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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

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STATE OF ARIZONA, *Appellee*,

*v.*

RAKEEM BARBER, *Appellant*.

No. 1 CA-CR 17-0622
1 CA-CR 18-0482
(Consolidated)
FILED 7-18-2019

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Appeal from the Superior Court in Maricopa County
No. CR2015-111701-002
The Honorable John Christian Rea, Judge

**AFFIRMED**

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COUNSEL

Arizona Attorney General's Office, Phoenix
By W. Scott Simon
*Counsel for Appellee*

Maricopa County Public Defender's Office, Phoenix
By Terry J. Reid
*Counsel for Appellant*

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**MEMORANDUM DECISION**

Chief Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Paul J. McMurdie and Judge Kenton D. Jones joined.

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**S W A N N**, Chief Judge:

**¶1** Rakeem Barber appeals both his conviction and sentence for burglary, and the court's subsequent restitution order. Barber contends the superior court committed reversible error by (1) misstating the definition for reasonable doubt while reading the preliminary instructions aloud to the jury, (2) allowing a witness to testify via live video stream, and (3) failing to order a mistrial after the state presented evidence suggesting Barber invoked his right to remain silent after his arrest.[1] For reasons that follow, we affirm.

**FACTS AND PROCEDURAL HISTORY**

**¶2** In March 2015, Barber and his co-defendants, Christien Petty and Ryan Newell, drove a rental car to an Ahwatukee neighborhood, parked in a cul-de-sac, put on bright colored traffic vests, and, after lingering in the area for several minutes, jumped into C.E.'s backyard. The three men emerged from the backyard approximately five minutes later, with one of them holding a pillowcase with items in it. An officer arrived before the men could return to their car and, seeing the officer, the men ran into a nearby nature preserve, escaping the chasing officer. The police discovered that the abandoned rental car was leased under Barber's name, and, inside the car, they found identification cards for Petty and Newell. C.E.'s home showed signs of forced entry and several items, including a pillow case, were missing from inside the home.

**¶3** Based on a lead from the identification cards in the rental car, the police followed two women who drove from a Phoenix apartment to an

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[1] Although Barber filed a separate notice of appeal from the court's restitution order, and we consolidated that appeal with his appeal from his conviction and sentence, Barber did not address the restitution order in his briefs. Nor did the state address it in its answer. We therefore decline to address it here. *See* ARCAP 13(a)(6); *Torrez v. Knowlton*, 205 Ariz. 550, 552, ¶ 3, n. 1 (App. 2003).

intersection in Ahwatukee, near where the burglary occurred. The police saw their car pick up three different men who appeared to have been hiding and who matched descriptions of the burglars. Although the police lost track of the car, they soon located all three men at the same Phoenix apartment, and ultimately arrested them that night. Barber was arrested with Petty, who had a gold watch from C.E.'s home and a key to the abandoned rental car. The police also found jewelry from C.E.'s home in the Phoenix apartment. C.E.'s neighbor identified Barber as one of the three men who jumped into the backyard.

**¶4** Barber and his two co-defendants were tried together in a 14-day trial. The jury convicted Barber of one count of burglary in the second degree, and the court sentenced him to a term of 15 years' imprisonment. The court also ordered Barber to pay a total of $32,273.28 in restitution. He timely appeals.

## DISCUSSION

### I. THE COURT'S MISTAKEN VERBAL PRELIMINARY INSTRUCTION DID NOT PREJUDICE BARBER.

**¶5** Barber contends that the court committed reversible error by misreading the preliminary instructions to the jury and mistakenly defining reasonable doubt in terms of "real probability," rather than "real possibility," as required by *State v. Portillo*, 182 Ariz. 592, 596 (1995). Because Barber failed to object to the court's instruction, we will not reverse unless he establishes that the court committed an error that was both fundamental and prejudicial. *See State v. Escalante*, 245 Ariz. 135, 140–42, ¶ 12–21 (2018); *State v. Velazquez*, 216 Ariz. 300, 309–10, ¶ 37 (2007).

**¶6** At the beginning of trial, the court read aloud the following preliminary instructions to the jury:

> There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you think there is a *real probability* that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

(Emphasis added.)

The court also provided the jury with a written version of the preliminary instructions, which contained the proper "real possibility" language as required by *Portillo*. At the end of trial, the court read aloud and provided copies of the final jury instructions, which also included the proper "real possibility" language. The jury referenced the final instructions during deliberations.

**¶7** "It is only when the instructions taken as a whole are such that it is reasonable to suppose the jury would be misled thereby that a case should be reversed for error therein." *State v. Gallegos*, 178 Ariz. 1, 10 (1994). Here, considering the court's mistaken oral preliminary instruction, together with its accurate written preliminary instruction and its final instructions (both oral and written), we find insufficient grounds to conclude that the jury was misled or confused about the proper legal principle. *See id.* at 10–11; *see also State v. Bracy*, 145 Ariz. 520, 535–36 (1985) (holding that an erroneous oral jury instruction did not mislead the jury when the jury otherwise received proper instructions). Accordingly, even if the mistaken oral instruction constituted error, it did not confuse the jury and therefore did not prejudice Barber.

II. THE COURT DID NOT ERR BY ALLOWING A WITNESS TO TESTIFY VIA LIVE VIDEO STREAM.

**¶8** Barber contends that the court violated his Sixth Amendment confrontation right by allowing C.E. to testify via live two-way video stream. We review such constitutional claims de novo. *State v. Forde*, 233 Ariz. 543, 564, ¶ 79 (2014).

**¶9** The state learned that the victims, C.E. and her husband, would be moving out of state before trial. At the state's request, the court found that C.E. was a material witness and that she may be unavailable for trial, and ordered that she be deposed before her move out of state. After C.E.'s deposition and move, the state requested that the court either declare C.E. unavailable and admit her deposition testimony, or permit her to testify via two-way video stream.

**¶10** At a hearing on the state's motion, C.E. testified from her new home via the proposed two-way video stream. C.E. explained that she was the sole caregiver for her 77-year-old husband, who had undergone multiple heart-related treatments, and had since developed diabetes, high blood pressure, incontinence, and dementia. She noted that, because of his significant health issues, she "cannot leave him alone at all," and that she had not found a caregiver that they could trust. She explained that her

husband was not eligible to enter a care center until he completed treatment for his recently-diagnosed tuberculosis, which would take five months. C.E.'s new home was far away from Arizona, and a trip to testify in person would have required her to be away from home for "a couple days."

**¶11** The court noted the video stream's high resolution, and, during C.E.'s testimony, the judge personally sat in the jury box to ensure that the jurors would be able to see and hear C.E.'s testimony. The court then ruled that C.E. could testify by video, which she did at trial.

**¶12** Under the Sixth Amendment, "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This right is designed to "ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845 (1990) (holding that allowing a child sex-abuse victim to testify by one-way video would not violate the defendant's confrontation rights). "While recognizing the Constitution's *preference* for face-to-face confrontation, however, the Supreme Court has clarified that the right to face-to-face confrontation is not absolute." *State ex rel. Montgomery v. Kemp*, 239 Ariz. 332, 335, ¶ 16 (App. 2016) (allowing an alleged sexual assault victim to testify via two-way video during trial). The right, therefore, "must occasionally give way to considerations of public policy and the necessities of the case." *Craig*, 497 U.S. at 849. In *Kemp*, we adopted a test for determining whether video testimony may replace face-to-face confrontation: "the [s]tate must show that (1) the denial of face-to-face confrontation is necessary to further an important public policy; (2) the reliability of the testimony is otherwise assured; and (3) there is a case-specific showing of necessity for the accommodation." 239 Ariz. at 335, ¶ 16; *see Craig*, 497 U.S. at 850.

**¶13** Here, by allowing C.E. to testify via live video stream, the court furthered the important public policies of protecting the well-being of vulnerable adults, *see Washington v. Glucksberg*, 521 U.S. 702, 731–32 (1997), and the state's ability to effectively prosecute charged offenders, *see United States v. Knights*, 534 U.S. 112, 121 (2001). Additionally, the reliability of the testimony was ensured by the court during the evidentiary hearing when the judge personally sat in the jury box while C.E. testified to experience the sound and visibility of the testimony from the jury's perspective. There were no reported issues with the video or audio at trial. Barber's ability to effectively cross-examine C.E. was also ensured by his opportunity to question C.E. face-to-face during her pretrial deposition.

**¶14** Finally, C.E.'s circumstances present a case in which the video accommodation was necessary—not merely convenient or efficient—for her to testify. *See Kemp*, 239 Ariz. at 337, ¶ 23 (noting that courts require "some impediment to testifying beyond a mere unwillingness to travel" and that "mere convenience, efficiency, and cost-saving are not sufficiently important" (citation omitted)). Although this case does not involve the uniquely heinous circumstances surrounding a sexual-assault victim's inability to testify at trial—as was the case in *Craig* and *Kemp*—such extreme circumstances are not necessary for finding that the confrontation right must "give way." *See Kemp*, 239 Ariz. at 336–37, ¶¶ 18–20. We conclude that C.E.'s circumstances rise to a level of necessity warranting an exception to the strong preference for face-to-face confrontation. The court did not err.

III. TESTIMONY SUGGESTING THAT BARBER INVOKED HIS RIGHT TO SILENCE DID NOT CONSTITUTE REVERSIBLE ERROR.

**¶15** After the three defendants were arrested and read their *Miranda* rights,[2] Barber invoked his right to silence while his two co-defendants, Petty and Newell, each gave statements to the police. At trial, the state elicited testimony from the interviewing officer that, after their arrest, all three defendants were brought to the South Mountain Precinct. The state then elicited testimony about the officer reading Petty and Newell their *Miranda* rights and about statements they made thereafter. The state did not ask about Barber's *Miranda* rights or subsequent interview. Outside the presence of the jury, Barber's counsel noted concern that testimony about the co-defendants' post-*Miranda* interviews, but not about Barber's, would impermissibly lead the jury to infer that Barber invoked his right to silence. At the end of the officer's testimony, and over defense counsel's objection, the court read a jury question asking the officer, "Did you interview Mr. Barber?" Despite the court having directed him to answer "yes" or "no," the officer responded, "Mr. Barber was with me at the South Mountain Precinct."

**¶16** In his opening brief, Barber argues that the state's elicitation of testimony from the officer and the subsequent jury question impermissibly led the jury to infer that Barber invoked his right to silence. In his reply brief, however, Barber cited two additional instances in which his post-*Miranda* silence was referred to: During the state's case-on-rebuttal, both the prosecution and defense elicited testimony suggesting Barber's

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[2] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

post-*Miranda* silence; and during its closing arguments, the state expressly referred to Barber's silence while responding to Barber's defense that the police failed to investigate an allegedly exculpatory story. But we generally do not address arguments raised for the first time in a reply brief. *State v. Watson*, 198 Ariz. 48, 51, ¶ 4 (App. 2000); *see* Ariz. R. Crim. P. 31.10(c) (requiring that the appellant's reply brief "be strictly confined to the rebuttal of points made in the appellee's answering brief"). And we decline to do so here. Therefore, while we will consider whether the evidence elicited during the state's case-in-chief violated Barber's rights, we will not consider the later references to Barber's silence because he did not address them in his opening brief.

**¶17** It is well established that a prosecutor may not use a defendant's post-arrest, post-*Miranda* silence to impeach the defendant or as evidence of the defendant's guilt. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976); *State v. Mauro*, 159 Ariz. 186, 197 (1988). This prohibition "rests on 'the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial.'" *State v. Ramirez*, 178 Ariz. 116, 125 (1994) (citation omitted). Such due process issues are subject to de novo review and harmless error analysis. *State v. Rosengreen*, 199 Ariz. 112, 116, ¶ 9 (App. 2000); *State v. Keeley*, 178 Ariz. 233, 235 (App. 1994).

**¶18** Here, the state elicited testimony that all three defendants were at the police station and that Petty and Newell offered post-*Miranda* statements, but did not elicit any testimony about Barber's statements to police. This arguably gave rise to the implication that Barber had invoked his right to silence at the station. The jury question asking whether the officer interviewed Barber, which the officer did not definitively answer, shows that the jury at least passively considered Barber's conduct at the station. But such evidence, even though it might give rise to juror speculation about Barber's invocation, is not the type of explicit and intentional remark on a defendant's post-*Miranda* silence that warrants reversal. *See, e.g.*, *Doyle*, 426 U.S. at 613–14, 618 (holding the prosecutor's explicit reference to the defendant's post-*Miranda* silence to impeach the defendant's subsequent explanation of events violated defendant's due process rights); *State v. Keeley*, 178 Ariz. 233, 234–35 (App. 1994) (finding reversible error because the prosecutor's comments on the defendant's silence "were a deliberate trial strategy by the prosecutor, not an inadvertent slip by the officer"); *State v. Downing*, 171 Ariz. 431, 434–35 (App. 1992) (finding the state's "calling the attention of the jury to [defendant's] refusal to speak to the officers was neither inadvertent nor a single time occurrence," and reversing the superior court's denial of a

mistrial); *cf. Mauro*, 159 Ariz. at 197–98 (finding that, although the testimony strongly implied defendant's silence, it did not violate his due process rights because the focus of the testimony was his demeanor, not his silence). Instead, the implication of Barber's silence was a necessary byproduct of the state's valid line of questioning about Barber's two co-defendants' statements to police. We see nothing to suggest that the state presented the evidence with the intent to create an unfavorable inference against Barber. *See Mauro*, 159 Ariz. at 198.

**¶19** Even if the testimony suggesting Barber's post-*Miranda* silence did constitute error, we find that the error would be harmless because the relevant testimony consumed only a small portion of the 14-day trial and the state otherwise presented sufficient evidence supporting Barber's conviction for burglary. *See State v. Bowie*, 119 Ariz. 336, 341 (1978) (finding no prejudice from improper prosecution question about defendant's post-arrest silence, in part because it "was the only time appellant's post-arrest silence was mentioned"). Under A.R.S. § 13-1507, "[a] person commits burglary in the second degree by entering . . . a residential structure with the intent to commit any theft or any felony therein." Here, the state presented eyewitness testimony identifying Barber as one of the three men who, after walking suspiciously by several homes, jumped into C.E.'s backyard. The state showed that C.E.'s home had been broken into and that several items were stolen. The rental car that the men abandoned near the scene of the crime was in Barber's name. And the police found C.E.'s jewelry in the possession of Petty, who was in the car with Barber when they were arrested, and in the Phoenix apartment where the three men went after the burglary.

**¶20** Accordingly, the court did not err.

## CONCLUSION

**¶21** For the foregoing reasons, we affirm Barber's conviction and sentence. We also affirm the court's restitution order.

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