IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

TIMOTHY EDWARD CAMPBELL, *Appellant*.

No. 1 CA-CR 19-0112
FILED 4-7-2020

Appeal from the Superior Court in Mohave County
No. S8015CR201700890
The Honorable Rick Weiss, Judge *Retired*
The Honorable Derek C. Carlisle, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michael O'Toole
Counsel for Appellee

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

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Paul J. McMurdie and Judge Jennifer B. Campbell joined.

C A T T A N I, Judge:

¶1 Timothy Edward Campbell appeals his conviction of possession of dangerous drugs for sale (methamphetamine) and the resulting sentence. For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 In June 2017, Lake Havasu City Police officers stopped a car that had been reported stolen. Campbell was riding in the front passenger seat; his friend, Jannae Mahesh, was driving. Campbell and Mahesh were detained in separate police vehicles. After being read his *Miranda*[1] rights, Campbell told officers that he was in town to visit his brother. He explained that he was in the process of buying the car from its owner, Mac Jones, but that Jones had reported the car stolen because Campbell had gotten behind on payments. According to Campbell, he had made a payment the previous day, so Jones should have withdrawn the police report.

¶3 Two officers then began an inventory search of the car. From the passenger-side window, one officer saw a black duffle bag in the driver's footwell, within reach of a passenger in the front seat. Inside the duffle bag, officers discovered 4.8 pounds of methamphetamine in a large zip-top bag, 5.7 grams of methamphetamine in a smaller zip-top bag, syringes, a few other miscellaneous items, and a coin purse containing a bank card in Campbell's name. Both Campbell and Mahesh were arrested and, as relevant here, charged with possession of dangerous drugs for sale (methamphetamine).[2]

---

1 *Miranda v. Arizona*, 384 U.S. 436 (1966).

2 The indictment also charged Campbell with forgery and theft of means of transportation, both of which were ultimately dismissed. The forgery count was dismissed on the State's motion before trial. The court dismissed the theft of means count after the State rested its case-in-chief, finding insufficient evidence to present that charge to the jury.

¶4 After the arrest, police officers interviewed Mahesh, who told officers that she and Campbell were driving back to Oklahoma from California and had stopped in Lake Havasu City to visit Campbell's brother. Jones, who she knew from Oklahoma, had instructed them to pick up the duffle bag at a carwash near the casino, and in exchange for delivering the bag, she could keep the car. Mahesh first reported that Jones gave these instructions to Campbell over the phone. Mahesh picked up the bag while Campbell was in the casino, and she "pinched" some of the methamphetamine for personal use and smoked it earlier that morning. During the interview, Mahesh told the officers that both she and Campbell knew the bag contained methamphetamine.

¶5 Mahesh ultimately pleaded guilty and was sentenced to 8.5 years' imprisonment. She then testified at Campbell's trial and claimed that Campbell had no idea about the methamphetamine. She testified that only she (not Campbell) had talked to Jones about picking up the black bag and that she had tried to keep Campbell from finding out she had picked up a duffle bag of methamphetamine, pinched some, and used it. Mahesh claimed that any contrary statements inculpating Campbell that she made during the interview were because she was "really high" at the time. The officers who interviewed her, however, testified that Mahesh had shown no obvious signs of impairment during the interview.

¶6 A jury found Campbell guilty of possession of dangerous drugs for sale (methamphetamine). After a continued trial on priors and sentencing hearing, the superior court sentenced Campbell as a repetitive offender to an aggravated term of 23 years' imprisonment. Campbell timely appealed, and we have jurisdiction under A.R.S. § 13-4033(A).

DISCUSSION

I. Confrontation Clause.

¶7 Campbell argues that his conviction must be reversed because testimonial hearsay was admitted at trial in violation of his rights under the Confrontation Clause of the Sixth Amendment. The Sixth Amendment's Confrontation Clause guarantees each criminal defendant "the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This guarantee thus prohibits admission of testimonial hearsay statements by a witness who does not appear at trial, unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004).

¶8 Kimberly Campbell, who the prosecutor described as Campbell's sister-in-law, and Campbell's brother were originally indicted along with Campbell and Mahesh. Neither Kimberly nor Campbell's brother went to trial with Campbell, and neither testified at Campbell's trial. On cross-examination of the case agent, however, defense counsel elicited a response that referenced Kimberly's statements to police, testimony that Campbell now assigns as error:

> Q. . . . Was there -- in your investigation, sir, -- I know you had several officers that had worked on this case and then feed information to you. So, as the case agent that's overlooked the whole case were there ever any indications of sales that [Campbell] was involved in that you found?
>
> A. Yes.
>
> Q. In this particular case?
>
> A. During interviews.
>
> Q. He indicated he was selling drugs?
>
> A. No; not him. During interviews. *Kimberly Campbell; she stated that he supplied them with methamphetamine during the interview.*
>
> Q. Okay. Did you follow-up on that? Is there anything to indicate that's true?
>
> A. That's her statement when I interviewed her, yes.

(Emphasis added.)

¶9 The case agent's reference to Kimberly's out-of-court statement during a police interview arguably implicated the Confrontation Clause. *See id.* at 52–54. But when defense counsel, whether strategically or carelessly, is the source of the error asserted on appeal, the invited error doctrine forecloses appellate review. *State v. Escalante*, 245 Ariz. 135, 145, ¶ 38 (2018); *State v. Logan*, 200 Ariz. 564, 565–66, ¶¶ 9, 11 (2001).

¶10 Here, defense counsel opened the field of inquiry with a broad question about whether the investigation had uncovered "any indications" that Campbell was involved in drug sales. *See State v. Lawrence*, 123 Ariz. 301, 304 (1979) (contrasting an available "carefully-framed" leading question with defense counsel's "broad, open-ended

inquiry . . . venturing onto dangerous ground" that invited the witness's otherwise-improper response). The case agent's response that "Yes," the investigation had produced such evidence, signaled to defense counsel that further inquiry might elicit inculpatory information. *See State v. Fulminante*, 161 Ariz. 237, 253–54 (1988) (noting that cross-examination on why the investigating detective suspected the defendant opened the door to the evidence underlying the detective's suspicion). Defense counsel then progressively narrowed the focus of his questions to ultimately "specifically call[] for the response now challenged," thereby inviting any error. *See State v. Stuard*, 176 Ariz. 589, 601 (1993); *see also State v. Moody*, 208 Ariz. 424, 453, ¶ 111 (2004).

¶11 Moreover, even assuming the invited error doctrine does not apply, Campbell is not entitled to relief. Because Campbell did not object at trial, we review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19–20 (2005). And even though a confrontation clause violation may deprive the defendant of constitutionally guaranteed procedures and thus qualify as fundamental error, *see Escalante*, 245 Ariz. at 141, ¶ 18, Campbell has failed to show prejudice.

¶12 Relying on Mahesh's trial testimony that Campbell knew nothing about the drugs, Campbell argues that the only evidence linking him to the methamphetamine—other than Kimberly's out-of-court statement—was his bank card in the duffle bag, which he suggests was probably there for Mahesh's use. But while Mahesh testified that Campbell was not involved, her prior statements to police inculpated him. She told officers that not only did Campbell know about the methamphetamine but also that he was the one communicating with Jones about picking up the duffle bag. Although Mahesh attempted to explain the discrepancy by claiming to have been "really high" during the interview, the officers involved countered her explanation by noting no obvious signs of impairment during the interview. Moreover, Mahesh's conduct at the time of the offense undermined her exculpatory trial testimony. Although she ostensibly picked up the black duffle bag in secret to keep Campbell in the dark, she nevertheless placed the newly acquired duffle bag in the car, in Campbell's plain view and within his reach.

¶13 Ultimately, Campbell offers no basis to conclude a reasonable jury could "plausibly and intelligently" have revised its assessment of Mahesh's credibility had Kimberly's out-of-court statement been excluded. *See Escalante*, 245 Ariz. at 144, ¶¶ 29–31. Accordingly, we affirm the conviction.

II. Sentencing.

¶14 Campbell argues that the superior court's finding of historical prior felony convictions should be vacated and the matter remanded for resentencing because a delay in his sentencing date allowed the State to procure the evidence necessary to prove his priors and because the court's comments improperly offered the State legal advice on how to provide such proof.

¶15 After the jury rendered a guilty verdict, the superior court set sentencing for December 6, 2018. For reasons that are not apparent in the record, sentencing did not go forward on that date. Over the next few weeks, Campbell sent several *pro se* letters to the court asking for his next court date. In early January, a newly assigned judge (the trial judge having retired) noted Campbell's letters and the unexplained failure to hold sentencing as scheduled, then reset sentencing for January 18, 2019.

¶16 On that date, the court noted that defense counsel was unable to be present due to a medical issue and, although no written continuance request had been filed, continued the hearing to ensure defense counsel could appear and participate in person. Defense counsel, appearing telephonically, agreed that he had orally informed judicial staff the previous day that he "needed to continue the sentencing."

¶17 During that hearing, there was some discussion of fingerprints and proof of prior convictions. Before either party made any statements, the court explained its assumption that defense counsel would need to be present for sentencing because "I assume that somebody is going to want to be presenting evidence regarding the priors. Maybe a fingerprint person or something like that. I don't know if the parties discussed it." The prosecutor noted that the parties had previously stipulated to the court's consideration of conviction records from California, which had already been submitted, and expressed that she anticipated proceeding based on documentary evidence alone: "[W]e didn't plan on presenting a witness for fingerprints, given the discussion with [the trial judge] that it appeared that what I had was enough for him to decide whether in fact this was Mr. Campbell's prior felonies."

¶18 The court noted the distinction between an agreement to allow the court to "review and consider" certain exhibits and the question of whether those admitted exhibits sufficed to prove the point in issue. The court then expressly declined to "tell anybody how to do their job," to weigh in on "whether or not they need to call a witness or need to call an

expert or need to have fingerprint comparisons done," or (aside from noting the existence of appellate cases on that issue) to "give either side any legal advice in connection with this case."

¶19 Thereafter, when the court inquired about available dates to reschedule the sentencing hearing, the prosecutor added that "just for the record, the State was prepared to proceed today," relying on the dissent in an unspecified unpublished appellate decision to suggest that priors could be proven without fingerprint evidence. The court responded, "Yeah, I'm pretty sure I've never relied on the d[iss]ent in an unpublished opinion for any kind of precedential value. But, again, I've been wrong, and I learn new things all the time, so we'll go with that." The court then continued the sentencing hearing to February 8.

¶20 At the end of January, the prosecutor moved to continue the sentencing because the State's fingerprint analyst would not be available for the scheduled date; defense counsel did not oppose the continuance. The court granted the unopposed continuance request and reset sentencing for February 20.

¶21 On the day of sentencing, Campbell filed an objection to the court considering any evidence that was not available as of the January 18 hearing, arguing that State's evidence at the time was insufficient to identify Campbell as the subject of the prior convictions and that the court had (inadvertently) instructed the prosecutor on how to cure the shortfall. After oral argument from both sides, the court denied Campbell's objection. The court noted that the continuance was granted at defense counsel's request due to counsel's physical absence. After summarizing the prosecutor's comments at the prior hearing, the court stated that it had declined to offer an opinion on the necessity of a fingerprint expert or sufficiency of the State's documentary evidence. The court acknowledged expressing surprise at the prosecutor's reliance on a dissent in a non-precedential appellate decision, but directed that surprise to the weight of authority, not as a comment on whether fingerprint evidence would be needed. The court also noted that defense counsel had not opposed the State's late-January request for a continuance to secure the fingerprint analyst's attendance, which implicitly acknowledged that a fingerprint comparison would be offered.

¶22 After proceeding with the trial on priors, the court found the State had proven five out of six alleged prior convictions and sentenced Campbell as a category three repetitive offender.

A. Delay.

¶23 Campbell argues that his sentencing hearing should have been held within 60 days after the verdict, *see* Ariz. R. Crim. P. 26.3(b), and that the delay prejudiced him by allowing the State time to secure a fingerprint comparison and thus prove his prior convictions. Rule 26.3(b) authorizes the court to continue the sentencing date for good cause but instructs that sentencing "should be no later than 60 days after the determination of guilt." Although Campbell was sentenced 112 days after the verdict, the Rule 26.3 timeframes are not jurisdictional. *See State v. Smith*, 112 Ariz. 208, 209 (1975). And because Campbell never challenged the sentencing delay in superior court, we review only for fundamental, prejudicial error. *See Henderson*, 210 Ariz. at 567, ¶¶ 19–20.

¶24 Even assuming that violation of a rule-based right to "speedy sentencing" could rise to the level of fundamental error, *but cf. State v. Spreitz*, 190 Ariz. 129, 139 (1997) (reiterating that the Rule 8 speedy trial right is procedural and not a fundamental right), Campbell has failed to show cognizable prejudice. First, Campbell requested or acquiesced in the bulk of the delay to which he now assigns error. The court continued the January 18 hearing at Campbell's request because of defense counsel's medical issue, and later Campbell did not oppose the State's request to continue sentencing to secure the fingerprint analyst's attendance.

¶25 Moreover, Campbell's only assertion of prejudice is directed at the State's use of the delay to secure additional evidence, but that is not the type of prejudice required. Here, cognizable prejudice must be based on some way in which the delay hampered Campbell's defense, and he has made no such allegation, much less showing. *Cf. State v. Zuck*, 134 Ariz. 509, 515 (1982) ("Appellant must show that he was prejudiced by being prevented from presenting some defense, rather than by the state's being allowed to make its case."); *State v. Vaughan*, 124 Ariz. 163, 164 (App. 1979) ("That he was subjected to enhanced punishment by delay that allowed the state to obtain material on his prior convictions is not the prejudice required.").

¶26 And in any event, Campbell has not established that the State would have been unable to prove his prior convictions without the fingerprint comparison. Generally, prior convictions for enhancement purposes are established by proof of the conviction (a certified copy of the conviction) and proof of identity (that those conviction documents pertain to the defendant). *See State v. Morales*, 215 Ariz. 59, 61, ¶ 6 (2007). A forensic comparison of the defendant's fingerprints to the fingerprints appended to

conviction documents may often provide the best proof of identity, but it is not the only possible proof. *See State v. Robles*, 213 Ariz. 268, 273, ¶ 16 (App. 2006). Other identifying information in conviction records may include the defendant's name, date of birth, photographs, cross-references to other convictions, or other unique identifiers, like identity numbers. *See State v. Solis*, 236 Ariz. 242, 248, ¶ 22 (App. 2014) (affirming prior-conviction finding based on matching photographs and dates of birth); *State v. Cons*, 208 Ariz. 409, 415, ¶¶ 16–17 (App. 2004) (affirming finding of two prior felony convictions: the first established by name, date of birth, and matched fingerprint; the other based on a cross-reference to the first, along with the defendant's name and date of birth).

¶27 Here, apart from the ultimate fingerprint matches, the certified conviction records (which Campbell stipulated to admitting into evidence) included a constellation of identifying information: Campbell's full name, date of birth, social security number, consistent state identification numbers, signatures, photographs, and one case's cross-reference to another conviction based on Campbell's admission. And Campbell has never maintained, either in superior court or on appeal, that the conviction records do not pertain to him. *See Robles*, 213 Ariz. at 273, ¶ 15 n.4.

¶28 Accordingly, Campbell has not shown that reversal is warranted based on pre-sentencing delay.

B. Judicial Bias.

¶29 Campbell next argues that the court's finding of prior felony convictions should be vacated and that he should be resentenced as a non-repetitive offender because the superior court's comments during the January 18 hearing established bias because the court improperly provided the State advice on how to prove the prior convictions. We review this claim of judicial bias for an abuse of discretion.[3] *See State v. Ramsey*, 211 Ariz. 529, 541, ¶ 37 (App. 2005).

¶30 Each criminal defendant is entitled to a fair hearing before a fair and impartial judge. *State v. Ellison*, 213 Ariz. 116, 128, ¶ 35 (2006).

---

[3] Campbell notes that certain types of judicial bias may constitute structural error, but he has not alleged that the judge here had any such "direct, personal, substantial pecuniary interest" or similar interest that might qualify for structural error review. *See State v. Granados*, 235 Ariz. 321, 325, ¶ 11 (App. 2014) (citation omitted).

Judicial officers, however, are presumed to be free from bias or prejudice, defined in this context as "a hostile feeling, ill will, undue friendship, or favoritism towards one of the litigants." *State v. Carver*, 160 Ariz. 167, 172 (1989). Thus, the party alleging bias has the burden to overcome this "strong presumption" of impartiality by a preponderance of the evidence. *State v. Cropper*, 205 Ariz. 181, 185, ¶ 22 (2003). Mere "speculation, suspicion, apprehension, or imagination" does not suffice. *Ellison*, 213 Ariz. at 128, ¶ 37 (citation omitted).

¶31 Here, the record shows that the superior court did not offer the State legal advice or otherwise improperly assist the prosecution. Moreover, even after raising his concern before sentencing, Campbell never sought a change of judge for cause. *See* Ariz. R. Crim. P. 10.1.

¶32 The newly assigned judge's first comment—"assum[ing]" that the State would "be presenting evidence regarding the priors," such as "a fingerprint person or something like that"—preceded the prosecutor's statement that she perceived fingerprint comparison to be unnecessary, so the comment could not have been an expression of favoritism or assistance to the State.

¶33 After the prosecutor suggested that the documents alone would be sufficient, the court expressly declined to "opine" on whether the conviction records provided sufficient evidence to prove Campbell had prior felony convictions and refused to "tell anybody how to do their job or whether or not they need to call a witness or need to call an expert or need to have fingerprint comparisons done." *Cf. State v. Hurley*, 197 Ariz. 400, 404–05, ¶¶ 18, 25 (App. 2000) (discerning no bias when the trial judge commented "that it is 'easier to convince' eight people than twelve" and the State then dismissed allegations of two of three prior convictions to qualify for an eight-person jury, noting that the judge "made clear at the time of his comments that it was entirely up to the state whether to proceed with the original charges or to dismiss any of the allegations of prior convictions"). Although the judge noted the existence of appellate decisions concerning proof of prior convictions, the judge neither specified the case law nor offered any construction of those rulings or advice on how the prosecutor should apply them to prove her case.

¶34 Accordingly, Campbell has not overcome the "strong presumption" of judicial impartiality. *See Cropper*, 205 Ariz. at 185, ¶ 22.

CONCLUSION

¶35 Campbell's conviction and sentence are affirmed.

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