FILED BY CLERK
APR 12 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. NELSON IVAN BOTEO-FLORES, Appellant.	2 CA-CR 2010-0106 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20092575002

Honorable Terry L. Chandler, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson — Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Lisa M. Hise — Tucson
Attorneys for Appellant

H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Nelson Boteo-Flores was convicted of facilitation of theft of a means of transportation and sentenced to the presumptive prison

term of 1.75 years. On appeal, Boteo-Flores argues the trial court erred in denying his motion to suppress statements because they were the result of an illegal detention or arrest. He also contends there was insufficient evidence to support his conviction and an officer's testimony was an improper opinion on the ultimate issue constituting fundamental error. For the following reasons, we affirm.

Factual and Procedural Background

¶2 In reviewing a trial court's ruling on a motion to suppress, we consider only the evidence presented at the suppression hearing, which we view in the light most favorable to sustaining the ruling. *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007). Most of the facts are undisputed. After a police officer went to an apartment complex to investigate a report of a stolen truck, he conducted surveillance of the parking lot and saw a driver arrive in a car registered to that address. A few minutes later, the car drove away. The driver was using a cellular telephone and, as he left the parking lot, he looked up and down the street. The car returned a short time later with three people whom the officer could not identify. Minutes after that, Boteo-Flores walked from the apartment complex to the street and looked up and down the street several times. The original driver of the car then drove out of the complex in the stolen truck the officers had been trying to locate. The driver "yelled or said something" to Boteo-Flores before he drove away, and Boteo-Flores watched the vehicle leave.

¶3 The officer approached Boteo-Flores, commanded him to move to the front of the officer's car, and handcuffed him. The officer then administered the *Miranda*[1] warnings and questioned him. Another officer arrived later, also giving Boteo-Flores the *Miranda* warnings and questioning him. Boteo-Flores then made incriminating statements. He had been detained from twenty-five to forty minutes before the second interview.

¶4 Before trial, Boteo-Flores filed a motion to suppress his incriminating statements, which the trial court denied. At the end of the prosecution's case, Boteo-Flores moved for a judgment of acquittal under Rule 20, Ariz. R. Crim. P., which the court also denied. Boteo-Flores was convicted and sentenced as discussed above. This appeal followed.

Motion to Suppress

¶5 Boteo-Flores first argues that the trial court erred in denying his motion to suppress because the officers lacked reasonable suspicion to detain him. "[W]e review a trial court's decision whether to grant a motion to suppress for an abuse of discretion." *State v. Kinney*, 225 Ariz. 550, ¶ 13, 241 P.3d 914, 919 (App. 2010).

¶6 An officer may detain a person in order to conduct a limited investigation if the officer has "a reasonable and articulable suspicion that a person is involved in criminal activity." *State v. Blackmore*, 186 Ariz. 630, 632-33, 925 P.2d 1347, 1349-50

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

(1996). An officer may rely on past experience and training to make inferences about the situation. *United States v. Arvizu*, 534 U.S. 266, 273 (2002).

¶7 The officer here observed a car leave the complex where the stolen truck had been parked. The car paused for an unusually long time before entering the street. It returned shortly thereafter with three occupants. Within minutes, Boteo-Flores walked out of the general area where the truck was parked and went out to the street, looking around. The stolen truck then exited the parking lot and its driver said something to Boteo-Flores as he left. The officer, based on his experience, believed Boteo-Flores was acting as a lookout for the driver of the stolen truck. And he did not know where the third person from the car was located. Finally, the officer testified that vehicle theft, especially the theft of trucks such as the one that was stolen, is often connected with human or narcotics smuggling and that people involved in smuggling often are armed.

¶8 The trial court found the officer had testified credibly, had a reasonable suspicion that Boteo-Flores was involved with the stolen truck, and had detained Boteo-Flores properly but had not arrested him. The record supports the court's finding that the officer had a reasonable, articulable suspicion that Boteo-Flores was involved in criminal activity.

¶9 Boteo-Flores further argues his detention was a de facto arrest. The trial court implicitly found handcuffing Boteo-Flores was reasonable when it concluded that Boteo-Flores was not under arrest. We defer to the court's findings of fact, *State v. Lopez*, 198 Ariz. 420, ¶ 7, 10 P.3d 1207, 1208 (App. 2000), including its findings on officer credibility and the reasonableness of the officers' inferences, *State v. Mendoza-*

Ruiz, 225 Ariz. 473, ¶ 6, 240 P.3d 1235, 1237 (App. 2010). But, we review de novo the ultimate legal issue. *State v. Navarro*, 201 Ariz. 292, ¶ 12, 34 P.3d 971, 974 (App. 2001). Whether a person is arrested "'turns upon an evaluation of all the surrounding circumstances to determine whether a reasonable person, innocent of any crime, would reasonably believe that he was being arrested.'" *Id.* ¶ 20, *quoting State v. Winegar*, 147 Ariz. 440, 448, 711 P.2d 579, 587 (1985). Factors to determine what a reasonable person would believe include "the officer's display of authority, the extent to which the defendant's freedom was curtailed, and the degree and manner of force used." *State v. Acinelli*, 191 Ariz. 66, 69, 952 P.2d 304, 307 (App. 1997).

¶10 However, an officer may take reasonable steps "to preserve his own safety and to prevent [a] defendant from fleeing." *Blackmore*, 186 Ariz. at 634, 925 P.2d at 1351; *see State v. Romero*, 178 Ariz. 45, 49, 870 P.2d 1141, 1145 (App. 1993) ("The use of force does not transform a stop into an arrest if the situation explains an officer's fears for his personal safety."). Handcuffs may be evidence that a person is under arrest, *see State v. Monge*, 173 Ariz. 279, 280 n.1, 842 P.2d 1292, 1293 n.1 (1992), but they also may be a reasonable measure to protect an officer's safety, *see Blackmore*, 186 Ariz. at 631, 634, 925 P.2d at 1348, 1351. *See also Washington v. Lambert*, 98 F.3d 1181, 1186 (9th Cir. 1996) ("[B]ecause we consider . . . the inherent danger of the situation[,] . . . pointing a weapon at a suspect and handcuffing him, or ordering him to lie on the ground, or placing him in a police car will not *automatically* convert an investigatory stop into an arrest that requires probable cause."). When an officer's safety concerns arise, we also look to: "(1) the proximity between the location of the crime and the site of the stop; (2)

the amount of time between the crime and the stop; and (3) the duration of the stop." *Blackmore*, 186 Ariz. at 633, 925 P.2d at 1350 (citations omitted). In order to determine the reasonableness of the duration of a stop "we must consider the degree of intrusion on an individual's privacy and weigh that against the purpose of the stop and the diligence with which the officer pursued that purpose." *State v. Sweeney*, 224 Ariz. 107, ¶ 18, 227 P.3d 868, 873 (App. 2010).

¶11 Here, the officer testified that vehicle theft, especially the theft of large trucks, often is connected with human or narcotics smuggling and that people involved in smuggling often are armed. The officer also testified he handcuffed Boteo-Flores because the whereabouts of the third person in the car was still unknown. The trial court explicitly found credible the officer's testimony. The officer also knew that the individual in the stolen truck had sped away, apparently attempting to elude police. Thus, the situation implicated officer safety concerns. Furthermore, the stop was at the location where the stolen truck had been seen and immediately after the crime—controlling a stolen vehicle—had occurred. *See Blackmore*, 186 Ariz. at 633, 925 P.2d at 1350. And the record does not indicate that Boteo-Flores was told he was under arrest. Finally, Boteo-Flores may have been stopped for only twenty-five minutes, during which the two officers questioned him to determine his involvement in the theft of the truck.

¶12 Although this situation may present a close question, deferring to the trial court's findings of fact on officer credibility and the reasonableness of the officer's inferences, *Mendoza-Ruiz*, 225 Ariz. 473, ¶ 6, 240 P.3d at 1237, we conclude the court did not abuse its discretion in determining Boteo-Flores was not under arrest. *See*

Sweeney, 224 Ariz. 107, ¶ 18, 227 P.3d at 873; *State v. O'Meara*, 197 Ariz. 328, ¶¶ 5, 13-14, 4 P.3d 383, 385, 387 (App. 1999) (forty-five to fifty minute investigative detention waiting for drug detection dog reasonable). The officer acted reasonably to protect his own safety and to prevent Boteo-Flores from fleeing, and he diligently pursued the purpose of the stop. The trial court did not err in denying Boteo-Flores's motion to suppress.

Sufficiency of the Evidence

¶13 Boteo-Flores further argues the trial court erred in denying his motion for a judgment of acquittal under Rule 20, Ariz. R. Crim. P., because there was not substantial evidence to support his conviction. Boteo-Flores contends the evidence was insufficient to show he provided the means or opportunity for the theft of the truck and that his conduct did not include a "voluntary act."

¶14 In examining any alleged error at trial, "[w]e view the facts in the light most favorable to sustaining the conviction[]." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). Substantial evidence "may be either circumstantial or direct." *State v. Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d 455, 458 (App. 2003). We will reverse a conviction "only if 'there is a complete absence of probative facts to support [the jury's] conclusion.'" *State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000), *quoting State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

¶15 Boteo-Flores was convicted of facilitating the theft of a means of transportation pursuant to A.R.S. §§ 13-1004 and 13-1814(A)(5). Section 13-1814(A)(5) defines theft of a means of transportation as "[c]ontrol[ling] another person's means of transportation knowing or having reason to know that the property is stolen." And facilitation occurs when "acting with knowledge that another person is committing or intends to commit an offense, the person knowingly provides the other person with means or opportunity for the commission of the offense." A.R.S. § 13-1004(A). Additionally, A.R.S. § 13-201 requires a person either engage in a "voluntary act" or omit doing something required by law in order to be found criminally liable. Thus, we evaluate whether Boteo-Flores acted voluntarily to provide the means or opportunity for someone to control another person's truck illegally.

¶16 The evidence presented at the suppression hearing was also admitted at trial. Both parties stipulated to the admission of the recording and transcript of the interview with Boteo-Flores.[2]

¶17 Boteo-Flores admitted to the officer that he was supposed to walk to the street, to look for police officers and, if he saw any, to whistle. Looking to see whether there were any police officers in the vicinity would give the driver a greater chance of successfully driving the truck to another location. The jury reasonably could have

[2]Neither the recording nor the transcript is included in the record on appeal. It is the appellant's duty to ensure the record is complete. *See State v. Mendoza*, 181 Ariz. 472, 474, 891 P.2d 939, 941 (App. 1995). Therefore, to the extent the contents of the recording are unapparent, we will presume they support the trial court's decision. *See id.* ("When matters are not included in the record on appeal, the missing portion of the record is presumed to support the decision of the trial court.").

concluded that acting as a lookout helped provide the opportunity for the driver to control the stolen truck. *See Spears*, 184 Ariz. at 290, 908 P.2d at 1075 ("Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt."). Additionally, Boteo-Flores took the voluntary action of walking to the street and looking around. Simply because he may not have seen the officers or decided not to whistle does not mean that Boteo-Flores failed to engage in the voluntary act of going to look for the officers. The trial court did not err in denying Boteo-Flores's motion for a judgment of acquittal.

Testimony

¶18 Finally, Boteo-Flores contends the officer's testimony at trial that Boteo-Flores had "facilitated helping" with the theft was an opinion on the ultimate issue and, thus, fundamental error. Boteo-Flores concedes he did not object to the testimony in the trial court; therefore, he has forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Fundamental error is that "'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.* ¶ 19, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). The defendant has the burden to show both that the error was fundamental and that it caused him prejudice. *Id.* ¶¶ 19-20.

¶19 Even if the officer's opinion was erroneously admitted, in order to warrant reversal, it must have prejudiced Boteo-Flores. But, other testimony established that Boteo-Flores walked toward the street and appeared to act as a lookout. And Boteo-

Flores admitted he was supposed to walk to the street, look for officers, and whistle if he saw any. Given this evidence, we cannot conclude that the officer's statement that he thought Boteo-Flores had "facilitated helping" the theft of a truck prejudiced Boteo-Flores. *See id.* ¶ 20.

Conclusion

¶20 For the foregoing reasons, we affirm Boteo-Flores's conviction and sentence.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge