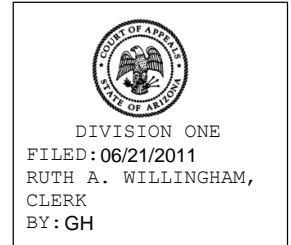


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 10-0447
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
DEREK SAMUEL JERIHA,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-127783-002 DT

The Honorable John R. Hannah Jr., Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Jeffrey L. Sparks, Assistant Attorney
General
Attorneys for Appellee

Coppersmith Schermer & Brockelman P.L.C. Phoenix
By James J. Belanger and Scott M. Bennett
Attorneys for Appellant

B R O W N, Judge

¶1 Derek Samuel Jeriha appeals from his convictions on two counts of armed robbery and two counts of kidnapping. Jeriha argues that the trial court erred by permitting the introduction of prejudicial evidence and that the prosecutor made improper remarks in his opening statement and closing argument. Because no objection was made to any of these matters in the trial court, our review is limited to fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Finding no fundamental error, we affirm.

BACKGROUND

¶2 The State presented evidence of the following at trial. On the morning of January 13, 2009, Nick was at the apartment of his girlfriend, Heather. Also present were two of Heather's friends, Michelle and Lee. After Nick awoke and came into the living room, Heather informed him that Jeriha had just stopped by about a cell phone she was selling and that he would be right back. Nick and Heather were familiar with Jeriha, as he was Heather's ex-boyfriend.

¶3 A short time later, the front door to the apartment burst open and Jeriha and two other men entered the apartment with handguns. The two men with Jeriha were wearing black ski masks. Nick recognized Jeriha and also recognized one of the masked men from his voice and his tattoos as Jeriha's friend, Dylan Gormey. The men beat Nick and then bound him and Heather

together on the floor with duct tape. While one man kept a gun trained on Nick and Heather, the other two went through the apartment, trashing it and taking things. Before leaving, Jeriha told Nick, "This is what you get for stealing my girlfriend."

¶14 Once the three men left, Lee, who Nick believed was a friend of Jeriha or Gormey, unbound Nick and Heather. Michelle and Lee left shortly thereafter and Nick and Heather began going through the apartment to determine what was taken. They found that Nick's wallet, telephone, 9-millimeter handgun, and car keys were missing. A short time later, Nick also discovered that the vehicle he had borrowed from his grandmother was gone.

¶15 After initially considering handling the matter himself, Nick called the police to report the robbery. Because Heather had a warrant out for her arrest, she left before the police responded. The robbery report was forwarded to the detective unit, and about three months after the robbery, a detective showed Nick photographic lineups that contained photographs of Jeriha and Gormey. Nick identified Jeriha and Gormey as two of the men who committed the robbery.

¶16 On April 23, 2009, police executed a search warrant at the apartment where Gormey resided with his girlfriend. Jeriha, Gormey, and Gormey's girlfriend were present at the apartment when the search occurred. In the apartment, police found a

wallet containing Nick's school identification, bank card, and various other cards with his name, all taken in the robbery. Also recovered were Heather's identification and various cards bearing her name. Police additionally found, among other items, a shotgun, a BB gun that looked like a semi-automatic handgun, a magazine loaded with .45 caliber ammunition, and other loose handgun ammunition.

¶7 Jeriha and Gormey were each indicted on two counts of armed robbery, a class 2 dangerous felony; one count of aggravated assault, a class 4 felony; two counts of kidnapping, a class 2 dangerous felony; and one count of theft of a means of transportation, a class 3 felony. Gormey was further indicted on three counts of misconduct involving weapons, a class 4 felony.

¶8 Jeriha and Gormey were tried jointly. At the close of the State's case, the trial court entered judgment of acquittal on the charges of misconduct involving weapons against Gormey. The jury convicted Jeriha and Gormey on the armed robbery and kidnapping counts, but acquitted them on the aggravated assault and theft of means of transportation charges. The trial court sentenced Jeriha to concurrent presumptive 10.5-year prison terms. Jeriha timely appealed.

DISCUSSION

¶9 Jeriha contends the trial court erred in admitting improper prejudicial evidence. Because Jeriha did not object to the evidence in question, he has forfeited appellate review of his claims absent fundamental error. *Id.* Under this limited standard of review, Jeriha bears the burden of establishing error, that the error was fundamental, and that the error caused him prejudice. *Id.* at 568, ¶ 22, 115 P.3d at 608. Error is fundamental only when it reaches the foundation of a defendant's case, takes from him a right essential to his defense, and is error of such dimension that he could not have possibly received a fair trial. *Id.* at 567, ¶ 19, 115 P.3d at 607.

¶10 All three categories of evidence Jeriha challenges on appeal relate solely to co-defendant Gormey. The first category of evidence is described by Jeriha as an "arsenal of deadly weapons found at the apartment of [Gormey's] girlfriend." The second category consists of evidence of "sexually provocative posters" on the walls of the girlfriend's apartment. The third category is evidence that Gormey was in violation of his probation by residing at his girlfriend's apartment without informing his probation officer.

¶11 Even if we were to conclude that the trial court erred in admitting the challenged evidence, which we do not decide, the admission of this evidence simply does not rise to the level

of fundamental error. Fundamental error occurs only in rare cases and "usually, if not always, involves the loss of federal constitutional rights." *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991) (quoting *State v. Smith*, 114 Ariz. 415, 420, 561 P.2d 739, 744 (1977)).

¶12 "To qualify as 'fundamental error' . . . the error must be clear, egregious and curable only via new trial." *Id.* at 155, 812 P.2d at 628. Here, the alleged errors are common and involve the admission of essentially irrelevant evidence, which could have been easily remedied if objections had been made.

¶13 Contrary to Jeriha's contention, any error in the admission of these three categories of evidence would not have impacted the fairness of his trial. Jeriha concedes that the shotgun and the ammunition found at the girlfriend's apartment were properly admissible on misconduct involving weapons charges. The majority of the balance of the weapons evidence on which Jeriha based his first claim of error are various types of medieval and collectible weapons, which were on display in the apartment. Jeriha's argument that a jury would likely be inflamed by a person possessing such a collection lacks any substantial logical support. Similarly, the posters found in the apartment were not overly provocative and similar items could likely be found in apartments around the country where men

reside. It is therefore improbable that a jury would be offended by such materials to the point that it would affect the outcome of the case.

¶14 The evidence that Gormey was in violation of his probation does present some possibility of prejudice to Gormey. Again, however, any prejudice would be relatively minor as the violation was technical in nature: the failure to notify his probation officer of the change in his residence. Thus, even if there was error in the admission of this evidence, there is no basis to conclude that this error was so egregious and of such a dimension as to make a fair trial impossible for Jeriha.

¶15 Moreover, none of the claimed errors in the admission of evidence can be considered as going to the foundation of Jeriha's case or taking from him a right essential to his defense. The defense presented by Jeriha at trial was that Nick held a grudge against him and was lying about the robbery. The three categories of evidence alleged to have been improperly admitted have no relation to this defense. Nor do they pertain to the credibility of either Nick or Jeriha. Accordingly, we conclude that Jeriha has failed to meet his burden of establishing the existence of fundamental error with respect to the admission of the three categories of evidence challenged on appeal.

¶16 In addition, Jeriha has failed to meet his burden of proving he was prejudiced by the alleged errors. There was no suggestion at trial that Jeriha had any direct connection to the weapons or posters in the girlfriend's apartment or any role in Gormey's violation of probation. Jeriha's argument that any prejudice from the admission of these three categories of evidence would spill over from Gormey because they were charged as accomplices and tried together is insufficient because it is purely speculative. See *State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006) (finding that prejudice for purposes of fundamental error review cannot be based solely on speculation). Further, to the extent that any possibility of spillover did exist, it was mitigated by the trial court's instruction that each defendant was entitled to have the jury determine guilt based on the defendant's own conduct and from the evidence applicable to that defendant. "With such an instruction, the jury is presumed to have considered the evidence against each defendant separately in finding both guilty." *State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995).

¶17 Jeriha also argues that error occurred in both the prosecutor's opening statement and closing argument. As with the claims of error in regards to the admission of evidence, Jeriha did not raise either of these issues below. Thus, our

review is again limited to fundamental error. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 606.

¶18 Jeriha asserts the prosecutor misstated the State's evidence in the opening statement. In particular, Jeriha complains that the prosecutor informed the jury that during the robbery, Gormey lifted his ski mask and told Heather that she was getting what she deserved. Noting that there was no evidence of this presented at trial, Jeriha argues that the prosecutor's statement prejudiced him by exaggerating the State's case and presenting a sinister image of Gormey.

¶19 We find no reversible error. Although no evidence was presented at trial consistent with the prosecutor's statement, this does not render the statement prejudicial error. The trial court instructed the jury, before opening statements, that "[w]hat the lawyers said or will say [in opening statements] is not evidence" and that "[y]ou are to determine the facts only from the testimony of witnesses and from the exhibits received in evidence." The trial court repeated these instructions prior to the jury commencing deliberations. Accordingly, Jeriha is unable to meet his burden of proving any prejudice from the prosecutor's opening statement. See *State v. Bowie*, 119 Ariz. 336, 339-40, 580 P.2d 1190, 1193-94 (1978) ("Any possible prejudice from the opening statement was overcome by the court's cautionary instructions that evidence did not come from the

attorneys and that the verdict must be determined only by reference to the evidence[.]”).

¶120 Jeriha also argues that the prosecutor committed error during closing argument by suggesting that the defendants had the burden of proving their innocence with the following remarks:

First of all, he has people coming into his home, right, Dylan and Derek who he's able to identify. If he's made this up, does he know whether or not they're going to have people who can come and say, you know what, Dylan and Derek, they were with me at that time. We saw them DJ-ing. We've got 300 people who were at a party seeing him DJ as he does into the early mornings.

According to Jeriha, these remarks shifted the burden of proof by faulting the defendants for failing to produce alibi witnesses. When viewed in context, however, these remarks are readily understood as merely part of an argument addressing the victim's credibility.

¶121 As a prelude to the remarks at issue, the prosecutor told the jury that he was going to “talk about just how incredibly stupid [the victim] would have to be to make up a story like this.” Immediately after the remarks in question, the prosecutor continued along the same line:

Would it be incredibly stupid for him to pick victims where he doesn't know if they're going to be able to produce a receipt that says, you know, I was at a Denny's restaurant or any other kind of

restaurant? That would be incredibly stupid.

It would be incredibly stupid of him to pick victims when he doesn't know if they're going to be able to produce, say, a cell phone record that shows that they were making a call on the other side of town or on the other side of the state where you might be able to look at their cell phone record and say, yep, this person was making a call around 8 o'clock in the morning, all the way across town, they couldn't have been up on Cave Creek and Bell Road. That would be just an incredibly stupid thing to make up if you were going to make up this story.

In short, the prosecutor was not telling the jurors that the defendants were obligated to establish an alibi, but rather merely explaining to the jury why it would not make sense for Nick to fabricate a story about being robbed by defendants when it might be easily disproven. There is nothing improper in this argument. See *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000) (noting "prosecutors have wide latitude in presenting their arguments to the jury"). Thus, there was no error, let alone fundamental error, in the prosecutor's closing argument.

CONCLUSION

¶22 Based on the foregoing, we affirm Jeriha's convictions and sentences.

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

PATRICIA A. OROZCO, Presiding Judge

/s/

DONN KESSLER, Judge