324, ¶ 16 (emphasis in original). Yet the trial court retains discretion to exclude third-party culpability evidence that offers “only a possible ground of suspicion against another.” *State v. Prion*, 203 Ariz. 157, 161 ¶ 21 (2002) (citation omitted).

¶10 On appeal, defendant suggests that evidence of the domestic violence incident would have aided in showing he “was unaware that there were drugs in his wallet and that someone in close proximity to the wallet,”

³ Defendant did not include a third-party culpability defense in his original or supplemental notice of defenses as required by Arizona Rule of Criminal Procedure 15.2(b), which provides, in relevant part, “Within the time specified in Rule 15.2(d), the defendant shall provide a written notice to the prosecutor specifying all defenses as to which the defendant intends to introduce evidence at trial, including, but not limited to, alibi, insanity, self-defense, defense of others, entrapment, impotency, marriage insufficiency of a prior conviction, mistaken identity, and good character. The notice shall specify for each listed defense the persons, including the defendant, whom the defendant intends to call as witnesses at trial in support of each listed defense”

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W.M., “had placed the drugs inside.” Defendant suggests the trial court applied a “higher standard of relevancy” and, as a result, prevented defendant from “elicit[ing] more testimony in support of his third party culpability defense.”

¶11 Officers found the baggie of methamphetamine in defendant’s wallet, which defendant admitted belonged to him and was usually carried in his back pocket. Although it is unclear whether the wallet was found on defendant’s person or in the vehicle at defendant’s direction, W.M was supervised at all times while Officer Valencia searched defendant and placed him under arrest. Therefore, even if the domestic violence incident provided W.M. with a motive for planting the methamphetamine in the wallet, there is no evidence that she had any opportunity to do so. *See Prion*, 203 Ariz. At 162, ¶ 25 (admitting third-party culpability evidence where it showed a third party “had the *opportunity and the motive* to commit” the crime in question) (emphasis added). The testimony offers at most a “possible ground of suspicion” against W.M. and falls short of creating any reasonable doubt as to defendant’s own guilt. *Id.* at 161, ¶ 21. Because the trial court did not abuse its discretion by excluding the testimony as irrelevant, we find no error, let alone fundamental error.

CONCLUSION

¶12 For the foregoing reasons, we affirm defendant’s conviction and sentence.



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