IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JASON FRANCIS PACYNA, *Appellant*.

No. 1 CA-CR 19-0511
FILED 11-19-2020

Appeal from the Superior Court in Maricopa County
No. CR2018-152602-001
The Honorable Katherine M. Cooper, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michelle L. Hogan
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Robert W. Doyle
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Jennifer B. Campbell delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Judge Maurice Portley[1] joined.

C A M P B E L L, Judge:

¶1 Jason Francis Pacyna appeals his conviction and sentence on one count of trafficking in stolen property, first degree, and one count of shoplifting with artifice or device. Pacyna argues the superior court erred by empaneling a tainted jury, by admitting evidence without requiring a proper foundation, and by accepting his admission to prior historical felonies without conducting the required colloquy, Arizona Rule of Criminal Procedure ("Rule") 17.6. Pacyna requests a new trial. For the reasons set forth below, we affirm Pacyna's convictions and sentences.

BACKGROUND[2]

¶2 In October 2018, Pacyna was observed on video shoplifting headphones from a Target store, which he then sold to a pawnshop. Target's loss-prevention officers filed a police report, which included the serial numbers of the stolen headphones. About two weeks later, the loss-prevention officers recognized Pacyna as he entered the store and walked to the electronics department. Pacyna took another pair of headphones, concealed them under his clothing, and exited the store—again without paying. The loss-prevention officers detained Pacyna and contacted the police.

¶3 Police arrested Pacyna and found a pawn slip for headphones in his backpack. The serial number on the pawn slip matched the serial number of the headphones Pacyna stole two weeks earlier. A police officer recovered the headphones from the pawnshop and impounded them as evidence. Pacyna admitted that he had taken the

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[1] The Honorable Maurice Portley, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article 6, Section 3, of the Arizona Constitution.

[2] We cite the facts in the light most favorable to sustaining the verdicts. *State v. Nottingham*, 231 Ariz. 21, 23, ¶ 2 (App. 2012).

headphones from Target without paying for them and sold them to the pawnshop.

¶4 Pacyna was charged with organized retail theft, trafficking in stolen property, and shoplifting with artifice or device but pled not guilty to all charges. During voir dire, a prospective juror disclosed that she knew the police officer who recovered the headphones. After she explained her potential bias, defense counsel moved to dismiss the entire jury panel, arguing her comments about the officer tainted the entire panel. The potential juror was dismissed and the trial court denied the motion to dismiss the rest of the panel. Ultimately, the jury found Pacyna guilty of trafficking in stolen property and shoplifting with artifice or device.

¶5 While the jury deliberated on the aggravating factors, Pacyna reached a stipulation with the State—Pacyna would admit the existence of two historical prior felony convictions, the State would dismiss the allegation that he committed the offenses while on probation, and Pacyna would receive stipulated sentences. Pacyna admitted his historical priors, but the superior court did not conduct a Rule 17.6 colloquy. Pacyna was sentenced according to his agreement with the State. Pacyna now appeals.

DISCUSSION

I. Motion to strike the jury panel

¶6 Pacyna contends that a potential juror ("Juror 18") tainted the jury panel during voir dire. Juror 18 acknowledged she knew the officer involved and, because she knew him, "would have to tend to believe him." Pacyna argues by denying his motion to strike the jury panel, the court violated his Sixth Amendment[3] right to a fair trial by a panel of impartial jurors.

¶7 A criminal defendant has a constitutional right to be tried by a fair and impartial jury. *State v. Greenawalt*, 128 Ariz. 150, 167 (1981); U.S. Const. amend VI; Ariz. Const. art. II, § 24. Whether to excuse jurors "is committed to the sound discretion of the trial judge, and in the absence of a clear and prejudicial abuse of that discretion, his action will not be disturbed on appeal." *State v. Arnett*, 119 Ariz. 38, 50 (1978). We will affirm

[3] U.S. Const. amend VI.

the superior court "unless the record affirmatively shows that such a fair and impartial jury was not secured." *Id.*

¶8 A party challenging the impartiality of a jury panel has the burden of proving that the panel selection was the result of a "material departure from the requirements of law." *State v. Davis*, 137 Ariz. 551, 558 (App. 1983) (citation omitted). That party must show either that the jury was unlawfully empaneled or that the jurors could not be fair and impartial. *Id.* As relevant here, Pacyna has the burden of showing that Juror 18's comments caused bias in other jurors, impairing their ability to be fair and impartial.

¶9 Pacyna points to *Mach v. Stewart*, where a prospective juror vouched for the credibility of the victim and the remarks were found to have tainted an entire panel. 137 F.3d 630, 632–33 (9th Cir. 1997) (as amended). In *Mach,* the prospective juror worked with sexual assault victims and stated that "she had never known a child to lie about sexual abuse." *Id.* "The court concluded that this individual's statements were 'expert-like,' dealt with material issues of the defendant's guilt and the victim's truthfulness, were delivered with certainty, and were repeated several times." *State v. Doerr*, 193 Ariz. 56, 62, ¶ 19 (1998) (citing *Mach,* 137 F.3d at 633). The court presumed that the comments tainted at least one of the jurors. *Mach*, 137 F.3d at 633.

¶10 Here, Juror 18 stated, "if it's true that one of the witnesses is someone that I'm aware of [and] that I know, it would be hard for me not to believe what he says on the stand . . . I mean, I would have to be honest. I would have to tend to believe him." Juror 18's comments were lay opinion, dealt with neither defendant's guilt nor the victim's truthfulness, and were not repeated. Nothing in the voir dire procedure suggests that the other panel members were prejudiced. In fact, near the end of voir dire, defense counsel asked the potential jurors whether anyone believed a testifying officer is more credible than anybody else and received no affirmative answers.

¶11 Pacyna contends that Juror 18's comments "left the trial jury panel with the conclusion that [the officer] was an honest and truthful person" because the officer did not testify at trial. This is purely speculation and belied by the record. "We will not, however, indulge in such guesswork," *Doerr*, 193 Ariz. at 61, ¶ 18, nor will we presume the existence of jurors' prejudice without objective indications that it exists. *State v. Tison*, 129 Ariz. 526, 535 (1981). *See also State v. Reasoner*, 154 Ariz. 377, 384 (App. 1987) (appellant had the burden of showing that remarks of

excused juror prejudiced others); *State v. Duffy*, 124 Ariz. 267, 274 (App. 1979) (finding the possibility that a comment by a prospective juror influenced others "too remote and speculative").

¶12 We find no evidence that Juror 18's comments prejudiced the jury panel. Juror 18's comments were brief and isolated in a lengthy voir dire involving 77 potential jurors. Because Pacyna failed to meet his burden, we find no abuse of discretion in the superior court's refusal to replace the entire panel.

II. Admission of headphones at trial

¶13 Pacyna next argues the superior court erred by admitting the first set of headphones retrieved from the pawn shop (the "Headphones") without a proper foundation. Relying on Arizona Rule of Evidence ("Evidence Rule") 901(b)(1), Pacyna argues that without the testimony of the officer who recovered the Headphones from the pawnshop, a chain of custody could not be established and "no witness could testify that there was a sufficient foundation to authenticate [the Headphones]."

¶14 We review a trial court's conclusion that evidence has an adequate foundation under an abuse of discretion standard. *State v. McCray*, 218 Ariz. 252, 256, ¶ 8 (2008). Under Evidence Rule 901(a), "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." The superior court does not determine whether the item is authentic. *State v. Irving*, 165 Ariz. 219, 223 (App. 1990). Rather, the court must be satisfied that there is evidence in the record from which a jury could reasonably conclude that the item is authentic. *Id.* Evidence Rule 901(b) provides a non-exhaustive list of evidence that satisfies the requirement, such as "(1) Testimony of a Witness with Knowledge," and "(4) Distinctive Characteristics and the Like."

¶15 However, "[Evidence Rule] 901 does not invariably require chain of custody testimony, but instead may be satisfied if the proponent produces 'evidence sufficient to support a finding that the item is what the proponent claims it is.'" *State v. Steinle in & for the Cnty. of Maricopa*, 239 Ariz. 415, 420–21, ¶ 25 (2016) (citing Evidence Rule 901(a)). The court may consider "the unique facts and circumstances in each case—and the purpose for which the evidence is being offered—in deciding whether the evidence has been properly authenticated." *State v. Haight-Gyuro*, 218 Ariz. 356, 360, ¶ 14 (App. 2008).

¶16 Here, a loss-prevention officer testified that he provided the serial number of the stolen Headphones to the police. About two weeks later, Pacyna returned to the same store and attempted to steal another pair of headphones. When police arrested Pacyna, they found a pawn slip in his backpack. The serial number on the pawn slip identified the Headphones and matched the serial number previously provided to the police. After *Miranda* warnings, Pacyna admitted stealing the Headphones and selling them to the pawnshop. The pawnshop management confirmed that serial number when the detectives retrieved the Headphones and impounded them as evidence. Finally, an officer testified that when he retrieved the Headphones from impound, he verified that they had the same serial number reported by Target loss-prevention officers.

¶17 Even though the officer who recovered the Headphones did not testify, the State presented evidence establishing a distinctive characteristic—the serial number of the Headphones—and used that characteristic to: (1) identify the Headphones that were stolen and sold to the pawnshop; (2) verify by the pawn slip Pacyna was the seller; and (3) verify that the police retrieved the very same Headphones from the pawn shop. Based on this evidence, a jury could reasonably conclude that the Headphones were in fact the very same headphones stolen by Pacyna from Target; accordingly, the court did not abuse its discretion in overruling Pacyna's foundation objection under Evidence Rule 901(b)(1) and admitting the exhibit into evidence.[4]

III. Admission with no Rule 17.6 colloquy

¶18 Pacyna argues for the first time on appeal that the superior court erred by failing to conduct a Rule 17.6 type colloquy when it accepted his admission of two prior felony convictions. A defendant who fails to raise an objection at trial forfeits the right to obtain appellate relief unless fundamental error exists. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005). "[W]e place the burden of persuasion in fundamental error review on the defendant." *Id.* Additionally, "[t]o prevail under this standard of

[4] Further, an exhibit may be admitted "when there is evidence which strongly suggests the exact whereabouts of the exhibit at all times, and which suggests no possibility of substitution or tampering." *State v. Hardy*, 112 Ariz. 205, 207 (1975). Any break in the chain of custody goes to the weight of the evidence rather than its admissibility. *State v. Morales*, 170 Ariz. 360, 365 (App. 1991). The evidence here "strongly suggests the exact whereabouts" of the Headphones at all times.

review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* Because this is a question of law, we review it de novo. *State v. Stuart*, 168 Ariz. 83, 87 (App. 1990).

¶19 Under Rule 17.6, "[t]he court may accept the defendant's admission to an allegation of a prior conviction only under the procedures of this rule, unless the defendant admits the allegation while testifying in court." Rule 17.2 requires the court to advise a defendant of his rights before accepting a plea of guilty. Rule 17.3 requires the court to determine that the plea is entered intelligently and voluntarily. The court must address the defendant personally in open court and establish "(1) the defendant wishes to forego the constitutional rights of which the defendant has been advised; and (2) the defendant's plea is voluntary and not the result of force, threats or promises (other than that which is included in the plea agreement). Rule 17.3(a)(1)–(2).

¶20 A Rule 17.6 colloquy "serves to ensure that a defendant voluntarily and intelligently waives the right to a trial on the issue of the prior conviction." *State v. Morales*, 215 Ariz. 59, 62, ¶ 11 (2007). Here, the superior court failed to conduct a Rule 17.6 colloquy prior to accepting Pacyna's admission. **"**A complete failure to afford a Rule 17.6 colloquy is fundamental error because a defendant's waiver of constitutional rights must be voluntary and intelligent." *Morales*, 215 Ariz. at 61, ¶ 10. Here, the court did not conduct the required colloquy and therefore committed fundamental error.[5] However, the court's error does not automatically entitle Pacyna to resentencing—he must also establish prejudice. *See State v. Escalante*, 245 Ariz. 135, 142, ¶ 21 (2018) ("If the defendant establishes fundamental error under prongs one or two, he must make a separate showing of prejudice . . . .").

¶21 "Establishing prejudice from fundamental error varies depending on the nature of the error and the unique case facts." *Id.* at 144, ¶ 29. Generally, prejudice must be established by showing defendant

[5] Under *State v. Escalante*, the superior court's error here falls under prong one because it deprived Pacyna of constitutionally-guaranteed procedures. 245 Ariz. 135, 142, ¶ 21 (2018); *see, e.g.*, *Henderson*, 210 Ariz. at 568, ¶ 25 ("Because the sentencing procedure followed denied Henderson the right to have certain facts decided by a jury beyond a reasonable doubt, we conclude that the procedure utilized went to the foundation of Henderson's case.").

would not have admitted the prior convictions had the colloquy been given. *Morales*, 215 Ariz. at 62, ¶ 11. Additionally, if the error deprives a defendant of the opportunity to have the fact of the prior conviction determined by a jury, he must prove that "a reasonable jury could have plausibly and intelligently returned a different verdict." *Escalante*, 245 Ariz. at 144, ¶ 31; *see also Morales*, 215 Ariz. at 62, ¶ 13 (even if defendant proved he would not have admitted the prior conviction but for the Rule 17.6 error, evidence in the record conclusively proved his prior convictions and, therefore, he would not be entitled to resentencing).

¶22 Apart from one general statement that the superior court's error was "both fundamental error and prejudicial to [Pacyna]," Pacyna fails to identify how the court's error caused prejudice. Pacyna notes a number of alleged Rule 17 deficiencies, but he offers no explanation of why he would not have admitted the prior convictions had the colloquy been given.

¶23 Additionally, Pacyna would not be entitled to resentencing because evidence conclusively proving his prior convictions exists in the record. First, certified sentencing orders for each of the felony convictions were admitted at trial. Second, a probation officer that supervised Pacyna's probation testified that Pacyna was placed on a two-year probation beginning in January 2018. Third, the Probation Violation Report not only identifies Pacyna's prior felonies but also confirms he was on probation when he committed the charged offenses.

¶24 The record conclusively establishes the prior convictions and that Pacyna was on probation when he committed the present offenses. A reasonable jury could only plausibly and intelligently find their existence. Further, Pacyna stipulated to the prior felonies at trial while the jury deliberated. The jury was dismissed before rendering its verdict, but not before it found, beyond a reasonable doubt, that Pacyna had committed the prior felonies within the past ten years and that he was on probation when he committed the present offenses. Additionally, had the jury been allowed to rule on the prior felony convictions and Pacyna's on-probation status, his sentence would likely have been much more severe. Because Pacyna has not shown that a reasonable jury could have reached a different verdict and "evidence conclusively proving his prior convictions is already in the record . . . there would be no point in remanding for a hearing merely to again admit the conviction records." *Morales*, 215 Ariz. at 62, ¶ 13. Therefore, we affirm the sentence.

CONCLUSION

¶25 For the foregoing reasons, the convictions and sentences are affirmed.

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