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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DAVID WARE JR., Appellant.	)	2 CA-CR 2012-0161 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20111046003

Honorable Jane L. Eikleberry, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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V Á S Q U E Z, Presiding Judge.

¶1 In this appeal from his convictions for armed robbery and aggravated robbery, appellant David Ware Jr. contends the trial court erred in denying his motion for a judgment of acquittal made pursuant to Rule 20, Ariz. R. Crim. P. We affirm.

Background

¶2 When reviewing the denial of a Rule 20 motion, we view the evidence "in the light most favorable to upholding the ruling." *State v. Cota*, 229 Ariz. 136, ¶ 63, 272 P.3d 1027, 1040, *cert. denied*, ___ U.S. ___, 133 S. Ct. 107 (2012). On an evening in March 2011, B., L., and K. walked out of a restaurant to B.'s car. B. was carrying her purse, containing $1,200 to $1,300 from the restaurant to be deposited at the bank; a briefcase with a laptop computer; and a box with a portable printer. Two men ran up to them in the parking lot, one of them pointing a gun at B. and telling her to "drop everything." The two men grabbed B.'s purse, briefcase, and printer and ran away, jumping over a nearby fence. K. saw a third man on the other side of the fence, and both she and L. testified one of the men who approached them had hair that was "bushy" or an "Afro-type thing."

¶3 None of the victims identified Ware as one of the men who approached them. In a subsequent interview with a Tucson Police detective, however, Ware admitted that he had been present at the robbery, "grabbed the printer" and put it in the car. He also admitted leaving the scene with the others and cutting his hair after the incident because he knew he "would be charged with something." At the close of the state's case, Ware moved for a judgment of acquittal and the trial court denied the motion. Ware was

convicted as noted above, and the court imposed concurrent, partially mitigated prison terms, the longer of which was nine years.

Discussion

¶4 On appeal Ware maintains the trial court erred in denying his Rule 20 motion for a judgment of acquittal because there was insufficient evidence of his presence at the crime; even assuming there was sufficient evidence of his presence, it showed he had been "merely present" during the crime; and his statement, which provided the only incriminating evidence against him, was involuntary because the interviewing detective did not inform him of his rights pursuant to *Miranda*.[1]

¶5 As an initial matter, as the state points out, Ware did not move to suppress his statements or otherwise object on *Miranda* grounds below. We therefore review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental error). And, because Ware has not asserted on appeal that fundamental error occurred, he has waived that argument. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived if not argued on appeal). Furthermore, the interviewing detective testified at trial that she had informed Ware of his rights pursuant to *Miranda* before interviewing him. *Cf. State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (we will not ignore fundamental error if we find it).

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

¶6 We otherwise review the trial court's ruling on Ware's Rule 20 motion de novo. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). In so doing, we view the evidence in the light most favorable to sustaining the convictions and determine whether "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* ¶ 16, *quoting State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990). "[T]he controlling question is solely whether the record contains 'substantial evidence to warrant a conviction.'" *Id.* ¶ 14, *quoting* Ariz. R. Crim. P. 20(a). Substantial evidence is that which "reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997).

¶7 Pursuant to A.R.S. § 13-1902(A) and § 13-1903(A), a person commits aggravated robbery "if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property" and if the person does so with the aid of "one or more accomplices actually present." Section 13-1904(A), A.R.S., elevates the offense to "armed robbery" when the person is armed with, uses, or threatens to use a deadly weapon, simulated deadly weapon, or dangerous instrument. And, a person acts as an accomplice to these offenses if he or she, inter alia, "[a]ids, counsels, agrees to aid or attempts to aid another person in planning or committing an offense." A.R.S. § 13-301.

¶8 In this case, as discussed above, the evidence established that two men, one of them armed with a gun, forced B. to relinquish her property. This evidence was

sufficient to establish the commission of the offense. And, because Ware admitted to the detective he had been present during the offense, we reject his argument that the victims' failure to identify him required the court to grant his Rule 20 motion.

¶9 Further, although Ware is correct that a defendant's guilt may not be established by his mere presence at a crime scene, *see State v. Noriega*, 187 Ariz. 282, 284, 928 P.2d 706, 708 (App. 1996), there was sufficient evidence from which the jury could infer he had been more than merely present. Two witnesses identified the second man as having "bushy" or "Afro-type" hair, and Ware admitted cutting his hair after the offense out of concern for being identified. He also admitted having handled the printer he knew to have been taken from the victims. And Ware acknowledged he knew one of the others involved in the robbery had a gun with him before and during the robbery. *See State v. Tison*, 129 Ariz. 546, 554, 633 P.2d 355, 363 (1981) (although presence at crime insufficient to prove accomplice liability, intent to participate may be shown by "relationship of the parties and their conduct before and after the offense").

¶10 Ware's arguments on appeal essentially ask us to reweigh the evidence, which we will not do. *State v. Haas*, 138 Ariz. 413, 419, 675 P.2d 673, 679 (1983). Rather, because when viewed in the light most favorable to the convictions there was substantial evidence from which a reasonable jury could find the elements of the offenses established, we must affirm the trial court's ruling. *See West*, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191.

Disposition

¶11 Ware's convictions and sentences are affirmed. His request for oral argument, improperly made in his opening brief, Ariz. R. Crim. P. 31.14(a), is denied.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

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

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge