IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

THEODORE ROCKY RAMOS,
Appellant.

No. 2 CA-CR 2014-0112
Filed October 13, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Cochise County
No. CR201100580
The Honorable John F. Kelliher Jr., Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

E C K E R S T R O M, Chief Judge:

¶1 Following a jury trial, appellant Theodore Ramos was convicted of first-degree murder, first-degree burglary, kidnapping, two counts of aggravated assault, and twelve counts of sexual assault. The trial court imposed a natural life term of imprisonment for the murder conviction and a combination of concurrent and consecutive prison terms for the other offenses. On appeal, Ramos challenges his convictions based on the court's comments to the jury regarding his guilt. He also argues that insufficient evidence supported the aggravated assault convictions.[1] We affirm for the reasons that follow.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the convictions. *See State v. Kuhs*, 223 Ariz. 376, n.2, 224 P.3d 192, 195 n.2 (2010). In the early morning hours of July 24, 2011, seventeen-year-old Ramos rang the doorbell at the home of the victims, B.L. and her husband, K.L. When K.L. partially opened the door to respond to Ramos's pleas for help, Ramos pushed the door open and killed K.L. by slitting his throat. Ramos then struck B.L., threatened her with a knife, and sexually assaulted her for approximately two hours. During this ordeal, Ramos cut B.L.'s arm

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[1]We summarily reject Ramos's additional claim that the jury did not return in open court the verdict on count thirteen for sexual assault. An amended transcript shows this argument to be groundless, as the state points out in its answering brief, and Ramos has not filed a reply brief disputing the point. *See State v. Cota*, 234 Ariz. 180, ¶ 3, 319 P.3d 242, 244 (App. 2014) (failure to respond warrants summary rejection of claim of error).

and fractured her rib. A police officer who performed a welfare check ultimately discovered Ramos naked and holding a knife in B.L.'s garage as she ran out of it. The jury rejected Ramos's guilty except insane (GEI) defense and convicted him of all charges. This appeal followed the imposition of sentence. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Court Comments

¶3 Ramos first contends the trial court committed reversible error by making comments to the jury regarding his guilt. In support of his argument, he points to various statements the court made during voir dire, in its preliminary instructions, and later in chambers. To properly evaluate this issue, we must first consider the broader context of the court's remarks.

¶4 Once Ramos had been restored to competency and had his trial date set, he informed the court he was "plea[ding] guilty except insane" pursuant to A.R.S. § 13-502. In a discussion concerning the court's preliminary jury questionnaire, Ramos objected to statements that he had entered pleas of "'Not Guilty'" to the charges and that the trial was being held to determine whether he was "'Guilty' or 'Not Guilty'" of the offenses. He maintained the jury pool instead should be told he had "entered pleas of guilty except insane to the charges" and "this trial has been scheduled to determine whether [he] is guilty or guilty except insane." The state insisted it still bore the burden of proving guilt. The state then persuaded the court to inform potential jurors that Ramos also could be found "not guilty." Ramos asserted, "I'm not going to be arguing that. And it may not be appropriate to put it into the instruction."

¶5 He then objected to language in the preliminary questionnaire asking venire members if they had already decided whether he was guilty or not guilty based on information from any source. He explained his position as follows:

> [T]his is an unusual case, and everyone agrees that . . . Ramos is guilty. The question is is he guilty except insane, or not. And I think it's going to be hard for

> jurors to process that in a pretrial examination . . . question . . . So I guess my thought is it's a little bit too complex a question.

The trial court sustained the objection and deleted this item.

¶6 During voir dire the court told the venire that Ramos had pleaded "guilty except insane," as he had requested. The court then informed the panel that Ramos was presumed innocent and that the state carried the burden of proving him guilty beyond a reasonable doubt. When one potential juror stated he would have difficulty being impartial, the court responded, "Remember, the defendant has entered a guilty except insane plea. . . . The issue for you to decide is has the State met its burden that . . . Ramos is guilty and, if the answer to that is yes, the second issue is was [he] insane at the time of the offense."

¶7 After a panel member expressed confusion about the plea and the determinations to be made at trial, Ramos stated:

> Arizona and many other states changed the law to if you're insane, you will no longer can [sic] plead not guilty by reason of insanity. What you plead is guilty but insane. No matter what happens in this jury room, [Ramos] will be sentenced. . . . Understanding that, my question[is] . . . does it affect your ability to sit in this trial . . . knowing that what we've pled is guilty except insane[?] We're not pleading not guilty by reason of insanity. Do you follow that[?] The State has the ability and the right to present the trial of whether [Ramos] is guilty or not guilty. And they will present that trial. And do you understand that we don't care if they present that trial or not[?] We're not pleading innocent. We're pleading guilty except insane.

¶8 The next day the trial court provided preliminary instructions to the jury explaining the presumption of innocence and the state's burden of proof. The court concluded its instructions by stating, "The defendant has pled guilty except insane. In the instructions obviously the defendant has pled not guilty. He pled guilty except insane. That should be abundantly clear. The rest of this plea of not guilty says the State must prove every part of any charge beyond a reasonable doubt."

¶9 In his opening statement, Ramos admitted he "had killed [K.L.], had sexually assaulted his wife, had done all of these things." Ramos nonetheless asserted he had done so during a psychotic incident, making him guilty but insane. The following day a juror told the court and the parties in chambers that she was afraid because her doorbell had been rung late during the previous night, yet no one was there when she answered. She worried, given the facts of the case, that this incident might be an attempt to intimidate her. When the trial court asked how she felt about continuing to serve, the following exchange occurred:

> Juror [C.]: I felt even in the process that . . . there's nothing for me to be afraid of because this isn't an issue of guilt.
>
> The Court: Or innocence.
>
> [Juror C.:][2] Or innocence. It's an issue of competency so I felt on either side there is no real value to any interference but I don't know either people. [sic]
>
> . . . .
>
> The Court: . . . I suspect being the objective observer, it is wholly unrelated. That's my feeling because like you say there's nothing to be gained by anyone and it takes some

[2] The transcript mistakenly attributes these remarks to the court, as the state notes in its answering brief.

> pretty unique person . . . or people to go to the extent to try and intimidate jurors when there is no real issue of guilt or innocence. It's competency, as you said.

In the same discussion, the court again told the juror, "It's not about guilt or innocence but sanity or insanity, competency."

¶10 For the first time on appeal, Ramos contends the trial court erred when it "told the jurors that guilt was not an issue and that the defendant's sanity was the only issue." He specifically argues that the above remarks by the court deprived him of the presumption of innocence and amounted to a "judicial pronouncement of guilt" that reflected judicial bias. The lack of any objection below results in fundamental error review on appeal. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). To prevail under this standard, Ramos has the burden of showing that the error was fundamental and resulted in prejudice. *See id.* ¶¶ 19-20.

¶11 We find relief unwarranted here for two reasons. First, Ramos was responsible for the confusion about the plea entered and the jury's role in adjudicating guilt. A defendant cannot invite error, even fundamental error, and seek appellate relief as a result. *State v. Logan*, 200 Ariz. 564, ¶ 9, 30 P.3d 631, 632 (2001). On appeal, Ramos continues to operate under the mistaken assumption that "he was required to [concede guilt] under the GEI statute" because "[a]s of 19[9]3 a defendant is not guilty by reason of insanity[;] he is instead guilty except insane." *See generally* 1993 Ariz. Sess. Laws, ch. 256, §§ 2-3 (repealing and replacing former statutes providing insanity defense); *State v. Gulbrandson*, 184 Ariz. 46, 55 n.1, 906 P.2d 579, 588 n.1 (1995); *see also* Ariz. R. Crim. P. 25 & cmt.

¶12 In fact, "Arizona maintains a distinction between recognized pleas and affirmative defenses." *State v. Hurles*, 185 Ariz. 199, 203, 914 P.2d 1291, 1295 (1996). Rule 14.3(a), Ariz. R. Crim. P., provides the list of pleas generally available to a criminal defendant: "not guilty, guilty, or no contest." Section 13-502(B) refers to "a plea of insanity" only for purposes of pretrial mental health evaluations and commitments "for up to thirty days" in a mental health facility.

See Ariz. R. Crim. P. 11.2(a). Otherwise, the statute characterizes GEI as an "affirmative defense," § 13-502(A), that a defendant must prove by clear and convincing evidence. § 13-502(C); *accord State v. Rose*, 231 Ariz. 500, ¶ 19, 297 P.3d 906, 912 (2013). The mere disclosure of the GEI defense pursuant to Rule 15.2(b), Ariz. R. Crim. P., is not equivalent to a guilty plea, and asserting such a defense at trial does not relieve the state of its burden of proof, affect the defendant's presumption of innocence, or require the defendant to admit any facts. *Hurles*, 185 Ariz. at 202-03, 914 P.2d at 1294-95; *accord State v. Rogovich*, 188 Ariz. 38, 43, 932 P.2d 794, 799 (1997).

¶13 Here, despite Ramos's statements, he actually entered a plea of "not guilty" that necessitated a trial, as the state correctly maintained. His express consent to the GEI defense on the record did not alter this plea. *See Hurles*, 185 Ariz. at 203, 914 P.2d at 1295. Ramos therefore was responsible for the confusion at trial about both the plea and its relationship to the presumption of innocence, as well as any sentiment among jurors that the trial was "a waste of time . . . because he has already pled guilty."[3] Ramos cannot now obtain appellate relief based on the trial court's comments that essentially repeated his own statements. *Cf. State v. Parker*, 22 Ariz. App. 111, 114-15, 524 P.2d 506, 509-10 (1974) (defendant invited prosecutor's "remarks . . . made in response to the defendant's statements").

¶14 In any event, we deny relief for the second, independent reason that Ramos cannot show prejudice from the alleged errors. When the trial began, the court informed the jurors they were the sole judges of the facts and must not take anything the court said as reflecting its opinion on the facts. The court's final instructions properly informed the jury of the presumption of innocence and the state's burden of proof. During deliberations the jury asked why it had received the option of "not guilty" on its verdict forms. The trial court referred jurors to its final instructions and answered, "The State has the burden of proving . . . Ramos guilty beyond a

[3] The juror who made this particular comment, R.H., ultimately served as an alternate and did not participate in deliberations.

reasonable doubt on each count." This exchange eliminated any prejudice caused by the court's earlier comments. In addition, the evidence of guilt was overwhelming, and Ramos admitted his guilt during voir dire, in his opening statement, and during closing argument, emphasizing that sanity was the only issue in the case. For all these reasons, he suffered no prejudice from the court's remarks.

¶15 Despite Ramos's claim on appeal, the trial court's statements did not reflect any judicial bias, much less bias amounting to structural error. "Bias and prejudice mean a hostile feeling or spirit of ill will, or undue friendship or favoritism, toward one of the litigants." *State v. Hill*, 174 Ariz. 313, 322, 848 P.2d 1375, 1384 (1993). Ramos concedes the judge here treated him "very well" and "would never ha[ve] made the comments he did had this not been a 'guilty except insane' case." As we indicated above, the fact that the judge accepted and repeated Ramos's assertions concerning his "plea" or defense does not establish that the judge was biased. If anything, it proves the opposite. Given the absence of any bias, the cases Ramos cites are readily distinguishable and do not establish structural error here. *See Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (judicial officer biased with "direct, personal, substantial pecuniary interest" in conviction); *United States v. Nickl*, 427 F.3d 1286, 1292-93, 1294 (10th Cir. 2005) (judge interrupted examination of witness to offer impermissible testimony).

Sufficiency of the Evidence

¶16 Ramos next challenges the sufficiency of the evidence supporting his aggravated assault convictions. We review the sufficiency of evidence de novo, *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011), and will uphold a conviction so long as each element of the offense is supported by substantial evidence. *See Kuhs*, 223 Ariz. 376, ¶ 24, 224 P.3d at 198. "'Substantial evidence is proof that reasonable persons could accept as adequate . . . to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *Id.*, *quoting State v. Bearup*, 221 Ariz. 163, ¶ 16, 211 P.3d 684, 688 (2009) (alteration in *Bearup*). When assessing the sufficiency of evidence, we view it in the light most favorable to sustaining the verdicts. *Id.*

¶17 Ramos first asserts he could not be convicted of aggravated assault pursuant to A.R.S. §§ 13-1203(A)(1) and 13-1204(A)(2), which require intentional, knowing, or reckless infliction of injury with a weapon, because the evidence suggested he "accidentally cut [B.L.] with a knife he was holding." The victim testified Ramos kept the knife around her "all the time" in order to force her to perform sexual acts with him. Based on this testimony, the jury could find, at minimum, that Ramos recklessly caused the knife wound on B.L.'s arm. *See* A.R.S. § 13-105(10)(c) (defendant reckless if "aware of and consciously disregards a *substantial and unjustifiable risk*") (emphasis added). Thus, contrary to Ramos's claim, substantial evidence supported his conviction of aggravated assault with a deadly weapon under count four.[4]

¶18 Ramos also challenges his conviction of aggravated assault causing the fracture of a body part, pursuant to §§ 13-1203(A)(1) and 13-1204(A)(3), arguing the state "was unable to prove how or when the [victim's] rib was broken." The state correctly responds that it need not prove the precise manner in which a crime occurs. *State v. Herrera*, 176 Ariz. 9, 16, 859 P.2d 119, 126 (1993). Yet Ramos argues the dearth of evidence regarding the mechanism of injury means the jury could not rationally find B.L.'s fracture "occurred during the commission of the crime[s]" or "was the result of intentional or reckless conduct." We reject this argument.

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[4]We have disposed of this issue assuming arguendo, as do the parties, that this offense required proof of a physical injury. We note, however, that no such proof was technically necessary under the indictment, which alleged a violation of §§ 13-1203(A)(2) and 13-1204(A)(2), or a predicate assault based on the reasonable apprehension of imminent physical harm. Furthermore, even though the evidence at trial rendered count four a duplicitous charge that was not cured below, we conclude this error resulted in no prejudice due to the overwhelming evidence of the assaults described by the victim and the insanity defense Ramos offered. *See State v. Waller*, 235 Ariz. 479, ¶¶ 33-36, 333 P.3d 806, 816-17 (App. 2014).

¶19 A kidnapping is an ongoing offense that begins when a victim is restrained and continues until her release or escape. *State v. Jones*, 185 Ariz. 403, 406, 916 P.2d 1119, 1122 (App. 1995). B.L. testified she did not have any rib pain before her encounter with Ramos but did have a painful rib fracture thereafter. She further testified Ramos had repeatedly dragged her into different rooms, constantly squeezed her breasts, and forcibly disarmed her when she attempted to grab a knife to resist him. B.L. was seventy-two years old at the time of the attack, and she stated that Ramos was "so strong and so quick" that she "didn't have a chance" against him.

¶20 From this circumstantial evidence the jury reasonably could conclude that B.L. had no fracture before the kidnapping and that Ramos's violence against her broke her rib during this episode, even though she did not testify about any particular trauma to it. The law makes no distinction between circumstantial and direct evidence. *State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993). The jury likewise could conclude his violence against B.L. was reckless because it created a substantial and unjustifiable risk of injury that Ramos consciously disregarded. *See* § 13-105(10)(c). To the extent reasonable people could fairly disagree about whether the evidence established the facts at issue, the evidence was substantial and the verdict must be upheld. *See State v. Rodriguez*, 192 Ariz. 58, ¶ 10, 961 P.2d 1006, 1008 (1998). In sum, sufficient evidence supported the conviction of aggravated assault under count seventeen.

Disposition

¶21 For the foregoing reasons, the convictions and sentences are affirmed.