IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 11/29/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA, Appellee, v. ANGELO S. GONZALES, Appellant.	)	1 CA-CR 10-0723 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-101847-001 DT

The Honorable Samuel A. Thumma, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
and Barbara A. Bailey, Assistant Attorney General
Attorneys for Appellee

Kathryn L. Petroff — Phoenix
Attorney for Appellant

B A R K E R, Judge

¶1 Angelo S. Gonzales appeals his conviction, and resulting sentence, for forgery, a class four felony. He argues the trial court's failure to grant a mistrial was an abuse of discretion. For the following reasons, we affirm.

Facts and Procedural History[1]

¶2 During the afternoon of a November day, Gonzales was riding his bicycle on the corner of 53rd Avenue and Maryland. Gonzales was traveling westbound in the eastbound lane – a violation of Arizona statute. Officers performed an enforcement stop, turning on their overhead lights and causing Gonzales to stop. When asked for his identification, Gonzales did not provide a driver's license, but instead told the officers that his name was Manuel Tacho and his date of birth was July 26, 1978. Gonzales did not match the physical description provided by the records check for Manuel Tacho, and his non-verbal behavior indicated to the officers that he was not being truthful.

¶3 The officers detained Gonzales and transported him to a detention facility to use what is known as the "One Touch" system to scan his fingerprint and determine his identity. Officer Carr had Gonzales fill out a fingerprint card; he

[1] We view the evidence in the light most favorable to sustaining the conviction. *See State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

observed as Gonzales wrote “Manuel Tacho” and “7-26-78” for the name and birth date and signed the card. When the officers ran Gonzales’s fingerprint through the One Touch system, they learned that his actual name was Angelo Gonzales, his birth date was 7-26-77, and there was a warrant out for his arrest.

¶4 Gonzales was charged with one count of forgery, a class four felony. During the trial, defense counsel made an oral motion in limine asking the court to preclude the State from introducing testimony about Gonzales’s outstanding warrant. The trial court denied the motion but limited the State to introducing the fact that there was a warrant and nothing more. While questioning an officer, the State made reference to the fact that the One Touch system would provide a person’s identification upon scanning a fingerprint “if a person has a prior record.” Defense counsel immediately moved for a mistrial. The court reserved ruling on the motion for mistrial, hearing oral argument and taking the matter under advisement. The trial court later denied the motion, but allowed the parties to recall Officer Carr for clarifying testimony and to request a limiting instruction. The parties did not do so.

¶5 Gonzales was convicted of forgery. At sentencing he admitted to a prior felony conviction. The trial court found that he was on parole at the time of the offense charged and sentenced him to the presumptive term of 4.5 years. Gonzales

timely appealed. 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 (2010), and 13-4033(A) (2010).

Discussion

¶6 Gonzales argues the prosecution's reference to his "prior record" required a declaration of mistrial. "A declaration of mistrial is the most dramatic remedy for trial error and is appropriate only when justice will be thwarted if the current jury is allowed to consider the case." *State v. Lamar*, 205 Ariz. 431, 439, ¶ 40, 72 P.3d 831, 839 (2003) (quoting *State v. Nordstrom*, 200 Ariz. 229, 250, ¶ 68, 25 P.3d 717, 738 (2001)). We will only find reversible error if the refusal was a clear abuse of discretion. *State v. Hoskins*, 199 Ariz. 127, 142, ¶ 57, 14 P.3d 997, 1012 (2000). In reviewing denial of a motion for mistrial, we give great deference to the trial court because it "is in the best position to determine whether the evidence will actually affect the outcome of the trial." *Lamar*, 205 Ariz. at 439, ¶ 40, 72 P.3d at 839 (quoting *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000)). When faced with a motion for mistrial based on a witness's testimony, the trial court must consider: "(1) whether the testimony called to the jurors' attention matters that they would not be justified in considering in reaching their verdict

and (2) the probability under the circumstances of the case that the testimony influenced the jurors." *Lamar*, 205 Ariz. at 439, ¶ 40, 72 P.3d at 839.

¶7 Because he did not testify at trial, any evidence of Gonzales's prior convictions was inadmissible, and testimony expressing that he had prior convictions would "call[] to the jurors' attention matters that they would not be justified in considering in reaching their verdict." *Id.*; *see also State v. Bailey*, 160 Ariz. 277, 280, 772 P.2d 1130, 1133 (1989). The testimony at issue is as follows:

> [The State]: And what is the One Touch system?
>
> [Officer Carr]: It's a computer system that is linked up through the Arizona Affiliated Fingerprint Identification System and PAY system, which is a local system that serves law-enforcement agencies that has records, pages of records of individuals, the name and information.
>
> They assign state identification numbers and a date of birth. You have all of that information and [it is] linked through fingerprints. The system is set up to where you can scan a left index and right index, and within a minute, it comes back with a response to who that person is who is putting his finger on the pad, who that person is.
>
> [The State]: And that is, of course if there is a[n]y fingerprint of the person in the system, if a person has a prior record.
>
> [Defense counsel moves for mistrial.]

After the side-bar discussion where defense counsel moved for a mistrial and the trial court reserved ruling on the motion, the State clarified Officer Carr's testimony.

> [The State]: I want to clarify. We talked about the fingerprint in the system?
>
> [Officer Carr]: Yes.
>
> [The State]: Are your fingerprints in the system?
>
> [Officer Carr]: Correct.
>
> [The State]: As a County employee, would mine be in the system?
>
> [Officer Carr]: Yes.
>
> [The State]: There are multitudes of different systems and databases that provide fingerprints. A lot of certification, licensing, that sort of thing?
>
> [Officer Carr]: Yes.

¶8 When the trial court ruled on the motion, it concluded that "taken as a whole, Officer Carr's testimony did not call to the attention of the jurors matters that they would not be justified in considering in determining their verdict." The court reasoned that the "jury could reasonably interpret [the] reference to 'a prior record' as a reference to defendant having previously provided fingerprints that were included in the different systems and databases that make up the 'One Touch' system." The reference to a "prior record" was an isolated, ambiguous reference made by the prosecutor that did not

necessarily imply that Gonzales had a prior criminal record. *Cf. State v. Gallagher*, 97 Ariz. 1, 7, 396 P.2d 241, 245 (1964) (statement alluding that the defendant had been in jail impermissibly conveyed to jury that defendant had prior criminal record) *disapproved on other grounds by State v. Greenawalt*, 128 Ariz. 388, 626 P.2d 118 (1981); *State v. Jacobs*, 94 Ariz. 211, 212-13, 382 P.2d 683, 684 (1963) (testimony about defendant's mug shot necessarily implies defendant is a former convict); *State v. Babineaux*, 22 Ariz. 322, 325, 526 P.2d 1277, 1280 (App. 1974) (statement that defendant had been in jail necessarily implies that he has a prior criminal record and can be as prejudicial as reference to prior criminal acts). Furthermore, the prosecutor's clarifying questions conveyed that the presence of a person's record in the One Touch system does not necessarily correlate to the person having a criminal record. The trial court did not abuse its discretion in concluding the following:

> [I]t is far from clear that the jury would construe Officer Carr's reference to a "prior record" as indicating that defendant had a prior *criminal* record as opposed to falling into one of the various categories of records Officer Carr explained made up the "One Touch" system.

¶9 Out of an abundance of caution, however, the trial court addressed the second prong of the inquiry, and we do the same. "We will not reverse a conviction based on the erroneous

admission of evidence without a 'reasonable probability' that the verdict would have been different had the evidence not been admitted." *State v. Hoskins*, 199 Ariz. 127, 142-43, ¶ 57, 14 P.3d 997, 1012-13 (2000).

¶10 The State was permitted to introduce evidence that Gonzales had a warrant out for his arrest in order to show his "intent to defraud." *See* A.R.S. § 13-2002(A). Independent of the challenged testimony, Officer Breeden testified that upon learning Gonzales's true identity, she also found that "[h]e had a warrant for his arrest." This testimony, establishing the motive Gonzales would have for providing a false name, was offered prior to the isolated reference to a 'prior record.' Because "in the overall context of the examination, and given the prosecutor's immediate correction . . . the trial judge's finding that the jury would not have gleaned that meaning from the testimony is not unreasonable," we conclude that it was not an abuse of discretion. *Nordstrom*, 200 Ariz. at 250, ¶ 68, 25 P.3d at 738. Furthermore, the court offered the curative measures of calling Officer Carr to provide clarifying testimony and considering any limiting instruction either party wished the court to consider.

Conclusion

¶11 For the reasons stated above, we affirm.

/s/
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DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
ANN A. SCOTT TIMMER, Presiding Judge

/s/
_____
PATRICK IRVINE, Judge