DIVISION ONE
FILED: 05/24/2011
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 10-0665
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
JAMES CHRISTIAN RUDER,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-171925-001 DT

The Honorable Margaret R. Mahoney, Judge

REVERSED AND REMANDED

Thomas Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
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Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Louise Stark, Deputy Public Defender
Attorney for Appellant

D O W N I E, Judge

¶1 James Christian Ruder appeals his convictions on two counts of misconduct involving weapons. Because the trial court erroneously precluded a defense witness from testifying at trial, we reverse Ruder's convictions and remand for a new trial.

FACTS AND PROCEDURAL HISTORY[1]

¶2 Officers Reeves and Rine saw a vehicle swerving and drifting across lanes of traffic. They initiated a traffic stop. Ruder was the driver and sole occupant of the vehicle. The officers asked Ruder if he had any weapons. Ruder removed a "small pocketknife" from his pocket and handed it to the officers. Officer Reeves asked permission to search the vehicle, and Ruder purportedly consented.[2] According to Officer Reeves, Ruder said the officers would find "a backpack with multiple knives and a pair of nunchucks, but there shouldn't be anything else." In searching the vehicle, Officer Rine saw a backpack propped against the center console. Inside the backpack, the officer found a pair of nunchucks, a fixed-blade knife in a sheath, and three folding knives.

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[1] Defendant challenges only the preclusion of his witness at trial. We thus confine our discussion to the facts and proceedings relevant to that issue.

[2] Ruder denies giving consent. We need not resolve this disputed factual question to decide the issue presented by this appeal.

¶3 Ruder testified at trial that, on the day of the traffic stop, he drove a family friend, Daniel Knight, to and from Knight's karate class. Knight reportedly left his backpack in the car, and Ruder called Knight to say he had it. Ruder testified he never opened the backpack, did not speak with Knight about its contents, and did not know what was in the backpack. Ruder testified he was on his way to return the backpack to Knight when the traffic stop occurred. He denied telling officers there were nunchucks and knives in the backpack.

¶4 Ruder was charged with two counts of misconduct involving weapons, both class 4 felonies.[3] The defense disclosed Knight as a potential trial witness and worked with the prosecutor to set up his interview. Knight failed to appear for two interviews.

¶5 On the first day of trial, the State asked the court to preclude Knight as a witness because the prosecutor could not effectively cross-examine him without first interviewing him. The court instead allowed the defense to locate Knight and bring him to court for an interview, provided he arrive by 1:00 p.m.

[3] Count 1 related to the nunchucks, which are a "prohibited weapon." Arizona Revised Statutes ("A.R.S.") section 13-3101(A)(8)(v). Count 2 related to the fixed blade knife, which an expert testified was a deadly weapon.

Ruder, who was not in custody, located Knight over the lunch hour and returned with him at 1:13 p.m.

¶6 To avoid postponing jury selection, which was scheduled to begin at 1:30, the court and counsel agreed Knight would be interviewed at the end of the day. The court warned the defense that, "if this guy's important to your case, you need to get him under control or you're going to be without him at trial." Defense counsel told Knight to wait in the witness room until they were ready to speak with him and not to talk about the case in front of jurors.

¶7 After voir dire, while counsel were exercising peremptory strikes, several members of the jury panel reported to the bailiff that Knight had been talking to them in the hallway. The trial judge seated prospective jurors but did not swear them in. She inquired whether they had "heard anything being discussed about this case." Six panel members raised their hands. They reported that Knight said he was Ruder's friend, that the nunchucks belonged to him, that Ruder was "a multiple felon, and the cops wanted to put him down for life," and that he was not going to let Ruder "go down for life." They related that Knight initiated the contact and "just . . . started talking." The court discharged the jury panel.

¶8 When questioned about his actions, Knight said he told one man Ruder "might have felonies, and that's what might be

taking so long." He also admitted telling a prospective juror he thought Ruder "got caught with nunchucks." The State renewed its motion to preclude Knight as a witness, and the court granted the motion.

¶9 Before jury selection the next day with a new panel, Ruder unsuccessfully sought reconsideration of the preclusion order. Trial proceeded, and Ruder testified in his own defense. He admitted having two felony convictions and acknowledged his right to possess deadly weapons had not been restored. The jury convicted Ruder on both counts. He was sentenced to mitigated concurrent terms of nine years' imprisonment.

¶10 Ruder timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

DISCUSSION

¶11 Ruder's sole contention on appeal is that the trial court erroneously precluded Knight as a trial witness. The State maintains preclusion was appropriate based on a discovery violation and Knight's actions.

¶12 The State conceded below that defense counsel gave adequate and timely notice of Knight as a witness and stated that counsel had worked together to arrange his interview. Even after Knight's comments to the jury panel, the State did not allege a discovery violation or bad faith by the defense, but

instead conceded defense counsel properly disclosed Knight and timely informed the State of his expected testimony. Given this record, the State has waived on appeal any argument that the defense committed a discovery or disclosure violation. *See Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) (arguments not raised below are waived).

¶13 We review the trial court's exclusion of evidence for an abuse of discretion. *State v. Robinson*, 165 Ariz. 51, 56, 796 P.2d 853, 858 (1990). "An 'abuse of discretion' is discretion manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *State v. Sandoval*, 175 Ariz. 343, 347, 857 P.2d 395, 399 (App. 1993).

¶14 Appellate courts consider competing interests when reviewing an order precluding a criminal defendant's evidence as a sanction. "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Taylor v. Illinois*, 484 U.S. 400, 408 (1988). A defendant's fundamental right, though, must be balanced against the State's interests "in the orderly conduct of a criminal trial[,]" "in protecting itself against an eleventh hour defense[,]" and in preserving "the integrity of the adversary process." *Id.* at 411, 412, 414.

¶15 Preclusion of a witness is "a sanction of last resort." *State v. Talmadge*, 196 Ariz. 436, 440, ¶ 17, 999 P.2d 192, 196 (2000); *see also State v. Roque*, 213 Ariz. 193, 210,

¶ 51, 141 P.3d 368, 385 (2006). Courts have "upheld the drastic remedy of excluding a witness only in cases involving 'willful and blatant' discovery violations." *United States v. Peters*, 937 F.2d 1422, 1426 (9th Cir. 1991) (quoting *Taylor*, 484 U.S. at 416). When choosing an appropriate sanction for a discovery violation, a trial court:

> should seek to apply sanctions that affect the evidence at trial and the merits of the case as little as possible since the Rules of Criminal Procedure are designed to implement, not to impede, the fair and speedy determination of cases. Prohibiting the calling of a witness should be invoked only in those cases where other less stringent sanctions are not applicable to effect the ends of justice. The court should also consider how vital the precluded witness is to the proponent's case, whether the opposing party will be surprised and prejudiced by the witness' testimony, whether the discovery violation was motivated by bad faith or willfulness, and any other relevant circumstances.

State v. Fisher, 141 Ariz. 227, 246, 686 P.2d 750, 769 (1984) (citations omitted); *see also State v. Smith*, 123 Ariz. 243, 252, 599 P.2d 199, 208 (1979).

¶16 Significantly, the trial court here found no discovery violation. And as we noted *supra*, the State made no such claim below. Some courts have held that, without such a violation, "application of the exclusionary sanction is impermissible." *See Peters*, 937 F.2d at 1426; *see also United States v. Schwartz*, 857 F.2d 655, 658-59 (9th Cir. 1988) ("In the absence

of a specific constitutional, statutory or other violation warranting the imposition of the exclusionary sanction, and subject also to the rules regulating admissibility, the government is entitled to offer its best evidence to the court and jury."); *cf. Chappee v. Vose*, 843 F.2d 25, 30 (1st Cir. 1988) (preclusion of witness appropriate where violation was "lurid and unequivocal, and its genesis was inexcusably deliberate").

¶17 We need not determine whether the lack of a discovery violation, standing alone, is fatal to the preclusion order in this case. Even if the defense *had* failed to provide sufficient contact information for Knight, as the State now suggests, the drastic remedy of preclusion would not be warranted.

¶18 Knight was unquestionably difficult to work with, and his behaviors were inappropriate. His actions wasted scarce judicial resources, inconvenienced jurors and counsel, and caused delay in the proceedings. Significantly, though, the court attributed none of this to Ruder or his lawyer. Defense counsel specifically instructed Knight to stay in the witness room and not speak to jurors.[4] Defense counsel had diligently tried to get Knight to participate in a pretrial interview with the prosecution. The record reflects that defense counsel left

[4] Knight had not been admonished by the court and thus did not disobey a specific court order that might give rise to a contempt citation.

a telephone message for Knight and also sent him a letter with the interview information. Defense counsel had a process server unsuccessfully attempt to serve Knight. Knight did appear in court on an earlier date to testify at an evidentiary hearing in Ruder's case. He also phoned defense counsel and attempted to reschedule a missed interview appointment. The State never sought a court order compelling Knight's attendance at an interview. Rule 15.3(a)(2), Arizona Rules of Criminal Procedure, allows the court to order a witness to submit to an interview upon motion by a party. *State v. Paxton*, 186 Ariz. 580, 588, 925 P.2d 721, 729 (App. 1996).

¶19 Although we understand the trial court's frustration with Knight, because there is nothing linking the defense to Knight's inappropriate conduct, the drastic sanction of preclusion was improper. We also disagree with the court's assessment that Knight was an unnecessary witness because "all that information can come from the Defendant." As a prohibited possessor, Ruder's criminal history would be before the jury as an element of the crime. Ruder, however, still had the right not to testify. *State v. Piper*, 113 Ariz. 390, 392, 555 P.2d 636, 638 (1976). Whether to testify was Ruder's decision to make, acting with the advice of his counsel, and should not be one implicitly compelled by the preclusion of his only witness.

¶20 We conclude the preclusion of Knight's testimony was error. The question then becomes whether a new trial is required. When, as here, an issue is properly presented to the trial court and erroneously ruled on, we review for harmless error. *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). The State has the burden of proving beyond a reasonable doubt that the error was harmless and did not prejudice Ruder by contributing to or affecting the verdict. *State v. Armstrong*, 218 Ariz. 451, 458, ¶ 20, 189 P.3d 378, 385 (2008); *State v. Henderson*, 210 Ariz. 561, 567, ¶ 18, 115 P.3d 601, 607 (2005).

¶21 Defense counsel made an offer of proof regarding Knight's proposed testimony, stating:

> The nature of Mr. Knight's testimony is to claim ownership of the weapons, all the weapons at issue in this trial, and to testify that Mr. Ruder had no knowledge that the weapons were . . . in the backpack -- the weapons were found in a backpack in a car Mr. Ruder was driving. [Knight] would testify that he left the weapons in that car and never informed Mr. Ruder about what was in there, and that they were his. No discussion ever happened.
>
> . . . .
>
> [Knight]'s testimony would have been that earlier in the day my client took him to karate practice, dropped him back off. [Knight] left a backpack with knives, nunchucks in it, didn't tell my client what was in it, and that he doesn't think -- he has no knowledge of my client being aware of what was in the backpack.

> So I think it is fundamental to our defense. We don't have any other witnesses other than [Knight]. The only other person really who could testify is my client as to the events that happened. Your Honor, I'd argue that this is in many ways essentially forcing my client to take the stand, because we don't have any other witnesses to the event.

¶22 The State was required to prove that Ruder knowingly possessed the nunchucks and fixed-blade knife. Knight was the only witness who could corroborate Ruder's defense. We recognize that Knight could not testify regarding Ruder's actual level of knowledge. But, contrary to the State's contention, his testimony was nonetheless relevant. If believed, Knight could corroborate Ruder's claim that the backpack and its contents were not Ruder's and that Knight had not told him what was in the backpack. *See* Ariz. R. Evid. 401 (defining "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

¶23 The State has not demonstrated, beyond a reasonable doubt, that the erroneous preclusion of Knight's testimony did not contribute to or affect the verdict. We understand the trial court's frustration and the lack of meaningful remedial measures. Under the circumstances, though, where it was not

established that the defense was at fault, preclusion of the only corroborating defense witness was not harmless error.

CONCLUSION

¶24 For the foregoing reasons, we reverse Ruder's convictions and remand for a new trial.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Presiding Judge

/s/
JON W. THOMPSON, Judge