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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 07/07/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,)
) No. 1 CA-CR 09-0333
)
 Appellee,) DEPARTMENT B
)
 v.) **MEMORANDUM DECISION**
)
 JARED ANTHONY REA,) (Not for Publication -
) Rule 111, Rules of the
 Appellant.) Arizona Supreme Court)
)
)

Appeal from the Superior Court in Mohave County

Cause Nos. CR2008-0292

The Honorable Steven F. Conn, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
And
William Scott Simon
Attorneys for Appellee

John A. Pecchia, Mohave County Public Defender Kingman
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Attorneys for Appellant

G E M M I L L, Judge

¶1 Defendant Jared Anthony Rea appeals from his convictions for aggravated assault with a deadly weapon or dangerous instrument and misconduct involving a weapon. For reasons set forth below, we affirm.

FACTS¹ AND PROCEDURAL HISTORY

¶2 Sometime around midnight on March 14, 2008, Rea and two friends, Veronica and Brandy, were at a bar in Lake Havasu City, Arizona. Rea was driving his father's pickup truck. In leaving the parking lot, Rea backed out of his parking space quickly, scattering stone in the process and almost hitting Robert R., who was standing in the parking lot alongside his Jeep. Something did in fact hit the Jeep's retractable side mirrors.

¶3 Robert said "what's your problem" and "[w]hat are you doing[;] you just hit my car," to Rea. Rea exited his truck "real quick" while denying that he had hit the vehicle, and started moving towards Robert. A verbal altercation followed, and Robert pulled out his cell phone to call 911 and started "back-pedaling" because he did not know what Rea's intentions were.

¹ On appeal we must view the facts in the light most favorable to sustaining the jury's verdicts and therefore resolve all reasonable inferences in support of the verdicts. See *State v. Vandever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

¶14 According to Robert, for the "[f]irst ten feet" as Rea walked towards him, Rea did not have anything in his hands. By the time he reached Robert, however, Rea had pulled a knife out of his pocket. Rea was "very angry." He said "what the 'f' did you say?" and "I didn't hit your car;" and kept "walking at [Robert] real fast swinging the knife around." According to Robert, "[Rea] wasn't jabbing [the knife] or running at [him]" with it; Rea walked toward him quickly, "swinging [the knife] around almost like . . . look what I got." Robert described the knife to police that night as a "flip out knife" with a silver blade and a black handle. He estimated that it was between five and seven inches long when fully opened. Rea and his passengers drove off. Robert gave the 911 dispatcher the license plate number of Rea's truck.

¶15 Police followed Rea to his parents' house. Robert, his girlfriend, and another witness, James, were driven to Rea's parents' house, and Robert's girlfriend immediately identified Rea as the individual who had "pulled the knife on [Robert]."

¶16 During a search of the truck incident to arrest, an officer located a folding knife under the driver's side floor mat. He also located an empty holster "a few inches [] under" the driver's seat as well as a semi-automatic handgun under the right front passenger's seat, where Brandy was seated when the

truck was stopped. The gun was not visible until the officer looked under the passenger seat.

¶17 Officer Brian J. interviewed Rea on the night of the incident. Rea admitted that he had gotten into a small argument with "an unknown person" outside the bar and admitted he had had a pocketknife "on him" during the argument, but denied displaying the knife. Rea denied any knowledge of the gun found in the truck but also made the comment that "he was fucked." He then said a person named Crawl had been in the truck earlier in the evening and that Crawl may have left the gun in the vehicle.

¶18 The State charged Rea with aggravated assault with a deadly weapon or dangerous instrument, a Class 3 felony, and misconduct involving weapons, a Class 4 felony. After a trial, a jury convicted Rea of both offenses charged. The trial court sentenced Rea to mitigated sentences of 8 years in prison on each charge and ordered that the sentences be served consecutively. Rea timely appealed. This court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010) and 13-4033 (2010).

ANALYSIS

Failure to Sever Offenses for Trial

¶19 Prior to trial, Rea moved to sever the two counts pursuant to Rules 13.3 and 13.4 of the Arizona Rules of Criminal

Procedure, arguing that the two crimes were not "of the same or similar character," were not "based on the same conduct or are otherwise connected together in their commission" and were not "part of a common scheme or plan." Ariz. R. Crim. P. 13.3(a)(1)-(3). Rea argued he was entitled to severance because evidence of either one of the offenses would not be admissible in the trial of the other offense if the two offenses were tried separately. Ariz. R. Crim. P. 13.4(b).

¶10 The trial court denied the motion to sever, but acknowledged that evidence of one crime would not be admissible at the trial of the other crime in this case. However, it found the cases "joined together in their commission" because "in leaving the scene of the alleged aggravated assault . . . the weapon is found and that is the basis of the misconduct involving weapons that is charged in Count Two."

¶11 On appeal, Rea argues that the trial court abused its discretion in denying the motion to sever and that he was prejudiced because evidence of his prohibited possessor status and the weapons misconduct charge necessarily tainted his trial on the aggravated assault charge. According to Rea, "[t]he mere fact the gun was found by police after [he] left the scene of an aggravated assault does not sufficiently connect the offenses for them to be joined."

¶12 Rule 13.3(a)(2) provides that offenses may be joined for trial if they are "based on the same conduct or are otherwise connected together in their commission." Joinder of different crimes is thus permitted "where the offenses arose out of a series of connected acts, and the offenses [are] provable by much the same evidence." *State v. Martinez-Villareal*, 145 Ariz. 441, 446, 702 P.2d 670, 675 (1985); see also *State v. Garland*, 191 Ariz. 213, 216-17, ¶ 14, 953 P.2d 1266, 1269-70 (App. 1998) (offenses arise out of series of connected acts if evidence as to each count of necessity overlaps and where most evidence admissible in proof of one offense is also admissible in proof of other).

¶13 In *Garland*, we found the mere fact that the defendant used a gun to commit theft of property one day and kidnapping, aggravated assault and armed robbery the next, was not sufficient to show that the crimes were necessarily connected because the common elements of proof of each crime were "independent of the other" and the evidence of each crime was inadmissible as proof of the other. 191 Ariz. at 217, ¶ 15, 953 P.2d at 1270. In *State v. Curiel*, 130 Ariz. 176, 184, 634 P.2d 988, 996 (App. 1981), we found error in the trial court's failure to sever possession of heroin charges from the charge of theft of a handgun. We reasoned that the fact that the crimes were committed on the same day did not "by itself connect them

in their commission." *Id.* Nor did the fact that both offenses "came to light as the result of a search of one automobile" sufficiently connect the crimes in their commission. *Id.*

¶14 We view this case as an amalgam of the situations we faced in *Garland* and *Curriel*. Thus, the mere fact that the two offenses in this case were committed within minutes and a scant distance of one another is not sufficient to establish that they were "based on the same conduct" or "otherwise connected in their commission," as the trial court appears to have concluded. See also *State v. Comer*, 165 Ariz. 413, 418, 799 P.2d 333, 338 (1990) (more than shared temporal proximity required to establish connection permitting joinder). Nor does the fact that the gun happened to come to light during the search of Rea's vehicle for the knife establish a connection between the crimes. Moreover, the trial court's observation that the evidence of each of the two charges would be inadmissible at the trial of the other is correct.

¶15 Ordinarily, we review a trial court's ruling on a motion to sever for an abuse of discretion. *Garland*, 191 Ariz. at 216, ¶ 9, 953 P.2d at 1269. However, Rule 13.4(c) requires a defendant to renew a denied pre-trial motion for severance either during the trial or at the end of the evidence in order to preserve the issue for review. When, as here, a defendant fails to do so, he forfeits appellate review of the severance

issue except for fundamental error. See *State v. Laird*, 186 Ariz. 203, 206, 920 P.2d 769, 772 (1996); *State v. Flythe*, 219 Ariz. 117, 120, ¶ 10, 193 P.3d 811, 814 (App. 2008) (noting that appellate courts "have strictly applied the waiver provisions of Rule 13.4(c), particularly the explicit requirement that motions for severance be renewed during trial"). To prevail on a fundamental error standard of review, the defendant must establish both that fundamental error occurred and that the error caused him prejudice. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005).

¶16 Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id.* at ¶ 19, 115 P.3d at 607. Even though the failure to sever the two charges constitutes error, Rea has failed to show that the error is fundamental because he has not proven that the error went to the foundation of his case, was an error that took away a right essential to his defense, or that the error was so great as to deprive him of a fair trial. Further, Rea has failed to show that the error caused him prejudice.

¶17 Rea's principal contention is that evidence of his "prohibited possessor status" unfairly tainted the jury's verdict regarding the aggravated assault charge. In support of

this conclusion, he argues that the aggravated assault evidence was "not overwhelming" and the guilty verdict for aggravated assault must therefore have been based on unfair prejudice. But Rea underestimates the strength of the evidence against him regarding aggravated assault.

¶18 Robert positively identified Rea at trial as the person who "pulled the knife on [him]." The knife Robert described resembled the knife found in Rea's truck. James, who saw the fight, also identified Rea at trial as the person involved in the fight and acknowledged he had written a statement on the night of the incident stating Rea "appeared to brandish the knife." Rea admitted to police that night that he had had a knife "on him."

¶19 On appeal, Rea maintains the evidence at trial was insufficient because James' testimony did not "corroborate" Robert's testimony about the display of the knife. However, the record shows that the jury was fully aware of the conflicts between James' earlier statements to police and his testimony at trial. It was for the jury alone to resolve any conflicts in that evidence. See *State v. Payne*, 7 Ariz. App. 43, 44-45, 436 P.2d 137, 138-39 (1968) (question of credibility of witnesses' testimony is an issue for jury, not for reviewing court). This

evidence is easily sufficient to sustain the jury's guilty verdict on the aggravated assault charge.²

¶120 Rea also argues that insufficient evidence supports the guilty verdict on the misconduct involving a weapon charge because Brandy testified at trial that Veronica, not Rea, handed her the gun and she put it under the seat. The evidence established that the police found an empty holster under the driver's seat of Rea's truck and a loaded, semi-automatic handgun under the passenger seat, where Brandy had been sitting. Additionally, Rea stipulated that he was a prohibited possessor at the time of the incident. He denied knowing that either the holster or the gun was in the truck.

¶121 The evidence, while conflicting, is sufficient to support the jury's finding of guilt. See *Mercer*, 13 Ariz. App. at 2, 473 P.2d at 804 ("Evidence is no less substantial simply because the testimony is conflicting or reasonable persons may draw different conclusions therefrom."). Brandy testified Rea

² Substantial evidence is "proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of [Rea's] guilt beyond a reasonable doubt.'" *State v. Fulminante*, 193 Ariz. 485, 493, ¶ 24, 975 P.2d 75, 83 (1999) (quoting *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869). Substantial evidence may be comprised of both circumstantial and direct evidence, and "[a] conviction may be sustained on circumstantial evidence alone." *State v. Blevins*, 128 Ariz. 64, 67, 623 P.2d 853, 856 (App. 1981). Furthermore, "[e]vidence is no less substantial simply because the testimony may be conflicting or reasonable persons may draw different conclusions therefrom." *State v. Mercer*, 13 Ariz. App. 1, 2, 473 P.2d 803, 804 (1970).

was the person who initially gave notice of the fact that there was a gun in the truck. The jury could infer from the presence of the empty holster underneath Rea's seat that he had either handed or tossed the gun directly to Brandy, or to Veronica to give to Brandy, before Brandy put it under her seat.

¶22 Given the substantial independent evidence that supports each of the jury's guilty verdicts, we are not persuaded that Rea was prejudiced as a result of the trial court's erroneous failure to sever. See *Laird*, 186 Ariz. at 206, 920 P.2d at 772 (where evidence of guilt is strong and reviewing court can say with certainty that defendant was not denied fair trial, erroneous failure to sever is not fundamental error). Furthermore, any conceivable prejudice was further attenuated by that fact that the trial court specifically instructed the jury that "[e]ach count charge[d] a separate and distinct offense"; that it had to "decide each count separately on the evidence with the law applicable to it uninfluenced by [its] decision on any other count"; and that it could find that the State had proven "beyond a reasonable doubt all, some or none of the charged offenses." See *State v. Lee*, 189 Ariz. 590, 600, 944 P.2d 1204, 1214 (1997) (instruction to consider each offense separately and to consider whether each is proven beyond a reasonable doubt may prevent jury's guilt determination on one charge from influencing determination on another charge); see

also *State v. Via*, 146 Ariz. 108, 115, 704 P.2d 238, 245 (1985) (trial court's instruction that jury should consider evidence to each count separately supports finding that defendant received a fair determination of guilt).

¶123 Rea cites *Sutton v. State*, 844 S.W.2d 350 (Ark. 1993), in support of his argument that it is prejudicial and reversible error for a trial court to join a felon in possession charge with a first degree murder charge. According to Rea, the Arkansas Supreme Court reasoned that the danger of a jury's perception being adversely influenced creates a "presumption favoring severance." *Sutton*, 844 S.W.2d at 354. However, the Arkansas Supreme Court also noted that it was "disinclined, as are other courts, to conclude that joinder of a felon/firearm charge with a second felony charge constitutes prejudice by that fact alone." *Id.* It found reversal was warranted in that case in part because the evidence of the primary charge, first degree murder, was "weak." That is not the situation here.

¶124 If Rea had not waived ordinary review of this issue by failing to renew his motion to sever during the trial, we may have reversed the convictions. Applying a fundamental error review, however, we conclude that Rea has not met his burden of showing that the trial court's failure to sever the charges for trial was fundamental error that caused him prejudice, and we will not reverse the verdicts on this ground.

Admissibility of Evidence

¶25 Prior to the start of Rea's case in chief, the State announced its intention to impeach Brandy's testimony regarding the knife and gun with prior statements she made to Veronica on the night of the crime. The State knew of Brandy's prior statements through statements made by Veronica during an interview with a defense investigator. Over defense counsel's objection, the trial court ruled that it would allow the State to question Veronica accordingly.

¶26 We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Aguilar*, 209 Ariz. 40, 49, ¶ 29, 97 P.3d 865, 874 (2004). We will review purely legal issues *de novo*. *State v. Moody*, 208 Ariz. 424, 445, ¶ 62, 94 P.3d 1119, 1140 (2004). "[A]ny evidence that substantiates the credibility of a prosecuting witness on the question of guilt is relevant and material." *State v. Thomas*, 130 Ariz. 432, 434, 636 P.2d 1214, 1216 (1981) (citing *State v. Mosley*, 119 Ariz. 393, 401, 581 P.2d 238, 246 (1978)). Whether this evidence is admissible depends on whether it may come in under a particular rule of evidence. *Id.*

Prior Inconsistent Statement/Knife

¶27 Rule 801(d)(1)(A) of the Arizona Rules of Evidence provides that an otherwise "hearsay" statement is admissible at trial if "[t]he declarant testifies at trial . . . and is

subject to cross-examination concerning the statement, and the statement is . . . inconsistent with the declarant's testimony." "[W]hen a witness denies making the prior statement, the prior statement is admissible for impeachment purposes." *State v. Ortega*, 220 Ariz. 320, 330, ¶ 33, 206 P.3d 769, 779 (App. 2008).

¶28 Brandy testified at trial that she never saw a knife "at all" on the night of the incident. When asked specifically if she had said anything to Veronica about a knife before they got back in the truck and drove away, Brandy stated that she "didn't remember" saying anything to Veronica and that "I never seen a knife so there would be no reason for [her] to say anything about that knife to [Veronica]."

¶29 During Veronica's testimony, defense counsel asked her if she "remembered" telling a defense investigator in an interview that someone had mentioned something about a knife that night. After refreshing her recollection with a transcript of the interview, Veronica testified that "[t]here was talk about a knife." She stated, "I don't know where I heard it from but I assume that since Brandy was the one person that I was with for 90 percent of the time, she was the closer person to me all the time[;] I assume that that's who told me about the knife and that's what I said here too." Veronica clarified that she had heard "talk about a knife . . . [w]hile all this was going on . . . [w]hile [Rea] was arguing with the guy."

¶130 On cross-examination, Veronica testified she had heard "talk about a knife" during the fight, and she "assume[d]" it was Brandy who "told [her]" about the knife but that she could not honestly say from whom she had heard it from. She acknowledged that she had told the interviewer, "I honestly want to say that I may have heard it from Brandy because that's the only person that was around me at the time," but maintained at trial that she still did not know who had said it or when because there was "a lot of commotion [and] [w]e were all drinking."

¶131 Rea argues that the statements the prosecutor elicited on cross-examination were not "inconsistent statements" because they were not inconsistent with either Veronica's own testimony at trial or with Brandy's testimony that she never saw a knife and never said anything to Veronica about one. To the extent that Veronica never unequivocally identified Brandy as the person who told her about the knife, her testimony was not inconsistent with Brandy's trial testimony in the traditional manner associated with prior inconsistent statements. However, the fact that Veronica "assumed" that it was Brandy who told her because Brandy was the "closest person" to her during the altercation when the knife was mentioned arguably contradicts Brandy's unequivocal denials at trial about any knowledge of the

weapon. Therefore we cannot say that it was an abuse of discretion to permit the cross-examination.

¶132 Both witnesses testified at trial, and the jury was thus able to fully assess their credibility. To the extent that Veronica, as a defense witness, may be viewed as equivocating in her testimony, that consideration would go to the weight of her testimony and not its admissibility. See *State v. Jeffers*, 135 Ariz. 404, 420, 661 P.2d 1105, 1121 (1983) (admission as hearsay exception is not foreclosed because statement is impugned; reliability and credibility are questions for the jury).

¶133 Furthermore, defense counsel elicited during his direct examination of Veronica the testimony that Veronica had told the interviewer that she only "assumed" it was Brandy who told her about the knife but was "not sure" from whom she heard it and only assumed it was Brandy because "she was closest to me at all times." Therefore the testimony on cross-examination is merely cumulative. Under these circumstances and given the strength of the evidence of the aggravated assault, even assuming the court erred in permitting impeachment on this basis, any error was harmless.

Prior Consistent Statements/Gun

¶134 Brandy testified at trial that she only became aware that there was a gun in the truck when they were in the driveway at Rea's parents' house and she heard him say that "[t]hat his

friend left a gun in his truck." She also testified that, "after [she was] told there was a gun in the vehicle," Veronica handed the gun to her and she put it under her seat.

¶135 During cross-examination by defense counsel, Brandy admitted that she initially lied to police when she was detained and told them that she "never saw a gun." It was only after the officer returned and told her that she would be under arrest and that "[t]hey would take away [her] kids . . . if [she] did not tell the truth about the gun" that she admitted to saying that she said she "saw a gun."

¶136 At trial, the State sought to introduce Veronica's statements to the defense investigator that "Brandy never passed a gun to her but that Brandy had, in fact, told her while they were sitting in the truck prior to being extricated from that vehicle by law enforcement that the defendant had thrown a gun or given her a gun and Brandy had kicked it under the seat." The State argued the evidence was admissible as an "excited utterance and present sense impression" to somehow rebut Brandy's testimony that the only reason she said something to police about the gun was due to the threats. The State also appears to have argued that it was admissible to rebut Veronica's statements to police that she had had absolutely no knowledge of a gun. The court permitted the State to elicit the

testimony as a prior consistent statement, but the basis for its doing so is unclear from the record.

¶137 During her direct testimony, Veronica maintained that she never saw a gun during the entire evening and that she would not have gotten into the truck had she known a gun was present. She also testified no "objects" were "passed" or "tossed" from her to Brandy while they were stopped in the driveway.

¶138 In response to the prosecutor's questions, Veronica testified during cross-examination that Brandy did not give her a gun "from the [d]efendant" while they were stopped in the driveway. She also testified that she did not learn about the gun until "after the fact," that she did not recall where she heard it, but that she knew that she and Brandy had had a conversation about what Brandy had said to the police. The prosecutor then elicited the fact that she had told the investigator that Brandy had told her while they were still in the truck in the driveway "that there was a gun involved and that it was thrown on her lap." It is unclear from the record whether Veronica was quoting the transcript of her interview or testifying, but she also stated, "I never saw anything but if it was thrown on her lap[,] I mean I was in the middle." On redirect, Veronica testified that she had been unsure when speaking with the investigator whether Brandy had actually told her, while they were in the vehicle or at some other time, that

it was a "gun" that Rea had thrown on her lap or just that Rea had thrown "something" on her lap.

¶139 Prior out-of-court statements of a witness are admissible if they are "consistent with the declarant's testimony and [are] . . . offered to rebut an express or implied charge . . . of recent fabrication or improper influence." Ariz. R. Evid. 801(d)(1)(B). The State maintains that Veronica's comments to the investigator were admissible as prior consistent statements to rebut Brandy's claim that "she only admitted knowledge of the gun after the police allegedly threatened her." Rea argues that the statements were improperly admitted as they were neither consistent with Brandy's statements to police nor necessarily inconsistent with Veronica's testimony about when Brandy told her about the weapon.

¶140 To the extent that Brandy's statements in the truck, as reported by Veronica, tend to corroborate the fact, as Brandy testified, that Brandy only became aware of the presence of a gun in the vehicle when Rea mentioned it in the driveway, it appears to be a prior consistent statement. However, its admission for the purpose of rebutting a charge of "recent fabrication or improper influence" is questionable as Brandy also testified that she lied to the police initially about her knowledge of the weapon.

¶41 Error is harmless if we can say beyond a reasonable doubt that it did not contribute to or affect the verdict. *State v. Green*, 200 Ariz. 496, 501, ¶ 21, 29 P.3d 271, 276 (2001) (quotations and citation omitted). Brandy testified that Rea initially informed her about the presence of a weapon in the vehicle, which means that he knew there was a gun in the truck. Rea admitted to being a prohibited possessor. An empty holster was found under his seat, and whether Veronica handed the gun to her or Rea tossed it at her, Brandy admitted receiving the weapon and hiding it under her seat while the truck was surrounded by police officers. Given the remainder of the evidence at trial, we are convinced that any error in admitting Brandy's statements to Veronica about the weapon did not ultimately affect the jury's verdict in this case. See *Green*, 200 Ariz. at 501, ¶ 21, 29 P.3d at 276 (we will not reverse a conviction if the error is harmless).

Juror Misconduct

¶42 During trial, the Jury Commissioner reported to the trial court that a juror had approached the Commissioner and advised her that she or he had overheard a discussion between Juror # 7 and another juror. In that discussion, the other juror had wondered "who [Rea's] witnesses were going to be," and Juror # 7 had purportedly stated that "it d[id]n't matter who the other witnesses [were] going to be." The Commissioner

informed the court that the reporting juror "was expressing a concern that this was not an appropriate comment to be making" because, according to the reporting juror, "this sounded like . . . [Juror # 7] was saying I don't care what the defense is because it doesn't matter because I already made up my mind."

¶43 The trial court submitted the matter to the attorneys for resolution. It offered them alternative courses of action, such as speaking to Juror # 7 about his or her comment, or agreeing to designate Juror # 7 as an alternate before the jury retired to deliberate. The court noted that it would do "whatever Counsel want[ed] to do," but also expressed its reluctance to interrogate the entire jury about the conversation and its hope that the matter could be resolved by designating Juror # 7 as the alternate at the appropriate time. The following day, both counsel agreed to designate Juror # 7 as the alternate, and the trial court proceeded accordingly.

¶44 After the jury rendered its verdicts, Rea filed a Motion for New Trial, arguing, among other things that Juror # 7's apparent misconduct entitled him to a new trial or, at least, an "[e]videntiary hearing of all 13 jurors." The trial court denied the motion. The trial court noted that the jurors could have been questioned about the matter at the time, but that everyone had agreed instead that Juror # 7 would be eliminated. It was also the trial court's understanding that

"everyone felt that was enough," and therefore the court concluded Rea waived the issue.

¶145 A denial of a motion for a new trial will be reversed only upon an affirmative showing that the trial court abused its discretion and acted arbitrarily. *State v. Mincey*, 141 Ariz. 425, 432, 687 P.2d 1180, 1187 (1984).

¶146 Rea suggests on appeal that Juror # 7's conduct might have improperly influenced the other jurors, and faults the trial court for failing to conduct "whatever investigation it deem[ed] warranted" and relying instead on the parties to suggest a solution. He also acknowledges that some of the discussion of the matter occurred during bench conferences that were not recorded. We can only presume that any such discussions support the trial court's decision. *State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982).

¶147 We agree with the trial court that Rea effectively waived his current arguments failing to raise them during the trial and by specifically agreeing to resolve the matter via the dismissal of Juror # 7. See, e.g., *State v. Dann*, 205 Ariz. 557, 575, ¶ 71, 74 P.3d 231, 249 (2003) (failure to bring error to trial court's attention waives the error as ground on which new trial may be predicated).

¶148 Rea can only prevail on this argument if he proves that fundamental error occurred that caused him prejudice. See

Henderson, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607 (failure to object at trial forfeits appellate relief save for showing of fundamental error). He has not shown the requisite prejudice. His argument on appeal is that Juror # 7 may have engaged in premature deliberations that might have influenced other jurors' deliberations. Such speculation does not establish prejudice in a fundamental error review. See *State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.2d 701, 705 (App. 2006). The trial court did not abuse its discretion in denying Rea's motion for new trial based on juror misconduct.

Prosecutorial Misconduct/Burden Shifting

¶49 Rea presented testimony that suggested that the gun in the truck belonged to and was placed there by individuals other than himself. Via the testimony of his father, Rea also presented evidence that suggested that other people were permitted to use the truck. Rea used the testimony that other people had been in the truck or used the vehicle and that no fingerprint evidence linked the weapons to Rea in order to support his argument that he had no idea that either the knife or gun were in the truck.

¶50 During his rebuttal closing argument, the prosecutor, therefore argued:

Don't you think if this gun had belonged to somebody else -- one of the four people -- family members knowing that [Rea] was a

prohibited possessor, don't you think the true owner of that gun would have come forward. We didn't hear any evidence of that.

* * *

You can take that fact into consideration. Nobody said anything. Nobody came forward and said it was their knife. Nobody came forward and said it was their gun. . . . Now I remember [the officer] testifying yeah, he said he had it on him but also I heard [the officer] testify that he has no explanation for how it ended up where the police found it under the floorboard. Use your common sense; your collective wits.

¶51 On appeal, Rea argues that the "nobody said anything" statement followed by reference to his lack of an explanation to the officer about how the knife got under the floorboard was an "improper burden shifting."

¶52 Counsel are given wide latitude in the scope of closing argument and may comment on the evidence, including all reasonable inferences that may be drawn therefrom. *State v. Zinsmeyer*, 222 Ariz. 612, 620, ¶ 16, 218 P.3d 1069, 1077 (App. 2009). Prosecutorial comments that are "fair rebuttal" to areas opened up by the defense are acceptable. *State v. Hernandez*, 170 Ariz. 301, 307-08, 823 P.2d 1309, 1315-16 (App. 1991).

¶53 Our review of the record shows that the State repeatedly informed the jury during its argument that the burden was "always on the State" to prove Rea guilty beyond a reasonable doubt. The comments to which Rea objects were

clearly made to rebut his suggestion that the gun and knife could have been placed in the truck by other individuals. The comments do not appear to intend to refer in any manner to Rea's failure to testify in this case nor did they suggest an improper shifting of the burden of proof.

¶154 A prosecutor may properly comment on a defendant's failure to present otherwise exculpatory evidence so long as he does not comment on the defendant's silence. *State ex rel. McDougall v. Corcoran*, 153 Ariz. 157, 160, 735 P.2d 767, 770 (1987). The prosecutor's comments did not do so in this case and therefore they do not constitute reversible error.

CONCLUSION

¶155 For the foregoing reasons, we affirm Rea's convictions and sentences.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
DIANE M. JOHNSEN, Presiding Judge

_____/s/_____
MICHAEL J. BROWN, Judge