IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

EARL JASON PUNLEY, *Appellant*.

No. 1 CA-CR 17-0686
FILED 8-22-2019

Appeal from the Superior Court in Mohave County
No. S8015CR201700139
The Honorable Billy K. Sipe, Judge *Pro Tempore*

AFFIRMED IN PART; REVERSED IN PART

COUNSEL

Arizona Attorney General's Office, Phoenix
By Jennifer L. Holder
Counsel for Appellee

Mohave County Legal Advocate, Kingman
By Jill L. Evans
Counsel for Appellant

MEMORANDUM DECISION

Judge David D. Weinzweig delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Paul J. McMurdie joined.

W E I N Z W E I G, Judge:

¶1 Earl Jason Punley appeals his convictions and sentences for misconduct involving weapons, a Class 4 felony (Count 1), possession of drug paraphernalia, a Class 1 misdemeanor (Count 2), and resisting arrest, a Class 1 misdemeanor (Count 3). We affirm the convictions and sentences for Counts 1 and 2, but reverse for Count 3.

FACTS AND PROCEDURAL BACKGROUND

¶2 Police found Punley and a woman walking in a roadway and contacted them. The woman admitted she had recently used methamphetamine and was on parole. The officers arrested her and then turned their attention to Punley.

¶3 Punley appeared "extremely nervous." He first denied but eventually admitted having "paraphernalia on him," saying "maybe" it was a methamphetamine pipe. An officer advised Punley he was under arrest and moved to grab his hand, but Punley "pull[ed] away" and tried to separate himself from the officer. A brief struggle ensued until the officer tripped Punley to the ground and handcuffed him. The officer searched Punley and found a methamphetamine pipe in his coat pocket and a pair of homemade nunchakus tucked in his front waistband.

¶4 The State charged Punley with misconduct involving weapons, a Class 4 felony (Count 1), possession of drug paraphernalia, a Class 6 felony (Count 2), and resisting arrest, a Class 1 misdemeanor (Count 3). Before trial, Punley successfully moved to sever Count 1 from the remaining counts, and the court ordered separate jury trials for Counts 1 and 2, plus a bench trial for Count 3. The State then moved to admit evidence of Punley's arrest, including his evasive actions, in the trials on Counts 1 and 2, arguing it was admissible as "other act" evidence under Arizona Rule of Evidence 404(b). The court agreed and granted the motion, finding the evidence "to be relevant for both trials" and not unduly prejudicial. The court held back-to-back jury trials on Counts 1 and 2 in

September 2017 and a bench trial on Count 3. Punley was found guilty as charged in each trial.

¶5 Punley timely filed a notice of appeal, and his counsel filed an opening brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). After reviewing the record, this Court issued an order pursuant to *Penson v. Ohio*, 488 U.S. 75 (1988), requesting supplemental briefing on two issues: (1) whether Punley waived his right to a jury trial on the misdemeanor charge of resisting arrest; and (2) whether the superior court erred by permitting evidence of resisting arrest during the jury trials on Counts 1 (misconduct involving weapons) and 2 (possession of drug paraphernalia). We have jurisdiction under Ariz. Const. art. 6, § 9, and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

DISCUSSION

A. Waiver of Jury Trial

¶6 "The right to a jury trial is a fundamental right secured to all persons accused of a crime by the Sixth Amendment of the United States Constitution and, in Arizona, by Article 2, §§ 23 and 24 of the Arizona Constitution." *State v. Butrick*, 113 Ariz. 563, 565 (1976). A defendant may waive that right; however, before accepting a waiver of a jury trial, the superior court "must address the defendant personally, inform the defendant of the defendant's right to a jury trial, and determine that the defendant's waiver is knowing, voluntary, and intelligent." Ariz. R. Crim. P. 18.1(b)(1)-(2). Failure to do so constitutes structural error requiring reversal. *State v. Le Noble*, 216 Ariz. 180, 184-85, ¶ 19 (App. 2007).

¶7 The superior court mistakenly thought that Punley was not entitled to a jury trial on the resisting arrest count because it was a misdemeanor. A defendant is entitled to a jury trial for resisting arrest whether charged as a felony or misdemeanor. *Id.* at 183, ¶ 16. The State confesses error and we agree. Punley was entitled to a jury trial on the misdemeanor charge for resisting arrest but was never advised of the right and did not waive it. *See id.*; Ariz. R. Crim. P. 18.1(b)(1)-(2). We reverse Punley's conviction and sentence on Count 3.

B. Evidence of Resisting Arrest

¶8 Punley argues the superior court erred in allowing the jury to hear evidence of resisting arrest in the trials on Counts 1 and 2. We review evidentiary rulings for an abuse of discretion and will uphold the decision

if there is reasonable evidence to sustain it. *State v. Salamanca*, 233 Ariz. 292, 294-95, ¶ 8 (App. 2013).

¶9 Under Arizona Rule of Evidence 404(b), "evidence of other crimes, wrongs, or acts is not admissible to prove" a defendant's character "in order to show action in conformity therewith." Such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b).

¶10 Before evidence of other acts may be admitted, the superior court must find "clear and convincing proof both as to the commission of the other bad act and that the defendant committed the act." *State v. Anthony*, 218 Ariz. 439, 444, ¶ 33 (2008) (quotation omitted). The court must also find (1) the prior act is offered for a proper purpose; (2) the act is relevant to prove that purpose; and (3) the probative value of admitting the evidence is not substantially outweighed by the danger of unfair prejudice. *Id.* The court must also provide an appropriate limiting instruction if requested. *Id.*

¶11 Evidence of the circumstances of Punley's arrest, including his evasive actions, was admissible in the trials on Counts 1 and 2 under Rule 404(b). The evidence was offered for a proper purpose of demonstrating Punley's knowledge and consciousness of guilt. In particular, Punley's evasive actions, which included pulling away from the officer and reaching to the front side of his body while on the ground, tended to show Punley knew he possessed nunchakus and drug paraphernalia and sought to conceal them from the officer or prevent him from finding them. *See* A.R.S. § 13-3102(A)(3) (misconduct involving weapons requires *knowing* possession of a prohibited weapon); A.R.S. § 13-3415(A) (possession of drug paraphernalia requires "use" or "possess[ion] with intent to use" drug paraphernalia); A.R.S. § 13-105(34) ("'Possess' means *knowingly* to have physical possession or otherwise to exercise dominion or control over property.") (emphasis added).

¶12 The evidence was relevant, and its probative value was not substantially outweighed by the danger of unfair prejudice. The officer's account of Punley's arrest did not suggest Punley attacked the officer, used profanity or required more than one officer to arrest him, and he testified to no more than necessary to show Punley's mental state. *See State v. Schurz*, 176 Ariz. 46, 52 (1993) ("[u]nfair prejudice" under Rule 403 "means an undue tendency to suggest decision on an improper basis, such as emotion, sympathy or horror") (quotation and citation omitted).

¶13 Nor did Punley dispute his evasive actions or offer any competing evidence or alternative explanation. *See, e.g.*, *Salamanca*, 233 Ariz. at 295-96, ¶ 14 ("Although Rule 404(b) requires the court to find by clear and convincing evidence that the other act was committed and that the defendant committed it, [the defendant] never disputed having sent the text messages.") (quotation and citation omitted). And the superior court did not provide a limiting instruction because Punley never requested one. Ariz. R. Evid. 105 (if evidence is admitted for one purpose but not for another, court must give limiting instruction upon timely request). Thus, the court did not err by allowing this evidence in both jury trials.

CONCLUSION

¶14 We have reviewed the record for reversible error and affirm Punley's convictions and sentences for Counts 1 and 2, but reverse his conviction and sentence for Count 3. *See State v. Leon*, 104 Ariz. 297, 300 (1969).

¶15 Counsel's obligations in this appeal will end once Punley is informed of the outcome and his future options, unless counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85 (1984). On the court's own motion, Punley has 30 days from the date of this decision to proceed with a pro se motion for reconsideration or petition for review.

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