

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 10-21-2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

STATE OF ARIZONA,) 1 CA-CR 09-0537
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 111, Rules of the
BENJAMIN RUDY CLARK,) Arizona Supreme Court)
)
Appellant.)
)
)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-163601-001 DT

The Honorable F. Pendleton Gaines, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Sherri Tolar Rollison, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
by Eleanor S. Terpstra, Deputy Public Defender
Attorneys for Appellant

P O R T L E Y, Judge

¶1 Defendant, Benjamin Rudy Clark, challenges his shoplifting conviction. For the following reasons we affirm.

FACTUAL AND PROCEDURAL BACKGROUND¹

¶2 Defendant and his girlfriend were running errands on October 9, 2008. While she was shopping, Defendant went into a nearby pet store. The storeowner greeted Defendant, and later saw him near the store exit holding an African Grey parrot. The storeowner questioned Defendant about the bird, and Defendant claimed ownership of the bird. An employee counted the store's African Grey parrots and noticed one was missing.

¶3 Defendant, who had left the store, was located at the back of the shopping center. After being confronted, Defendant relinquished the bird. The bird was returned to the store, and the police were called. Defendant was subsequently arrested in a nearby apartment complex.

¶4 Defendant was charged with shoplifting, a class six felony. On the first day of the two-day trial, the trial court read and provided the jury with the preliminary instructions, which included witness credibility. After the presentation of evidence, but before closing arguments, there was a hearing to

¹ We view the evidence in the light most favorable to sustaining the verdict and resolve all inferences against Defendant. *State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997).

discuss the final jury instructions. During the hearing, the court stated:

I repeat in the final jury instructions only those that have constitutional reference to them I don't repeat the boiler plate about circumstantial evidence, credibility of the witnesses. Those are in the preliminaries. I tell them they are preliminaries, to consider the preliminaries with the finals.

¶15 There was no objection. Subsequently, the court instructed the jury:

You should consider and follow those instructions together with the preliminary instructions you were given at the beginning of the trial. If an earlier instruction is repeated here, that is done for clarity or emphasis only.

¶16 The jury returned a guilty verdict. After he was sentenced, Defendant appealed, and we have 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 and -4033 (2010).

DISCUSSION

¶17 Defendant contends that the trial court erred by failing to reinstruct the jury on witness credibility during the final jury instructions. Because he did not object to the court's practice as required by Arizona Rule of Criminal

Procedure 21.3(c),² we will only review for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Defendant bears the burden of establishing that the trial court erred, that the error was fundamental, and that the error caused him prejudice. *Id.* at 568, ¶ 22, 115 P.3d at 608.

¶8 Our supreme court has stated that preliminary instructions cannot be a substitute for final instructions, and “judges *must* instruct juries on basic legal principles, including burden of proof and reasonable doubt, following the evidence and before the commencement of deliberations.” *State v. Johnson*, 173 Ariz. 274, 276, 842 P.2d 1287, 1289 (1992).

¶9 In *State v. Alvarez*, 205 Ariz. 110, 112, ¶ 3, 67 P.3d 706, 708 (App. 2003), however, we held that there was no fundamental error when the trial court failed to reinstruct the jury on certain preliminary instructions. Although the court instructed the jury on the burden of proof, the elements of the offenses, and reasonable doubt, the court did not repeat the preliminary instructions concerning direct and circumstantial evidence, objections, witness credibility, and expert opinion. *Id.* at ¶ 2. We found that the defendant “waived any arguable error by not objecting to the trial court’s omission of those

² “No party may assign as error on appeal the court’s giving or failing to give any instruction . . . unless the party objects thereto before the jury retires to consider its verdict” Ariz. R. Crim. P. 21.3(c).

instructions and that the resulting error, if any, did not approach the level of fundamental error." *Id.* at ¶ 3.

¶10 Defendant argues, however, that Alvarez is distinguishable. Specifically, he argues that the trial court minimized the importance of the omitted instruction when it told the jury in this case that "[i]f an earlier instruction is repeated here, that is done for clarity or emphasis only." Although reinstructing the jury on all relevant instructions, including witness credibility, is the better practice and removes the appellate argument, the statement does not give rise to fundamental error. In fact, the court also informed the jury that it was to consider the preliminary instructions and that it was responsible for determining the facts of the case. Because we presume that the jury followed the instructions, *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996), it is unlikely that the jury was misled. See *State v. Johnson*, 205 Ariz. 413, 417, ¶ 10, 72 P.3d 343, 347 (2003) ("We will reverse a conviction when the instructions, taken as a whole, may have misled the jury."). Consequently, we find no fundamental error.

¶11 Because there is no fundamental error, we need not address Defendant's arguments on prejudice. See *Henderson*, 210 Ariz. at 569, ¶ 26, 115 P.3d at 608.

CONCLUSION

¶12 Based on the foregoing, we affirm Defendant's conviction and sentence.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Judge

/s/

PATRICIA A. OROZCO, Judge