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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

JAY ALAN BONKE, *Appellant*.

No. 1 CA-CR 17-0130
FILED 4-3-2018

Appeal from the Superior Court in Maricopa County
No. CR2016-102027-001
The Honorable Christine E. Mulleneaux, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Jillian Francis
Counsel for Appellee

MayesTelles PLLC, Phoenix
By David P. Lish, Mark H. Mendoza
Counsel for Appellant

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MEMORANDUM DECISION

Judge Jennifer M. Perkins delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Kent E. Cattani joined.

P E R K I N S, Judge:

¶1 Jay Alan Bonke appeals his convictions and sentences for trafficking in stolen property. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining the verdicts. *State v. Payne*, 233 Ariz. 484, 509, ¶ 93 (2013).

¶3 Bonke invited a man to be his roommate in April 2016, but did not add his name to the lease. One Friday night in August 2016, the roommate arrived home and found the apartment management had changed the locks and placed an eviction notice on the door.

¶4 The following Monday the apartment manager retrieved the roommate's passport and birth certificate from his bedroom, but did not allow him to enter the apartment because he was not on the lease. While retrieving the documents, the manager took photographs of the roommate's room.

¶5 The apartment management allowed Bonke to enter unsupervised and retrieve his belongings on several occasions. Twenty-one days after changing the locks, the manager allowed the roommate to enter the apartment and recover his personal property. While unlocking the door for the roommate, the manager stated, "I'm going to be honest with you, some of your stuff is missing." The roommate noted his television, sound bar, video game console, and computer were gone. His watch and tower fan were also missing.

¶6 The roommate alerted the police that his items had been stolen. The manager took photographs of the room and provided them and the earlier photographs to the investigating officer. The officer included descriptions of the photographs as well as the photographs themselves in his report.

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¶7 After learning that Bonke had pawned the watch, television, sound bar, and video game console, the State charged him with trafficking in stolen property.

¶8 The State disclosed the police report with the attached photographs to Bonke in a timely manner, including a photograph later marked as Exhibit 18. Two days before trial, the prosecutor enlarged Exhibit 18 from a 4x6 photograph to 8x10 and lightened it, revealing greater details. The State did not provide Bonke a copy of the enhanced photograph until the morning of the second day of trial. The State introduced the enhanced photograph in evidence as Exhibit 13.

¶9 Before trial began, Bonke made an oral motion *in limine* to preclude mention of the missing computer and tower fan because the State had not charged him with trafficking those items. He argued that allowing the jury to hear allegations of additional uncharged misconduct would be unduly prejudicial. The trial court granted the motion *in limine*.

¶10 Evidence at trial included pawnshop receipts and surveillance footage of Bonke pawning the watch, television, sound bar, and video game console. Bonke admitted to pawning the four items. He claimed all of the items belonged to him and testified the roommate had given him the watch.

¶11 The jury found Bonke guilty of three counts of trafficking in stolen property. The trial court sentenced Bonke to mitigated concurrent terms of imprisonment, the longest of which was 3.25 years.

¶12 Bonke timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes sections 12-120.21(A)(1) (2018), 13-4031 (2018), 13-4033(A)(1) (2018), and Article 6, Section 9, of the Arizona Constitution.

DISCUSSION

I. Motion for Mistrial

¶13 Bonke argues the trial court erred by denying two motions for mistrial he made based on: (1) the State's failure to disclose the enhanced photograph marked as Exhibit 13; and (2) the roommate's testimony regarding an uncharged missing item in violation of the order granting Bonke's motion *in limine*.

¶14 We review the denial of a motion for mistrial for an abuse of discretion. *State v. Jones*, 197 Ariz. 290, 304, ¶ 32 (2000). Because "a mistrial

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is the most dramatic remedy for trial error,” it should be granted “only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted.” *State v. Adamson*, 136 Ariz. 250, 262 (1983). In evaluating whether a mistrial is warranted, the trial court “is in the best position to determine whether the evidence will actually affect the outcome of the trial.” *Jones*, 197 Ariz. at 304, ¶ 32.

A. Enhanced Photograph

¶15 The State is required to provide the defense with a “list of all documents, photographs, and other tangible objects that the State intends to use at trial.” Ariz. R. Crim. P. 15.1(b)(5). The purpose of Rule 15.1 is “to give full notification of each side’s case-in-chief so as to avoid unnecessary delay and surprise at trial.” *State v. Armstrong*, 208 Ariz. 345, 353, ¶ 38 (2004) (quoting *State v. Dodds*, 112 Ariz. 100, 102 (1975)). All disclosure must be completed at least seven days before trial unless otherwise permitted. Ariz. R. Crim. P. 15.6(c). If a party seeks to introduce evidence that was not disclosed at least seven days before trial, the party must file a motion, supported by affidavit, seeking an extension. Ariz. R. Crim. P. 15.6(d).

¶16 We review the trial court’s assessment of the adequacy of disclosure under Rule 15.1 for an abuse of discretion. *State v. Roque*, 213 Ariz. 193, 205, ¶ 21 (2006), *disagreed with on other grounds by State v. Escalante-Orozco*, 241 Ariz. 254, 267, ¶ 14 (2017).

¶17 Bonke argues the State should have disclosed Exhibit 13, which was an enlarged and lightened version of the photograph previously disclosed, seven days before trial because it revealed details not visible in Exhibit 18.

¶18 However, the timely-disclosed police report described and included the original photograph, and both the description and the original photograph contained the details visible in Exhibit 13. Additionally, Bonke’s counsel interviewed the apartment manager who took the photograph regarding the contents of the photograph. Thus, the State did not untimely disclose Exhibit 13 because Bonke and his counsel already knew its contents.

¶19 Under these facts, the trial court did not abuse its discretion by denying Bonke’s motion for a mistrial based on a failure to separately disclose the enhanced photograph.

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B. Witness Testimony

¶20 “When unsolicited prejudicial testimony has been admitted, the trial court must decide whether the remarks call attention to information that the jurors would not be justified in considering for their verdict, and whether the jurors in a particular case were influenced by the remarks.” *Jones*, 197 Ariz. at 304, ¶ 32. “When the witness unexpectedly volunteers information, the trial court must decide whether a remedy short of mistrial will cure the error.” *Id.* (emphasis omitted); *see also State v. Stuard*, 176 Ariz. 589, 602 (1993) (finding the trial court’s instructions mitigated any potential prejudice created by unsolicited testimony).

¶21 Here, we need only address prejudice. The jury heard the roommate make five brief references to a missing computer. Bonke failed to object to either of the first two references, which came when the roommate was listing a handful of items he found missing from his bedroom. The third and fourth references were in quick succession, when the roommate was identifying missing items depicted in a photograph of his bedroom. Defense counsel objected at that point, prompting a bench conference, after which the trial court admonished the roommate and told the jury:

Jurors, you are to disregard any statements with regard to a missing computer.

He’s not been charged with a missing computer. You’re to disregard that testimony at this time.

¶22 Bonke claims the trial court’s use of the phrase “at this time” impliedly allowed the jury to consider the roommate’s testimony about the missing computer at a later time—specifically, during deliberations. However, given the trial court’s frequent use of the phrase “at this time” during the trial, it is highly unlikely the jury ascribed it special meaning in this particular instance.

¶23 Notwithstanding the admonition, the roommate made one more reference to a computer in recounting a conversation he had with Bonke after the items went missing, but it is not clear from his testimony he was referring to the same computer as in the earlier references. Defense counsel again failed to object. Finally, when the roommate was asked on cross-examination whether he gave police the serial numbers of the missing items, he responded, “Just for my—I can’t mention items that are missing, right. That he wasn’t charged with?”

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¶24 The roommate's references to the computer were brief, and the State did not mention the computer during opening or closing arguments. Moreover, defense counsel failed to object to several of the references. Finally, any potential prejudice from the statements was mitigated by the trial court's curative instruction to the jury to disregard the testimony. *See Stuard*, 176 Ariz. at 602. We presume a jury follows instructions unless the record indicates otherwise. *Payne*, 233 Ariz. at 518, ¶ 151. Therefore, the trial court did not abuse its discretion by denying Bonke's motion for mistrial based on the roommate's references to the missing computer.

II. Alleged Prosecutorial Misconduct

¶25 Bonke argues the prosecutor's failure to prevent the roommate from testifying in violation of the preclusion order, along with the failure to disclose the enhanced photograph, constitute prosecutorial misconduct warranting a new trial.

¶26 To prevail on a claim of prosecutorial misconduct, the defendant must demonstrate the prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *see also State v. Hughes*, 193 Ariz. 72, 79, ¶ 26 (1998). "[T]he denial of due process is a denial of 'fundamental fairness, shocking to the universal sense of justice.'" *State v. Velasco*, 165 Ariz. 480, 487 (1990) (quoting *Oshrin v. Coulter*, 142 Ariz. 109, 111, (1984)).

¶27 A conviction will be reversed for prosecutorial misconduct only if (1) misconduct occurred and (2) "a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial." *State v. Anderson*, 210 Ariz. 327, 340, ¶ 45 (2005). Absent an abuse of discretion, we defer to "the trial court's determination whether prosecutorial misconduct is so prejudicial as to require a new trial." *State v. Smith*, 182 Ariz. 113, 116 (App. 1995). Additionally, the Arizona Supreme Court has expressed great reluctance "to reverse a conviction on grounds of prosecutorial misconduct as a method to deter such future conduct." *State v. Towery*, 186 Ariz. 168, 185 (1996).

¶28 Bonke contends the prosecutor committed misconduct by failing to instruct the roommate to refrain from mentioning the missing computer while testifying. In response, the State argues that at the time the roommate testified, there was no clear ruling from the trial court precluding such testimony. On the first day of trial, the trial court granted Bonke's oral

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motion *in limine* to preclude any mention of the computer and the tower fan since they were not at issue. The next day, Bonke asked the court for permission to question the roommate about the tower fan, which the court granted. The prosecutor then asked to allow discussion of all items missing from the roommate's bedroom. The trial court heard argument about the issue, but did not rule at that time because the jury was coming in. Later, the trial court concluded the prosecutor may not have understood that the previously-granted motion *in limine* remained in place. Moreover, the trial court acknowledged that the discussion when revisiting Bonke's motion *in limine* could have confused the prosecutor. On this record, Bonke has not established the prosecutor committed misconduct by failing to instruct the roommate to refrain from mentioning the computer.

¶29 Furthermore, even assuming misconduct, Bonke has not demonstrated resulting prejudice. The State offered a wealth of evidence to show Bonke committed the charged crimes, including the surveillance footage of Bonke at the pawn shop, the pawn shop receipts, the testimony of both the pawn shop employee and the roommate, and Bonke's own testimony.

¶30 Under these circumstances, the roommate's limited (and unsolicited) statements over five half-days of trial, particularly as limited by the court's curative instruction, do not demonstrate a denial of due process or shock "the universal sense of justice." *Velasco*, 165 Ariz. at 487.

¶31 Bonke also claims the State's nondisclosure of the enhanced photograph amounted to prosecutorial misconduct. Because the trial court did not err in finding that the prosecutor adequately disclosed the contents of the photograph, the prosecutor's actions regarding the enhanced photograph did not amount to prosecutorial misconduct.

CONCLUSION

¶32 For the foregoing reasons, we affirm Bonke's convictions and sentences.



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