IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

BILLY JOE MCCAIN,
Appellant.

No. 2 CA-CR 2014-0327
Filed May 29, 2015

Appeal from the Superior Court in Pima County
No. CR20134970001
The Honorable Jane L. Eikleberry, Judge

REVERSED AND REMANDED

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 Billy McCain appeals from his convictions and sentences for two counts each of armed robbery and aggravated assault. For the reasons that follow, his convictions and sentences are reversed, and we remand this case for a new trial.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the conviction[s]." *State v. Tyszkiewicz*, 209 Ariz. 457, ¶ 2, 104 P.3d 188, 189 (App. 2005). In October 2013, E.R. and R.A. were robbed in a laundromat by a man wielding a gun. The perpetrator took five dollars and some quarters from R.A., as well as E.R.'s wallet that contained personal documents and credit cards. The descriptions of the man by the victims were not entirely consistent with each other or the evidence admitted at trial.

¶3 R.A. testified the perpetrator was tall, had long hair, a "kind of long" blond beard, and was wearing a backwards hat. R.A. claimed the gun used in the robbery had an orange tip, like a toy gun. R.A. further recalled that the man wore a short-sleeved shirt, but did not notice any tattoos. E.R. said he thought the man had tattoos on one of his arms. Both of McCain's arms are covered in "sleeve" tattoos.[1]

¶4 R.A. described the perpetrator's truck as "[a] blue Chevrolet." E.R. similarly described the truck as "a blue Chevy . . .

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[1]A "sleeve" is "[a] tattoo that covers all or a large part of the arm." *The American Heritage Dictionary* 1647 (5th ed. 2011).

an old Chevy . . . a '78 or '84, '85." However, a surveillance camera from a nearby grocery store filmed the truck driving away from the laundromat. A detective testified that he reviewed the video and initially believed it showed "an early 2000, black Ford step-side truck." McCain was later arrested while driving a 2006 blue Mitsubishi truck.

¶5 The laundromat's surveillance camera also captured the robbery itself, and the police released still images from the video to the media. The police released information about the location of the robbery and the photographs and description of the suspect, but did not reveal any other details of the crime.

¶6 M.M., McCain's former girlfriend, received a telephone call from McCain in which he told her his picture was on the internet, and he did not know why. Thereafter, M.M. "found pictures on a news article for Tucson about a holdup at a laundromat." She believed that the perpetrator shown in the pictures was McCain, and in particular recognized the shirt he was wearing, stating she was with him when he purchased it. She described the shirt as "a Duck Dynasty shirt . . . made to look like a Jack Daniels T-shirt." She testified that, when she discussed the incident with McCain, he told her that he had taken the victims' wallets, but "there was only a couple of bucks between the wallets." M.M.'s mother also identified McCain as the perpetrator shown in the photographs, although when she viewed the photographs, she was already aware of M.M.'s belief that the suspect was McCain.

¶7 After the telephone conversation, McCain began to send M.M. threatening messages through telephone calls and text messages. "[A] week or a week and a half" after the conversation, and after McCain threatened M.M. and her family, she contacted "88 Crime" in Tucson and reported McCain as the perpetrator.

¶8 A detective presented E.R. with a photographic lineup that included McCain's picture. The detective had prepared the array in black and white because the color photograph of McCain "was kind of bright and shiny and it would have stood out in comparison to the other photographs." The detective conceded that, as modified, McCain's photograph "was still bright," and the exhibit

confirms it was noticeably brighter than the other photographs. E.R. stated that McCain's picture "looked most like the suspect," but did not positively identify him.

¶9 In November 2013, officers stopped McCain for a traffic violation. As they arrested him, he said they would find two guns in the truck, which was registered to J.H. A search of the truck revealed a nine-millimeter handgun, but it did not have an orange tip.

¶10 The officers brought McCain into an interrogation room at the Tucson Police Department. After receiving the *Miranda*[2] advisory, McCain invoked his right to an attorney. Nonetheless, a police detective proceeded to interrogate him.

¶11 At a pretrial hearing, the trial court suppressed statements McCain made after he invoked his right to an attorney. In one of the suppressed statements, McCain admitted that he had been staying at the home of J.H. and keeping some personal possessions there. Police subsequently executed a search warrant on the home of J.H. and found a T-shirt matching the description given by M.M.

¶12 At trial, a police detective testified he had "come into information that Mr. McCain was staying" at the home of J.H. McCain objected on the ground of foundation, noting the detective had no basis for knowing that McCain was staying at J.H.'s home other than McCain's own suppressed statement. The trial court nonetheless allowed the testimony, finding its admission permissible so long as the detective did not say where the information came from.

¶13 As noted above, McCain was convicted of two counts each of armed robbery and aggravated assault.[3] The court sentenced

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

[3]McCain was also charged with three counts of possession of a deadly weapon by a prohibited possessor. These charges were severed from the charges of armed robbery and aggravated assault. McCain was convicted pursuant to a plea bargain of one count of

him to enhanced, presumptive, concurrent prison terms, the longest of which were 15.75 years. This appeal followed.

Use of Suppressed Statement

¶14 We first address McCain's contention that the trial court erred in allowing the state to use his statement—that he had stayed at the home of J.H.—against him. Specifically, McCain contends he made the statement after he had requested an attorney and it should, therefore, have been inadmissible at trial. In response, the state does not argue that the trial court erred in initially suppressing McCain's statement, nor does it suggest that the detective had an independent source for the information that McCain was staying at the home of J.H. Rather, it contends that "[McCain's] statement about where he had been staying was not admitted at trial." In essence, the state maintains that it can present as evidence the essential facts disclosed by McCain within suppressed statements so long as it does not alert the jury that McCain himself confessed to those facts.

¶15 The state's contention, and the trial court's apparent acceptance of that reasoning, contradicts the well-established purpose of the exclusionary rule, which is to deter police misconduct. *See Herring v. United States*, 555 U.S. 135, 142 (2009) (exclusionary rule crafted to curb police misconduct); *United States v. Leon*, 468 U.S. 897, 916 (1984); *State v. Guillen*, 223 Ariz. 314, ¶ 13, 223 P.3d 658, 661 (2010) (same). If courts allowed the state to use the evidentiary fruits of unlawful interrogation, officers would have no incentive to refrain from repeating that misconduct in the future. *See State v. Bravo*, 158 Ariz. 364, 373-74, 762 P.2d 1318, 1327-28 (1988) (recognizing police motivation for violating *Miranda* as significant factor for excluding resulting evidence). And, the exclusionary rule would have no practical application if the state could present the evidentiary fruits of unlawful interrogations at trial by merely omitting the fact that the defendant provided the crucial information

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possession of a deadly weapon by a prohibited possessor and sentenced to a 4.5-year prison term. That conviction and sentence are not at issue in this appeal and are not affected by our disposition.

himself. Creating such a loophole would, in effect, allow the admission of the evidentiary fruits of any suppressed statement, essentially thwarting the deterrent purpose of the exclusionary rule.

¶16 Here, as the trial court acknowledged, the detective persisted in his interrogation of McCain after he invoked his right to counsel, a clear violation of "black letter *Miranda* law known to all qualified police officers." *Bravo*, 158 Ariz. at 373, 762 P.2d at 1327. As discussed below, McCain's statement, given post-invocation, that he had resided at the residence of J.H., coupled with the state's resultant search of that residence to discover the shirt matching that of the perpetrator, provided the state's most persuasive evidence of McCain's guilt at trial.

¶17 The trial court's admission of McCain's statement at trial ultimately rewarded the state for the misbehavior of its officers in securing it. We therefore conclude the court erred in allowing the testimony. This determination, however, does not end the analysis.

¶18 "When the State violates a defendant's Fifth and Fourteenth Amendment rights, his conviction may still stand if the error is found to be harmless." *State v. Rodriguez*, 186 Ariz. 240, 246, 921 P.2d 643, 649 (1996). "Under harmless error analysis, to avoid a reversal, the state must establish that an error was harmless beyond a reasonable doubt." *State v. Lehr*, 227 Ariz. 140, ¶ 69, 254 P.3d 379, 393 (2011).

¶19 In considering whether the error was harmless, we must decide whether admission of the "Duck Dynasty" T-shirt found at the home of J.H. was also error. As the state points out, McCain did not object to admission of the shirt below, and he does not now claim its admission was fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005) (unobjected-to trial error reviewed for fundamental, prejudicial error). We therefore will deem any claim that the T-shirt should have been excluded as the "fruit of the poisonous tree" waived. *See*

State v. Moreno-Medrano, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (failure to argue fundamental error on appeal waives issue).[4]

¶20 However, without McCain's statement that he kept personal belongings at the home of J.H., there would have been no showing that the T-shirt found there belonged to McCain, and its relevance would have been questionable. *See* Ariz. R. Evid. 401, 402. Because McCain has conceded the shirt's admissibility as "illustrative or demonstrative evidence" to aid the jury in determining whether the shirt seen in the surveillance video was in fact a Duck Dynasty shirt, we will assume arguendo that such is the case.

¶21 The state claims that any error was harmless because (1) M.M. and her mother identified McCain as the robber, (2) M.M. knew details about the crime that were not publicly released, (3) E.R. selected McCain's photograph from a photographic lineup, (4) a gun of the type the victims believed was used in the robbery was found in the truck McCain was driving, and, (5) that truck looked like the one in which the perpetrator left the crime scene. Although we agree that the state presented a substantial case, we do not believe the state has met its burden of showing that "overwhelming evidence" established McCain's guilt. *State v. Spreitz*, 190 Ariz. 129, 142, 945 P.2d 1260, 1273 (1997).

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[4]The state claims the T-shirt is admissible regardless of the *Miranda* violation under *United States v. Patane*, 542 U.S. 630, 633-34 (2004), in which the plurality determined that "the physical fruits of [a] suspect's unwarned but voluntary statements" were not required to be suppressed. We note that *Patane* concerns otherwise voluntary statements given without a *Miranda* warning, *Patane*, 542 U.S. at 635, 643-44, rather than the situation here, where McCain had invoked his right to counsel and his continued interrogation therefore gave rise to a further presumption of involuntariness. *See Maryland v. Shatzer*, 559 U.S. 98, 104-05 (2010). However, because McCain has waived the issue, we need not decide whether *Patane* should nonetheless apply.

¶22 McCain countered much of the state's evidence. He challenged M.M.'s credibility with evidence that she did not report him as the perpetrator until he began to send her threatening messages. M.M.'s mother did not approve of McCain's relationship with her daughter and only viewed the photographs of the robbery after her daughter suggested the perpetrator might be McCain. The only details M.M. provided about the robbery were that McCain took the victims' "wallets" and that he acquired little money. M.M. did not know the precise amount of money taken, and it would not be difficult to speculate that people in a laundromat would not be carrying large amounts of money. Moreover, her information was partially incorrect to the extent that only one wallet was in fact taken.

¶23 The detective who prepared and conducted the photographic lineup from which E.R. stated McCain "looked most like the suspect" conceded that McCain's photograph was "bright."[5] And, E.R. did not positively identify McCain. The gun found in McCain's possession did not have the orange tip that R.A. described. Both E.R. and R.A. described the getaway car as a Chevrolet, and E.R. described it as an "old Chevy," but the truck McCain was stopped in was a 2006 Mitsubishi.

¶24 In this context, the improperly admitted statement connecting McCain to the Duck Dynasty T-shirt might have had a substantial impact on the verdict. That shirt looked very much like the one worn by the perpetrator as seen in the still photographs taken from the surveillance video. It provided a definitive physical link between McCain and the crime. Furthermore, it matched M.M.'s description of a T-shirt she claimed McCain owned, thereby bolstering the credibility of the state's most significant witness. And if, in the absence of the shirt evidence, the jury chose to disbelieve the testimony of M.M., the state's case consists only of an equivocal witness identification from a suggestive lineup, McCain's use of a

[5]Because McCain did not argue, either here or below, that the lineup was "unduly suggestive," we do not consider this an issue of admissibility of the lineup, only its weight. *State v. Dessureault*, 104 Ariz. 380, 384, 453 P.2d 951, 955 (1969).

truck that had nothing in common with the truck used by the perpetrator except color, and a gun of the same type as that identified by witnesses, but without a distinguishing feature that one of the witnesses noted. Under these circumstances, we cannot say the state has "establish[ed] beyond a reasonable doubt that the error did not contribute to or affect the verdict." *State v. Valverde*, 220 Ariz. 582, ¶ 11, 208 P.3d 233, 236 (2009). Accordingly, we must reverse McCain's convictions and sentences and remand this case for a new trial.

Speedy Trial

¶25 McCain also claims the trial court abused its discretion in granting the state a continuance over his objection, thereby violating his right to a speedy trial under Rule 8, Ariz. R. Crim. P. Although we have already concluded that McCain's convictions and sentences must be vacated, we consider this issue because if McCain's speedy trial rights were violated, and he was prejudiced thereby, it would require dismissal of the charges with prejudice, thus barring retrial. *See* Ariz. R. Crim. P. 8.6; *Humble v. Superior Court*, 179 Ariz. 409, 416, 880 P.2d 629, 636 (App. 1993) ("Dismissal with prejudice is mandated if the defendant shows prejudice from the delay.").

¶26 About one month before McCain's trial was scheduled to begin, the state moved for a continuance pursuant to Rule 8.5 to allow the crime laboratory to complete DNA[6] testing. The state claimed it had insufficient time to complete the testing because the trial was "short set." The trial court found "that extraordinary circumstances exist and delay is indispensable to the interests of justice" and granted the continuance over McCain's objection. "We review the trial court's granting of a continuance for an abuse of discretion; we will not reverse such a ruling on appeal in the absence of a clear abuse and resulting prejudice." *State v. Vasko*, 193 Ariz. 142, ¶ 8, 971 P.2d 189, 191 (App. 1998).

[6]Deoxyribonucleic acid.

¶27 The state contends that, because it could have sought an extension to obtain the DNA testing pursuant to Rule 15.6(e), Ariz. R. Crim. P., and an extension granted under this rule would have been excluded from the time limits of Rule 8.2, "[t]he trial court cannot have abused its discretion in granting the motion for a continuance when no motion was even required."

¶28 McCain argues that the state would not have qualified for such an extension, even had it so moved, and that the issue is waived because the state did not seek an extension on that basis. We need not resolve this question, however, because whether or not the court erred in granting the continuance, McCain has not demonstrated prejudice.

¶29 "The specific test for prejudice when a speedy trial violation occurs is whether [a] defendant has shown that his defense has been harmed by the delay." *Vasko*, 193 Ariz. 142, ¶ 22, 971 P.2d at 194. McCain has not argued that his defense was in any way impeded by the court's granting of the continuance. He has only asserted that the delay caused him to be anxious. Although "anxiety in defendant" has been listed as a factor to be considered in whether a constitutional right to a speedy trial has been violated, McCain has not asserted a constitutional claim, only a claim pursuant to Rule 8, and, even under a constitutional analysis, "prejudice in preparing for and conducting the defense" is the most important factor. *State v. Soto*, 117 Ariz. 345, 348, 572 P.2d 1183, 1186 (1977). We therefore conclude McCain was not prejudiced by the trial court's granting of a continuance and that retrial is not barred.[7]

Disposition

¶30 For the foregoing reasons, McCain's convictions and sentences for armed robbery and aggravated assault are reversed. We remand this case for further proceedings consistent with this decision.

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[7]McCain has also claimed the trial court erred in admitting evidence that he threatened M.M. Our disposition renders it unnecessary to address this contention.