IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JAMES EARL JOHNS, JR., *Appellant*.

No. 1 CA-CR 16-0368
FILED 2-13-2018

Appeal from the Superior Court in Maricopa County
No. CR2013-448856-001 DT
The Honorable David O. Cunanan, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michael Valenzuela
Counsel for Appellee

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

MEMORANDUM DECISION

Judge Jennifer M. Perkins delivered the decision of the Court, in which Presiding Judge Kenton D. Jones and Judge Jon W. Thompson joined.

P E R K I N S, Judge:

¶1 James Earl Johns, Jr., appeals his convictions and sentences for first-degree burglary, a class 2 dangerous felony, and first-degree felony murder, a class 1 dangerous felony. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 We view the evidence in the light most favorable to supporting the conviction. *State v. Boozer*, 221 Ariz. 601, 601, ¶2 (App. 2009).

¶3 The victim shared a studio apartment with L.G. and her boyfriend, E.D.; the latter had an altercation with Johns' girlfriend, M.W. on the day in question. Later that day, Khanor Sanford accompanied Johns to the victim's apartment where Johns used a pistol to force his way into the apartment. E.D. and L.G. were both present when Johns entered and pointed a pistol at E.D, who immediately fled into the bathroom.

¶4 While the victim and Johns struggled over the pistol, Sanford drew his own pistol, reached over, and shot the victim in the chest. After the victim fell to the floor, Johns pistol-whipped him.

¶5 The victim died of a gunshot wound to the torso. He also suffered lacerations to the face and broken nasal bones, consistent with blunt force trauma. DNA was found under the victim's fingernails.

¶6 The State initially disclosed that the DNA under the victim's fingernails matched Sanford, Johns's co-defendant. At the beginning of the first trial, after jury selection, the detective who collected the DNA swabs from Johns and Sanford realized he had inadvertently switched the labels on the swabs before sending them for testing. The detective informed the prosecutor, who immediately informed the defendants, their counsel, and the superior court.

¶7 Johns moved to dismiss the case or preclude the DNA evidence, on the ground the State had violated its disclosure obligations

under Arizona Rule of Criminal Procedure ("Rule") 15.6. The superior court denied the motion to dismiss, finding no bad faith and declared a mistrial. The court continued the trial for 30 days, to a date before Johns's last day pursuant to Rule 8. The superior court granted the State's motion to order new buccal swabs from each of the defendants and ordered that the State expedite any request for review by a DNA expert. The superior court also ordered the expedited appointment of a DNA expert for Johns.

¶8 Thirteen days before the second trial began, the State disclosed the new DNA results, which implicated Johns. Johns moved to preclude the new DNA results, arguing he had not had sufficient time to review the evidence, discuss it with his expert, and prepare for trial. He argued the time required to adequately prepare for the DNA evidence would require a continuance past his last day under Rule 8, forcing him to choose between his right to a speedy trial and his right to counsel. The superior court summarily denied the motion to preclude after reviewing the record of the prior hearing.

¶9 Before the next trial day, Johns moved to either reconsider his motion to preclude, stay the proceedings, or continue the trial. After a discussion with Johns's counsel and the State, the court declared a mistrial, dismissed the jury, and continued the case for five months. The court found the circumstances justified excluding time under Rule 8 over Johns's objection. The superior court subsequently granted several motions by the State to continue the trial, each excluding time under Rule 8. Trial ultimately commenced on March 29, 2016, more than a year after the corrected DNA results were disclosed.

¶10 The jury convicted Johns and his co-defendant, Sanford, of burglary in the first degree and first-degree felony murder. The superior court sentenced Johns to life with the possibility of parole after 25 years for the felony murder charge. The court, finding the burglary to be an inherently dangerous offense, sentenced Johns to an additional 10.5 years in prison to run concurrently with his life sentence. Johns filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

DISCUSSION

¶11 On appeal, Johns argues the superior court abused its discretion in denying his motion to preclude the DNA evidence for untimely disclosure. Johns further argues the superior court erred in denying his motion for judgment of acquittal because there was insufficient

evidence to support a conviction. Finally, Johns argues the superior court erred in finding the first-degree burglary charge to be an inherently dangerous offense. However, Johns did not object to the finding at trial. Thus, we review the superior court's dangerousness finding for fundamental error only. *See State v. Henderson,* 210 Ariz. 561, 568, ¶ 22 (2005).

¶12 We review questions of law, including constitutional issues, *de novo*. *State v. Moody*, 208 Ariz. 424, 445, ¶ 62 (2004). However, we review denial of a motion to preclude for abuse of discretion, absent a purely legal question. *Id.* Similarly, we review the imposition of discovery sanctions and the granting or denial of continuances for abuse of discretion. *State v. Naranjo*, 234 Ariz. 233, 242, ¶ 29 (2014); *State v. Miller*, 111 Ariz. 321, 322 (1974). We will affirm the superior court's ruling if the result was legally correct for any reason. *State v. Carlson*, 237 Ariz. 381, 387, ¶ 7 (2015). We review *de novo* the sufficiency of the evidence to support a conviction. *State v. West*, 226 Ariz. 559, 562, ¶ 15 (2011).

I. Late-disclosed DNA Evidence

¶13 To begin, assuming *arguendo* the State violated its continuing duty to make timely disclosure under Rule 15.6, and did not comply with Rule 15.6(d), the court did not abuse its discretion in refusing to sanction the State by precluding the DNA evidence. "Preclusion is rarely an appropriate sanction for a discovery violation, and should be invoked only when less stringent sanctions would not achieve the ends of justice." *Naranjo*, 234 Ariz. at 242, ¶ 30 (internal punctuation and citations omitted). Before precluding evidence, the court should consider how vital the evidence is, whether the evidence will surprise or prejudice the opposing party, whether bad faith motivated the discovery violation, and any other relevant circumstances. *See id.*

¶14 Here, as relevant to burglary in the first degree, the accurate DNA results were crucial to show one of the defendants was inside the apartment and struggling with the victim. Moreover, though all parties were surprised by the mistakenly switched DNA swabs, the belated disclosure was timely because the mix-up had just been discovered. Indeed, the record shows the prosecution immediately disclosed the mistake upon discovery. Finally, the superior court found no evidence of bad faith on the part of the State, and Johns agrees that "it does not appear the late disclos[ure] was motivated by bad faith." Under these extraordinary circumstances, the superior court acted within its discretion by denying preclusion and continuing the trial to a date within the Rule 8 trial deadline.

See Ariz. R. Crim. P. 8.5(b) (continuance of any trial date shall be granted "only on a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice."); *State v. Jackson*, 109 Ariz. 559, 563 (1973) (finding continuance within the time set by speedy-trial deadline "presumptively nonprejudicial."); *see* Ariz. R. Crim. P. 15.6(d).

¶15 Nor did the court abuse its discretion in summarily denying Johns's renewed motion for preclusion after the State disclosed the new DNA results implicating him. The State provided notice at the hearing on the mix-up, more than 30 days before the new trial date, that it intended to obtain new buccal swabs, have them tested, and disclose and use the new DNA results at trial, as required by Rule 15.6(b). The State timely disclosed the new DNA results 13 days before the new trial date. *See* Ariz. R. Crim. P. 15.6(c). Under these circumstances, the State fulfilled its disclosure obligations, and no sanction was warranted. The court did not abuse its discretion in summarily denying the motion, and continuing the case for several months to allow Johns to prepare his defense to the new DNA results.

¶16 We are not persuaded otherwise by Johns's reliance upon *Jimenez v. Chavez*, 234 Ariz. 448 (App. 2014). In *Jimenez*, on special action review, this Court found the State had violated Rule 15.6 by disclosing DNA results less than 24 hours before trial, knowing the testing would be completed less than a week before trial, and announcing it was ready for trial despite not having the DNA results. *See Jimenez*, 234 Ariz. at 449–50, ¶¶ 2–5, 451–53, ¶¶ 16–23. This Court held that "when the state delays disclosure of inculpatory evidence in violation of Ariz. R. Crim. P. 15.6, a continuance that delays trial beyond a defendant's last day under Rule 8.2 is an improper sanction under Rule 15.7." *Id.* at 449, ¶ 1. In this case, the State timely disclosed DNA results, not knowing they were incorrect, and disclosed that the results were likely in error as soon as it learned the labels on the buccal swabs were inadvertently switched, complying with its obligations under Rule 15.6. Here, also unlike in *Jimenez*, the superior court initially continued the trial to a date within the speedy trial limits, and the State timely disclosed the new DNA results 13 days before the new trial date. Preclusion was not required on these facts.

II. Denial of Judgment of Acquittal

¶17 Johns argues the superior court erred in denying his motion for judgment of acquittal, because insufficient evidence showed he intended to commit aggravated assault, as necessary to support the charge

of first-degree burglary, the predicate for the felony murder conviction. A.R.S. § 13-1105(A)(2).

¶18 A person commits burglary in the first degree in pertinent part by "entering or remaining unlawfully in or on a residential structure with the intent to commit … any felony therein" when he or an accomplice "knowingly possesses …a deadly weapon … in the course of committing … any felony." A.R.S. § 13-1507(A); A.R.S. § 13-1508(A). A person commits aggravated assault, a felony, in pertinent part by either "intentionally [or] knowingly … causing any physical injury to another person" or "[i]ntentionally placing another person in reasonable apprehension of imminent physical injury," "[i]f the person uses a deadly weapon." A.R.S. § 13-1203(A)(1)–(2); A.R.S. § 13-1204(A)(2).

¶19 "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. West*, 226 Ariz. at 562, ¶ 16 (emphasis in original). "When reasonable minds may differ on inferences drawn from the facts, the case must be submitted to the jury, and the trial judge has no discretion to enter a judgment of acquittal." *Id.* at ¶ 18. (omitting internal punctuation). Criminal intent can rarely be established with direct evidence. *State v. Noriega*, 187 Ariz. 282, 286 (App. 1996). "Criminal intent, being a state of mind, is shown by circumstantial evidence. Defendant's conduct and comments are evidence of his state of mind." *State v. Bearup*, 221 Ariz. 163, 167, ¶16 (2009).

¶20 The circumstantial evidence was more than sufficient to show Johns intended to commit an aggravated assault once he forced his way into the apartment, by using his pistol to threaten, beat, or shoot E.D. Moreover, K.H., who had accompanied Johns, M.W., and Sanford to the studio apartment, testified M.W. stated she wanted Johns to confront E.D. about the earlier altercation. K.H. testified that when the victim did not open the door to the apartment, Johns pulled out a pistol and cocked it. E.D. testified Johns used the pistol to force his way into the apartment, and pointed the pistol toward him, prompting him to run to the bathroom. E.D. thought the group was there to either threaten or shoot him with Johns's pistol. Additionally, Johns pistol-whipped the victim after Sanford shot the victim. This circumstantial evidence and the reasonable inferences that can be drawn from it were more than sufficient to demonstrate Johns intended, once he entered the apartment, to commit aggravated assault. Johns's actions demonstrate he intended to use his pistol to either cause physical

injury to another or to place "another person in reasonable apprehension of imminent physical injury."

¶21 Johns further argues that even if he had intended to commit the underlying felony of assault or aggravated assault, such intent was "never able to come to fruition." The offense of burglary in the first degree does not require completion of the underlying felony, thus Johns's argument fails. *See State v. Bottoni*, 131 Ariz. 574, 575 (App. 1982). Accordingly, we affirm the superior court's denial of Johns's motion for judgment of acquittal on the offense of burglary in the first degree, the predicate offense for felony murder.

III. Finding Burglary Inherently Dangerous

¶22 Johns argues the superior court erred in finding the first-degree burglary was an inherently dangerous offense. However, Johns did not object to the court's finding, limiting this Court to a review for fundamental error only. *See State v. Henderson,* 210 Ariz. 561, 568, ¶ 22 (2005). On fundamental error review, the defendant has the burden of proving the court erred, the error was fundamental in nature, and he was prejudiced thereby. *Henderson*, 210 Ariz. at 567, ¶ 20.

¶23 A person commits burglary in the first degree in pertinent part by "entering or remaining unlawfully in or on a residential structure with the intent to commit … any felony therein" when he or an accomplice "knowingly possesses … a deadly weapon … in the course of committing … any felony." A.R.S. § 13-1507(A); A.R.S. § 13-1508(A). An offense is "dangerous" if it involves, in pertinent part, "the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument." A.R.S. § 13-105(13). Section 13-704 enhances the sentencing range if the offense is "dangerous." A.R.S. § 13-704.

¶24 Pursuant to *Blakely v. Washington*, 542 U.S. 296 (2004), a defendant is constitutionally entitled to a jury determination of whether he used a deadly weapon or dangerous instrument in committing the crime, unless the jury finds the defendant guilty of an offense that is inherently dangerous. *See Blakely*, 542 U.S. at 303–04; *State v. Larin*, 233 Ariz. 202, 212–13, ¶ 38 (App. 2013). Because first-degree burglary as charged required only "possess[ion]" of a firearm, and not "discharge, use or threatening exhibition" of a firearm, first-degree burglary is not an inherently dangerous offense. *See Larin*, 233 Ariz. at 213, ¶ 40. Thus, the superior court was required to put the dangerousness question to the jury, and committed fundamental error by finding the offense inherently dangerous.

¶25 However, the court's error could not have prejudiced Johns. The undisputed evidence presented at trial showed Johns used his pistol to force his way into the victim's apartment, pointed the pistol at the apartment's occupants, and used it to pistol-whip the victim. Given this testimony, no reasonable jury could have failed to find the offense was dangerous. Therefore, any possible error was not prejudicial. *Cf. State v. Miranda-Cabrera*, 209 Ariz. 220, 227, ¶ 30 (App. 2004) ("[A] violation of the Sixth Amendment's jury requirement with regard to sentencing factors may constitute harmless error if no reasonable jury would fail to find the factor's existence beyond a reasonable doubt.").

CONCLUSION

¶26 For the foregoing reasons, we affirm Johns's convictions and sentences.

AMY M. WOOD • Clerk of the Court
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