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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

TERRY ALLEN MC PHERSON, *Appellant*.

No. 1 CA-CR 17-0173
FILED 12-26-2017

Appeal from the Superior Court in Maricopa County
No. CR2016-107139-001
The Honorable Richard L. Nothwehr, Judge *Pro Tempore*

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

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MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge James P. Beene and Judge Kent E. Cattani joined.

H O W E, Judge:

¶1 Terry McPherson appeals his convictions and sentences for aggravated assault, a class 3 dangerous felony; unlawful imprisonment, a class 6 dangerous felony; unlawful discharge of a firearm, a class 6 dangerous felony; and possession or use of dangerous drugs, a class 4 felony. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 McPherson met B.A. on Tinder (a dating app). One day in February 2016, the two decided to meet in person. After meeting, B.A. followed McPherson back to his apartment to engage in consensual sex. While at the apartment, B.A. saw McPherson injecting what she believed to be methamphetamine into his hand. The two then began to engage in sex.

¶3 After a couple minutes, McPherson told B.A. that people were coming after him and that “he can hear them in the walls and coming up through the floor.” McPherson then started spraying his apartment with sulfuric acid, telling B.A. that it would kill them. During this time, B.A. attempted to get dressed. McPherson knew that B.A. carried a gun in her purse so he dumped the contents on the floor and grabbed the gun. B.A. asked for her gun back and told McPherson that she wanted to leave. But McPherson pointed the gun at her and told her that she had to stay.

¶4 While holding B.A.’s gun, McPherson ordered B.A. to go back and forth from the bedroom to the living room several times. B.A. eventually got dressed and tried to leave through the front door but McPherson slammed her into the door and made her go back to the bedroom. McPherson then started shooting at the ceiling, where he heard the voices coming from. McPherson became distracted, and B.A. grabbed her cell phone and called 9-1-1. B.A. was unable to stay on the phone with the 9-1-1 operator because McPherson came in and out of the room. At one point, B.A. answered the operator’s returning phone call but had to leave her phone hidden inside her purse.

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¶5 While in the bedroom, B.A. heard McPherson yelling and shooting in the living room. The 9-1-1 operator called B.A. back and told her that she should try to escape if she safely could. After a pause in McPherson's yelling, B.A. walked into the living room to check if he was still there. He was not, so she ran outside the apartment and towards the road where she flagged down a police officer.

¶6 Phoenix police officers arrested McPherson, who still had B.A.'s gun. After an officer read McPherson his *Miranda*¹ rights, McPherson stated that he knew B.A. carried a gun and that they went to his apartment to have consensual sex. McPherson further told the officer that he heard people talking in his apartment's walls and became suspicious of B.A. so he went to her purse to get her gun. He then explained that after he got the gun he shot at where he thought the voices were coming from several times and that he also went outside his apartment to see if anyone was around his window. The officer then helped McPherson onto his feet and noticed a small plastic baggie on the ground where McPherson had been sitting. The officer asked McPherson what was in the baggie and McPherson replied that it was methamphetamine.

¶7 The State charged McPherson with aggravated assault, unlawful imprisonment, unlawful discharge of a firearm, and possession or use of dangerous drugs. The State further alleged that the aggravated assault, unlawful imprisonment, and unlawful discharge of a firearm counts were all dangerous offenses pursuant to A.R.S. § 13-704.

¶8 On November 18, 2016, 12 days before the start of trial, the State moved in limine to preclude evidence that McPherson and B.A. had met on Tinder and that they were engaging in sex before the incident occurred. At the start of trial, McPherson's counsel argued that "the State's motion in limine should not be granted for the mere fact that [McPherson] has the right to have the entire story told." McPherson's counsel also stated that she would cross-examine B.A. about why she had a gun, her previous experiences in dangerous situations, and how that affects her ability to be reasonably in fear. The next day, the court granted the State's motion in part, precluding evidence that the two met through Tinder but not the evidence that they were engaging in sex before the incident. The State then orally moved to preclude the arguments about B.A.'s past experiences McPherson's counsel had raised. The court refused to rule on the oral

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

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motion and stated that “[i]f you believe that we need another motion in limine regarding the history with the weapon, please let us know.”

¶9 Before the next day of trial, the State filed two motions in limine. One moved to preclude evidence of B.A.’s prior experience with dangerous situations and the reasons she had possessed a gun. The other motion, titled “Various Topics,” requested that the court preclude the following eight matters from trial: (1) defenses not previously disclosed; (2) the insanity defense; (3) all “non-legal” defenses; (4) all non-disclosed defense witnesses; (5) untimely defense motions; (6) arguments about punishment, sentence, penalty, and the jury’s nullification power; (7) evidence that B.A. refused to give a defense interview; and (8) argument about whether the methamphetamine in question was a usable quantity. The court heard oral argument on both motions before the presentation of evidence. On the motion about B.A.’s prior experiences and gun possession, McPherson’s counsel argued that the evidence was relevant and should not be precluded. The court disagreed and subsequently granted that motion.

¶10 On the “Various Topics” motion in limine, McPherson’s counsel objected only to precluding the diminished capacity defense, arguing that “there may be some diminished capacity in this.” Specifically, McPherson’s counsel stated that she: (1) did not intend to argue insanity as a defense; (2) did not have any defense witnesses; (3) agreed that argument about punishment, sentence, penalty, and the jury’s nullification power should be precluded; (4) agreed to preclude B.A.’s refusal to participate in a defense interview; and (5) agreed that the usable quantity issue was irrelevant. The State responded that diminished capacity was not a recognized defense and that the State had the burden of proving the culpable mental state for each count. The court subsequently precluded: (1) the insanity defense; (2) the diminished capacity defense; (3) any non-disclosed defense witnesses; (4) any argument about punishment, sentence, penalty, and the jury’s nullification power; and (5) evidence that B.A. refused a defense interview. The court did not rule on the usable quantity matter.

¶11 Following the five-day trial, the jury found McPherson guilty of all charged counts. During the aggravation phase, the jury found that the aggravated assault, unlawful imprisonment, and discharge of a firearm convictions were all dangerous offenses pursuant to A.R.S. § 13-704. The trial court subsequently sentenced McPherson to life imprisonment without the possibility of release for 25 years for the aggravated assault conviction, 6 years’ imprisonment for the unlawful imprisonment and discharge of a firearm convictions each, and 10 years’ imprisonment for the possession or

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use of dangerous drugs conviction, all to be served concurrently with each other. McPherson timely appealed.

DISCUSSION

1. Motions in Limine

¶12 McPherson argues only that the trial court erred by not precluding the State's motions in limine as untimely. He does not contend that the trial court erred by granting any specific request within the motions but that because the court excused the untimeliness of the motions and granted them, he "was disadvantaged and placed in an unfair position of having to change trial strategy in the midst of trial." We review the trial court's decision to rule on an untimely motion in limine for an abuse of discretion. *State v. Vincent*, 147 Ariz. 6, 8-9 (App. 1985). We review only for fundamental error when a defendant fails to object to the alleged trial error. *State v. Henderson*, 210 Ariz. 561, 567 ¶ 19 (2005).

¶13 "[I]n criminal cases, a motion in limine is nothing more than a motion to suppress specifically authorized by" Arizona Rule of Criminal Procedure 16. *State v. Rodriguez*, 126 Ariz. 28, 30 (1980). Under Rule 16.1(b), all motions "shall be made" no later than 20 days before trial or at such other time as the court directs. Ariz. R. Crim. P. 16.1(b). An untimely motion shall be precluded. Ariz. R. Crim. P. 16.1(c).

¶14 The time restrictions of Rule 16.1 do not mean that the trial court is mandated to preclude an untimely motion, however: "Trial courts have the discretion to extend the time for filing motions and, implicitly, to hear untimely motions." *State v. Colvin*, 231 Ariz. 269, 271 ¶ 7 (App. 2013). "[T]his court has recognized that the preclusive effect of Rule 16.1(c) exists in order to insure orderly pretrial procedure in the interests of expeditious judicial administration" and that the decision to invoke the rule lies with the trial court "because the rule protects judicial interests rather than the interests of the parties." *Id.*

¶15 Here, the State's motions in limine were not filed 20 days before trial and thus, were untimely under Rule 16.1. The trial court, however, requested argument for the State's November 18 motion and then requested that the State submit any additional motions in limine in writing. McPherson did not object to the timeliness of the State's November 18 motion or the two subsequent motions the State filed. Because he failed to object, he has forfeited review for all but fundamental, prejudicial error. *State v. Peltz*, 242 Ariz. 23, 27 ¶ 7 (App. 2017). McPherson has waived fundamental error review, however, because he never argued that the trial

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court's decision to hear the State's untimely motions was fundamental, prejudicial error. *See id.*; *see also State v. Moreno-Medrano*, 218 Ariz. 349, 354 ¶ 17 (App. 2008) (holding that failure to allege fundamental error waives the argument on appeal). Notwithstanding waiver, no error occurred because the State could have objected to the issues in the motions without a written motion at trial. *See State v. Cramer*, 174 Ariz. 522, 523 (App. 1992) (finding no abuse of discretion by considering an untimely motion in limine because the State could have objected to the evidence at trial without a written motion).

2. Unlawful Imprisonment

¶16 McPherson argues next that insufficient evidence supports his unlawful imprisonment conviction and its dangerousness designation. We review a sufficiency of the evidence argument *de novo*. *State v. West*, 226 Ariz. 559, 562 ¶ 15 (2011). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Cornman*, 237 Ariz. 350, 356 ¶ 21 (App. 2015). We review the sufficiency of the evidence to determine whether substantial evidence exists, that is, evidence that "reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *Id.*

¶17 A person commits unlawful imprisonment when he or she knowingly restrains another person. A.R.S. § 13-1303(A). A person is restrained for purposes of unlawful imprisonment when his or her movement is restricted "without consent, without legal authority, and in a manner which interferes substantially with such person's liberty," by either confining such person or moving him or her from one place to another. A.R.S. § 13-1301(2). Additionally, no consent exists when the restraint is accomplished by physical force, intimidation, or deception. A.R.S. § 13-1301(2)(a).

¶18 Sufficient evidence supports McPherson's unlawful imprisonment conviction. B.A. testified that she willingly went with McPherson to his apartment to engage in consensual sex. But McPherson then started hearing voices and took B.A.'s gun from her purse. B.A. testified that she tried to leave but McPherson slammed her into the door and told her that she could not do so. Additionally, while confined inside the apartment, McPherson pointed the gun at B.A. and ordered her to go back and forth from the bedroom to the living room on several occasions. This evidence alone is enough for a reasonable person to find beyond a reasonable doubt that McPherson knowingly restrained B.A. And contrary

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to McPherson's argument that B.A. never withdrew her consent to remain in the apartment, once McPherson slammed her into the door and pointed the gun at her to keep her from leaving, any initial consent was implicitly, if not expressly, withdrawn. *See* A.R.S. § 13-1301(2)(a).

¶19 McPherson argues finally that his unlawful imprisonment conviction cannot be a dangerous offense as the jury found. The State charged McPherson with unlawful imprisonment and alleged that the offense was dangerous pursuant to A.R.S. § 13-704 because he used a dangerous weapon when committing the offense. A dangerous offense is one that "involv[es] the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another person." A.R.S. § 13-105(13). A "dangerous weapon" includes firearms. A.R.S. § 13-105(15). McPherson admitted to taking B.A.'s gun and to having it the entire time. McPherson also told the police officer that he shot at his apartment where he thought the voices were coming from. B.A. testified that McPherson pointed the gun at her and ordered her to remain inside the apartment. These actions satisfy both the "discharge" and "threatening exhibition of a deadly weapon" requirements under A.R.S. § 13-105(13). Thus, sufficient evidence supports the jury's finding that McPherson's unlawful imprisonment conviction was a dangerous offense.

CONCLUSION

¶20 For the foregoing reasons, we affirm.



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