

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

CODY MICHAEL LINDENBAUM, *Appellant*.

No. 1 CA-CR 17-0460
FILED 6-19-2018

Appeal from the Superior Court in Maricopa County
No. CR2016-135176-002
The Honorable Gregory Como, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Jana Zinman
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Lawrence S. Matthew
Counsel for Appellant

STATE v. LINDENBAUM
Decision of the Court

MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Jennifer M. Perkins and Judge Peter B. Swann joined.

H O W E, Judge:

¶1 Cody Michael Lindenbaum appeals his conviction and sentence for attempted third-degree burglary, a class 5 felony. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 One morning in July 2016, Lindenbaum and Matthew Hernandez approached a Honda Prelude parked in a driveway. S.K., who knew the homeowner, J.R., saw Lindenbaum “leaning on the car like he was struggling to open it.” S.K. asked Lindenbaum if the car was his, and Lindenbaum responded that it was. S.K. then knocked on J.R.’s front door to inform him of what was occurring. J.R. walked toward the driveway and saw the two men standing next to the Honda before they started walking away. J.R. called the police and both J.R. and S.K. saw Lindenbaum and Hernandez enter an apartment complex and take the stairs to a third-floor corner apartment.

¶3 When police officers arrived, they took descriptions of the two men from J.R. and S.K. and then went to the apartment complex. Officer Ortega, along with other officers, went to apartment A-31, which J.R. and S.K. identified as the possible apartment the men entered, and conducted a knock and announce. No one answered, so Officer Ortega went to the apartment complex’s second floor. While Officer Ortega was on the second floor, Lindenbaum and a female associate came down the stairs next to A-31 to talk with the officers. Because Officer Ortega “immediately kind of thought [Lindenbaum] matched the description” of the suspect, he radioed for another officer to bring S.K. over for a “one-on-one identification[.]” When S.K. saw Lindenbaum, he immediately stated that Lindenbaum was the person who had tried breaking into the Honda. J.R. also subsequently identified Lindenbaum as the person standing next to the Honda.

¶4 After Officer Ortega arrested Lindenbaum and had him removed, he discovered through Lindenbaum’s female associate that

STATE v. LINDENBAUM
Decision of the Court

apartment A-31 was hers and that the second suspect, Hernandez, might be there. After she let the officers into the apartment, Officer Ortega saw Hernandez and ordered him to stand up and put his hands in the air. Hernandez "was bending over at the waist and he had his hands on his waist[,]” so Officer Ortega drew his gun and commanded Hernandez to put his hands in the air. Hernandez stated that he could not stand or raise both hands because he had a gun in his waistband. Officer Ortega searched Hernandez and found three guns in his waistband. Hernandez was arrested, and the officers photographed the apartment and the three guns. The State charged Lindenbaum with attempted third-degree burglary.

¶5 At trial, J.R. and S.K. both testified that the man trying to break into the Honda had distinctive neck and facial tattoos and the other man did not have neck or facial tattoos. When asked how S.K. recognized Lindenbaum, he stated that "not many people have this same kind of tattoos on their face. So as soon as the policeman brought him out, I was able to point him out, that was the guy, because you rarely see people with such kind of tattoos."

¶6 When Officer Ortega testified, the State asked about the guns Hernandez had and moved to admit the photographs of them. Lindenbaum did not object, and the court admitted the photographs. Through the State's questioning, Officer Ortega made clear that none of the guns belonged to Lindenbaum. Officer Ortega also testified that Lindenbaum was the only person he had contact with at the apartment complex who had face and neck tattoos. During a second officer's testimony, the State discussed apartment A-31's condition and moved to admit the photographs of the apartment where Hernandez's guns could be seen on a couch. Lindenbaum did not object to the handguns being admitted but objected to the photographs of the apartment because Lindenbaum stayed the night there only once, and the images depicted a messy apartment with mattresses and clutter spread across the living room floor. The court found that the apartment photographs did "not have a great deal of relevance," but did not find that they were "particularly prejudicial other than showing a messy room and that [Lindenbaum's] sleeping in a place where people don't pick up their items."

¶7 After the State rested, Lindenbaum testified on his own behalf. Lindenbaum testified that he and his girlfriend stayed the night in apartment A-31 the night before the attempted burglary. According to Lindenbaum, the next morning he announced that he was going to a convenience store to get coffee for his girlfriend and Hernandez stated that he would come. As the two walked back from the convenience store,

STATE v. LINDENBAUM
Decision of the Court

Hernandez told Lindenbaum to “hold on[]” because he had “to take care of something.” Lindenbaum testified that he was on his phone on the side of the street while Hernandez walked up to the Honda in J.R.’s driveway. Lindenbaum stated that he heard S.K. ask Hernandez a question and that he saw S.K. walk to J.R.’s front door. Lindenbaum further testified that after he saw the interaction, he started walking back toward the apartment. Although Lindenbaum stated that he went to the apartment’s third floor, he denied going back into A-31 and instead stayed outside to smoke a cigarette. He then went downstairs to talk with Officer Ortega and claimed that he “didn’t do anything.” Officer Ortega then arrested Lindenbaum after S.K. identified him.

¶8 The jury convicted Lindenbaum of attempted third-degree burglary. The jury found that the State had proved several aggravating circumstances and the trial court determined that Lindenbaum had five historical prior felony convictions. The court sentenced Lindenbaum as a repetitive offender to five years’ imprisonment. Lindenbaum timely appealed.

DISCUSSION

¶9 Lindenbaum argues that the trial court erred by admitting evidence that Hernandez possessed guns. “We review admission of evidence for an abuse of discretion,” *State v. Nordstrom*, 230 Ariz. 110, 114 ¶ 8 (2012), but because Lindenbaum did not object below, we review only for fundamental error, *see State v. Henderson*, 210 Ariz. 561, 567 ¶ 19 (2005). Under fundamental error review, the “defendant must establish both that fundamental error exists and that the error in his case caused him prejudice.” *Id.* at ¶ 20.

¶10 Assuming without deciding that the trial court fundamentally erred by admitting evidence of Hernandez’s guns, Lindenbaum’s claim fails because he cannot meet his burden of showing prejudice. “Prejudice under fundamental error review is a fact-intensive inquiry and varies depending upon the type of error that occurred and the facts of a particular case.” *State v. James*, 231 Ariz. 490, 494 ¶ 15 (App. 2013). To establish prejudice, a defendant “must affirmatively prove prejudice and may not rely upon speculation to carry his burden.” *State v. Dickinson*, 233 Ariz. 527, 531 ¶ 13 (App. 2013).

¶11 Lindenbaum contends that the evidence prejudiced him because “it is easy to understand how a jury would conclude that someone merely associated with a person who possessed an arsenal of loaded

STATE v. LINDENBAUM
Decision of the Court

weapons must be guilty of something, especially when [he] was a convicted felon.” But Lindenbaum cannot prove that the gun evidence affected the jury’s verdict. The uncontroverted evidence at trial placed Lindenbaum outside of J.R.’s house during the attempted burglary. And while J.R.’s and S.K.’s testimony about the location of each man differed slightly, both testified that the person with the face and neck tattoos was the one trying to break into the car. Additionally, both J.R. and S.K. subsequently identified Lindenbaum as the person they saw attempting to break into the Honda. Contrary to Lindenbaum’s argument that the evidence was not overwhelming because the “eyewitness testimony varied substantially,” the eyewitnesses were consistent that two men were near J.R.’s driveway, one had face and neck tattoos and the other did not, and the tattooed man was the person attempting to break into the Honda. The jury received all this information and heard from Officer Ortega that the guns found on Hernandez did not belong to Lindenbaum and that Lindenbaum was the only person he saw at the apartment complex who had face and neck tattoos. On this record, Lindenbaum’s contention of prejudice is merely speculative. Lindenbaum has failed to affirmatively prove any prejudice and therefore cannot establish fundamental error.

CONCLUSION

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



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