

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

MARK ANTHONY LUEVANO, *Appellant*.

No. 1 CA-CR 18-0885
FILED 10-24-2019

Appeal from the Superior Court in Maricopa County
No. CR2011-138118-002
The Honorable Edward W. Bassett, Judge *Retired*

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

Bain & Lauritano, PLC, Glendale
By Amy E. Bain
Counsel for Appellant

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MEMORANDUM DECISION

Judge Jennifer M. Perkins delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Judge Paul J. McMurdie joined.

P E R K I N S, Judge:

¶1 Defendant Mark Anthony Luevano appeals his convictions and sentences for two counts of aggravated assault, two counts of kidnapping, and one count of burglary in the first degree. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 During the daylight hours of July 19, 2011, Mark Luevano and David Zamora went to M.S.'s apartment at the Marcos de Niza Projects in Phoenix, where she lived with her four-year-old son, G.S. The three adults smoked methamphetamine in M.S.'s bedroom while G.S. played at a neighbor's home. After Zamora began looking through M.S.'s belongings, she told him to leave. Zamora left and Luevano went with him. That night, M.S. was sleeping in her bed with G.S. when the doorbell rang. She saw Luevano and Zamora at the front door but did not answer. The two men then went around to the back door, and M.S. saw them looking through a back window. M.S. did not want them in her apartment, and the two men eventually left.

¶3 Later that night, M.S. awoke to the sound of "feet stomping" in her living room, where she found Luevano and Zamora next to the couch. Zamora asked M.S. where the meth was, and she told him that they had smoked all of it. Zamora then became angry and grabbed a knife from the kitchen. The three of them went into M.S.'s bedroom, and Zamora began looking through her belongings while Luevano watched. Zamora broke some mirrors and then flipped the bed where G.S. had been sleeping. A confrontation ensued, and G.S. was cut just below the left eye. Zamora eventually told M.S., "I will just take you right now." Luevano then wrestled the knife away from Zamora and stabbed M.S. in the face, arm, and chest while she held G.S. The two men then fled. M.S. received treatment at a hospital and survived.

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¶4 Police arrested Luevano and Zamora, and a Detective interviewed them separately. Zamora told the Detective that he and Luevano went to M.S.'s apartment "to get high." Zamora also admitted to breaking things in the apartment but denied using a knife against M.S. or G.S. In his separate interview, Luevano told the Detective that he was already at M.S. apartment sleeping with her when two men "[came] smashing into the apartment." Luevano told the Detective that he "just wanted to get out of there" and fled immediately after the two men arrived. The Detective noticed a cut on the web of Luevano's hand, and when he asked where the cut came from, Luevano said he "didn't know." A crime scene tech photographed the cut.

¶5 A grand jury indicted Luevano and Zamora for two counts of aggravated assault, two counts of kidnapping, and one count of burglary in the first degree. The case proceeded to trial, with Luevano represented by counsel and Zamora representing himself. Both M.S. and G.S. testified at trial, as did the Detective. The Detective testified without objection:

Q: And during that time when [Zamora] began to talk to you, did he tell you who was with him that night?

A: Eventually, yes.

Q: Who was with him that night? Who did he tell you?

A: He told me that he and Mark Luevano went over to [M.S.'s] house.

Q: And what was the purpose of them going over to [M.S.'s] house?

A: He said they went there to get high, and that's when he got upset because she wouldn't get him — she wouldn't get him high.

¶6 Neither defendant testified at trial. Zamora delivered his closing argument in which he stated that he was "by himself" at M.S.'s apartment on the night of the incident, and that he was not there at all when M.S. was stabbed.

¶7 The jury convicted Luevano as charged and found several aggravating circumstances. The superior court sentenced Luevano to lengthy concurrent and consecutive prison terms. Luevano timely filed a delayed notice of appeal.

DISCUSSION

¶8 Luevano argues the court violated his rights under the Sixth Amendment Confrontation Clause by allowing the Detective to testify that Zamora said Luevano was with him on the night of the incident.

¶9 Fifty years ago, the United States Supreme Court found a violation of the Confrontation Clause where the trial court admits a non-testifying co-defendant's confession incriminating the defendant. *See Bruton v. United States*, 391 U.S. 123, 137 (1968). However, "later cases have dramatically limited the type of statement found to be so incriminating that its admission into evidence necessarily violates the Sixth Amendment." *State v. Blackman*, 201 Ariz. 527, 538, ¶ 42 (App. 2002) (citing to a lengthy discussion of *Richardson v. Marsh*, 481 U.S. 200 (1987) and *Gray v. Maryland*, 523 U.S. 185 (1998)). In *Richardson*, the Supreme Court held *Bruton* applies to statements that are "facially incriminating" to a defendant, not those which become incriminating "only when linked with evidence introduced later at trial." 481 U.S. at 207-08; *see also State v. Vasquez*, 233 Ariz. 302, 306, ¶ 13 (App. 2013).

¶10 Because Luevano failed to object at trial, we review for fundamental error only. *See State v. Alvarez*, 213 Ariz. 467, 469, ¶ 7 (App. 2006). To prevail on fundamental error review, a defendant must establish error that (1) "went to the foundation of the case," (2) "took from the defendant a right essential to his defense," or (3) "was so egregious that he could not possibly have received a fair trial." *State v. Escalante*, 245 Ariz. 135, 142, ¶ 21 (2018). The first two prongs, if found, require a subsequent finding of prejudice; the third is inherently prejudicial. *Id.* To prove prejudice, a defendant must show "that without the error, a reasonable jury could have plausibly and intelligently returned a different verdict." *Id.* at 144, ¶ 31. The standard for prejudice is not "easily satisfied" and "necessarily excludes imaginative guess work." *Id.* "The defendant bears the burden of persuasion at each step." *Id.* at 142, ¶ 21.

¶11 Allowing the Detective's testimony that Zamora told him Luevano was with him on the night of the incident was not "so egregious that [Luevano] could not possibly have received a fair trial." *Escalante*, 245 Ariz. at 142, ¶ 20 (limiting this type of error to cases where the error "so profoundly distort[s] the trial that injustice is obvious without the need to further consider prejudice."); *see also State v. Ring*, 204 Ariz. 534, 552, ¶ 45 (2003) (stating that only in cases of "structural error" may the court obviate the need to assess whether the error was harmless). Thus, assuming without deciding that the court erred here, Luevano must show prejudice.

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¶12 The Detective did not directly testify that Luevano engaged in the crimes charged. Rather, he merely stated that Zamora told him Luevano went with Zamora to M.S.'s apartment on the night of the incident. Moreover, while Zamora did not testify, he contradicted the Detective's testimony in his closing argument by stating that he was "by himself" at M.S.'s apartment on the night of the incident, and that he was not there at all when M.S. was stabbed.

¶13 To the extent the Detective's testimony contradicted Luevano's story that he was sleeping with M.S. on the night of the incident and fled when two men arrived, it was far from the only contradictory evidence. Both M.S. and G.S. testified that Luevano came to the apartment with Zamora and stabbed M.S. after wrestling the knife away from Zamora. The Detective also testified that he noticed a cut on Luevano's hand during his interview with him and that Luevano could not explain where the cut came from. The state admitted photographs of the cut into evidence and published them to the jury. There is thus substantial other evidence that also contradicted Luevano's story. Luevano fails to show that "a reasonable jury could have plausibly and intelligently returned a different verdict" absent the Detective's hearsay testimony. *Escalante*, 245 Ariz. at 144, ¶ 31. The prosecutor did not mention the testimony in her closing or rebuttal arguments. Because Luevano fails to show prejudice, we need not decide whether the Detective's testimony was "facially incriminating" under *Bruton* and *Richardson*.

CONCLUSION

¶14 We affirm Luevano's convictions and sentences.



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