IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

BENJAMIN ROMAN PEINADO,
Appellant.

No. 2 CA-CR 2014-0347
Filed June 22, 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NOT FOR PUBLICATION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 Pima County
No. CR20140989001
The Honorable Carmine Cornelio, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By David A. Simpson, Assistant Attorney General, Tucson
Counsel for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Scott A. Martin, Assistant Legal Defender, Tucson
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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 Benjamin Peinado appeals from his conviction and sentence for aggravated robbery. He asserts several claims of trial error, most of which concern the element of force. For the following reasons, we affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the jury's verdicts . . . ." *State v. Lizardi*, 234 Ariz. 501, ¶ 2, 323 P.3d 1152, 1153 (App. 2014). In September 2012, Peinado and two other men entered a J.C. Penney store in Tucson and stuffed perfume and cologne bottles into their pants. After they left the store without paying for the items, D.S., a loss prevention officer who had been watching them on a security monitor, confronted Peinado. When D.S. identified himself and asked Peinado to return to the store, Peinado pushed him and a struggle ensued. During the struggle, Peinado threatened to "shank"[1] D.S., causing him to release Peinado who then fled the scene in a car driven by one of his companions.

¶3 After a jury trial, Peinado was convicted of aggravated robbery as noted above. He was sentenced to an enhanced,[2] minimum prison term of ten years.

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[1] To "shank" is "to cut (a person) deeply with a knife." *Webster's Third New Int'l Dictionary* 2087 (1971).

[2] Although the sentencing minute entry describes Peinado's offense as "non-repetitive," the court found Peinado had five historical prior felony convictions and was a category-three

Sufficiency of the Evidence

¶4 Peinado asserts the trial court erred in denying his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., for several related reasons. He likewise challenges the trial court's denial of his motion for new trial. We review a trial court's denial of a Rule 20 motion de novo, *State v. Gray*, 231 Ariz. 374, ¶ 2, 295 P.3d 951, 952 (App. 2013), and we review a denial of a motion for new trial for an abuse of discretion. *State v. Williamson*, 236 Ariz. 550, ¶ 40, 343 P.3d 1, 13 (App. 2015). In reviewing a defendant's conviction for sufficient evidence, we determine whether substantial evidence, that is, "'proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt,'" supports the jury's verdict. *State v. Lopez*, 230 Ariz. 15, ¶ 3, 279 P.3d 640, 642 (App. 2012), *quoting State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). "We will reverse a defendant's convictions 'only if there is a complete absence of probative facts to support [the jury's] conclusion.'" *Id.*, *quoting State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000) (alteration in *Lopez*).

Immediate Person or Presence

¶5 Peinado first argues that he did not take property from D.S.'s person or immediate presence. Robbery is defined, in pertinent part, as when a person "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 . . . to prevent resistance to such person taking or

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repetitive offender, and sentenced him as such. When a conflict exists between the oral pronouncement of sentence and the minute entry, and the conflict may be clearly resolved by reviewing the record, the oral pronouncement controls. *State v. Ovante*, 231 Ariz. 180, ¶ 38, 291 P.3d 974, 982 (2013). We therefore correct the sentencing minute entry to reflect that Peinado's offense was repetitive. *See State v. Jonas*, 164 Ariz. 242, 245 n.1, 792 P.2d 705, 708 n.1 (1990).

retaining property." A.R.S. § 13-1902(A). "In the course" is defined as "beginning with the initiation and extending through the flight from a robbery." A.R.S. § 13-1901(2). "A thing is in the control or presence of a person . . . which is so within the person's reach, inspection, observation, or control that he or she could, if not overcome by violence . . . , retain possession of it." 77 C.J.S. *Robbery* § 11 (2006). Although Peinado was not in D.S.'s immediate presence when he initially took the property, he was when he used force to retain the property. *See Ward v. State*, 120 P.3d 204, 207 (Alaska Ct. App. 2005); *see also People v. Gomez*, 179 P.3d 917, 925, 928 (Cal. 2008) ("[T]he immediate presence element can be satisfied at any point during the taking.").

Use of Force to Retain Control

¶6 Peinado secondly claims that because "force" is defined in § 13-1901(1) as a "physical act directed against a person as a means of *gaining control* of the property," one cannot use "force" to "retain" property: one who already has possession of property already has control, and therefore cannot "gain control." In interpreting statutes, we must not render any provision "meaningless, insignificant, or void." *Mejak v. Granville*, 212 Ariz. 55, ¶ 9, 136 P.3d 874, 876 (2006). As Peinado acknowledges, were we to interpret the statute as he suggests, we would render null the inclusion of "retaining property" in § 13-1902(A). Peinado asserts that we must do so nonetheless because the rule of lenity requires it. But that rule "is a construction principle of last resort" and inapplicable here. *State v. Bon*, 236 Ariz. 249, ¶ 13, 338 P.3d 989, 993 (App. 2014). We therefore reject Peinado's proposed interpretation of §§ 13-1901(1) and 13-1902(A).

Evidence of Use of Force

¶7 Peinado's last claim regarding the sufficiency of the evidence of force is that the evidence does not show he used force to retain control of the stolen property. In particular, he claims that under *State v. Celaya*, 135 Ariz. 248, 252, 660 P.2d 849, 853 (1983), he did not commit robbery because he only used force to effect his escape.

¶8 Peinado is correct that, under *Celaya*, when force is used to enable escape, rather than to retain control of taken property, robbery does not occur. *Id.* But, if a jury could conclude that the defendant used force to effect escape or to retain control, *Celaya* does not mandate reversal of a conviction for robbery—only that the jury be instructed on theft. *Id.* at 252-53, 660 P.2d at 853-54.

¶9 Here, Peinado claims there was no evidence he used force to prevent D.S. retaking the stolen goods because "[D.S.] never testified that he was interacting with [Peinado] with the goal of getting the cologne back . . . . [D.S.]'s goal was to have [Peinado] arrested and prosecuted for taking the cologne." While it is true D.S. never directly stated he was attempting to recover the stolen property, it is nonsensical to assume he would have arrested Peinado but allowed him to keep the store's property. The jury certainly could infer that, had Peinado not used force, D.S. would have detained him and recovered the cologne and perfume. *See State v. Aguilar*, 169 Ariz. 180, 182, 818 P.2d 165, 167 (App. 1991). The evidence, therefore, was sufficient to support a conclusion that Peinado used force and the threat of force to retain control of the property. *See Lopez*, 230 Ariz. 15, ¶ 7, 279 P.3d at 642. Although the jury could also have found Peinado was using force exclusively to escape, that possibility only entitled Peinado to a jury instruction on theft, which he received. *See Celaya*, 135 Ariz. at 252-53, 660 P.2d at 853-54. The trial court did not err in denying Peinado's Rule 20 motion for judgment of acquittal on any of the bases asserted. And because Peinado's motion for new trial was based on the same arguments as his Rule 20 motion, the court likewise did not err in denying that motion.

Accomplices

¶10 Although Peinado did not make this claim in his Rule 20 motion at trial, he now contends the evidence was insufficient to support a finding of aggravated robbery based on the presence of accomplices. *See* A.R.S. § 13-1903(A). Peinado has forfeited review of this claim except for fundamental error; however, a conviction based on insufficient evidence constitutes fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601,

607-08 (2005); *State v. Stroud*, 209 Ariz. 410, n.2, 103 P.3d 912, 914 n.2 (2005). Peinado argues there was no showing that his accomplices "had any intent to aid or facilitate a *robbery*," asserting they did not participate in the use of force, and in fact were running to a getaway car at the time Peinado used force.

¶11 A person is liable as an accomplice if he "with the intent to promote or facilitate the commission of an offense . . . [a]ids, counsels, agrees to aid or attempts to aid another person in planning or committing an offense." A.R.S. § 13-301(2). Peinado maintains there was no evidence that the men accompanying him intended to facilitate a robbery, as opposed to a mere theft or shoplifting. We disagree.

¶12 Acting as a getaway driver, with the knowledge that a person has committed an offense and the intent to facilitate the person's escape, is sufficient to establish liability as an accomplice for that offense. *See State v. Axley*, 132 Ariz. 383, 385, 393, 646 P.2d 268, 270, 278 (1982); *State v. Parker*, 121 Ariz. 172, 173-74, 589 P.2d 46, 47-48 (App. 1978). While Peinado was confronting D.S., his companions were retrieving the getaway car. After Peinado threatened D.S., he ran to that car, and his companions drove him away. As Peinado notes, there was no direct testimony that his accomplices were aware of his confrontation with D.S. But neither was there any testimony that his accomplices were unaware of the confrontation. Based on the proximity of Peinado and his accomplices, the jury could infer that the other men either saw or heard his confrontation with D.S., and nonetheless proceeded to facilitate Peinado's escape from the scene of the robbery. *See Axley*, 132 Ariz. at 394, 646 P.2d at 279; *Parker*, 121 Ariz. at 173-74, 589 P.2d at 47-48; *see also State v. West*, 226 Ariz. 559, ¶ 16, 250 P.3d 1188, 1191 (2011) ("Both direct and circumstantial evidence should be considered in determining whether substantial evidence supports a conviction."). Accordingly, we conclude sufficient evidence supported Peinado's conviction for aggravated robbery.[3]

[3]The state argues the men with Peinado were accomplices to robbery because the evidence clearly established they were accomplices to theft, and one is liable as an accomplice for an offense

Jury Instruction

¶13 Peinado finally asserts the court erred in instructing the jury that a corporation could be a "person" for purposes of robbery. "We review de novo whether jury instructions correctly state the law." *State v. Prince*, 226 Ariz. 516, ¶ 77, 250 P.3d 1145, 1165 (2011). In our review, we look at "the instructions as a whole to determine . . . whether a given instruction correctly states the law." *State v. Almaguer*, 232 Ariz. 190, ¶ 5, 303 P.3d 84, 87 (App. 2013). "We will not reverse a conviction, based on a claim of error with respect to jury instructions, 'unless we can reasonably find that the instructions, when taken as a whole, would mislead the jurors.'" *State v. Sucharew*, 205 Ariz. 16, ¶ 33, 66 P.3d 59, 69 (App. 2003), *quoting State v. Strayhand*, 184 Ariz. 571, 587, 911 P.2d 577, 593 (App. 1995).

¶14 Peinado asserts that including a "corporation" in the definition of "person" essentially tells the jury that a corporation may be a victim of a robbery. We disagree. The instruction stated that a "corporation . . . or entity capable of holding legal or beneficial title" may be a person "as the context requires." Robbery requires

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one intended to promote or facilitate or "any offense that is a natural and probable or reasonably foreseeable consequence" thereof. A.R.S. § 13-303(A)(3). The state asserts "it was imminently foreseeable that [Peinado]—or one of the other co-conspirators—might threaten violence and escalate the theft into a robbery." But the state cites no evidence showing it was foreseeable this particular theft would become a robbery, essentially asking us to conclude, as a matter of law, that it is always foreseeable a theft will escalate into a robbery. But accomplice liability should not be so broadly construed. *See People v. Chiu*, 325 P.3d 972, 976 (Cal. 2014) ("[L]iability 'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.' Reasonable foreseeability 'is a factual issue to be resolved by the jury.'"), *quoting People v. Medina*, 209 P.3d 105, 110 (Cal. 2009) (citation omitted).

"taking any property of another from his person or immediate presence" combined with either the threat or use of force against "any person." § 13-1902(A). Essentially, there are three "persons" contemplated by the statute: 1) The owner of the property, 2) The one from whose "person or immediate presence" the property is taken, and 3) The one against whom force or the threat of force is used. *Id.; State v. Coursey*, 71 Ariz. 227, 235, 225 P.2d 713, 718 (1950) (person dispossessed of property by robbery need not be the owner). The owner of the property need not be the same "person" as either of the other two "persons" and may be a corporation. *See State v. Prasertphong*, 206 Ariz. 70, ¶¶ 87-89, 75 P.3d 675, 696-97 (2003), *vacated on other grounds*, *Prasertphong v. Arizona*, 541 U.S. 1039 (2004); *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996); *State v. Riley*, 196 Ariz. 40, ¶ 19, 992 P.2d 1135, 1141 (App. 1999). The instruction that a "corporation . . . or entity capable of holding . . . title" may be a "person" was given to the jury to explain this concept. The instruction therefore correctly stated the law.

¶15 A robbery cannot be committed against a corporation. A corporation, of course, has no "person or immediate presence" and it is not possible to use force or the threat of force against it. This would be obvious to any reasonable juror. Furthermore, the jury was not instructed that a corporation is always a person; they were instructed that a corporation may be a person "as the context requires." The instruction, accordingly, was not likely to mislead the jurors into believing a corporation could be the victim of a robbery, or that J.C. Penney, rather than D.S., was the victim. *Sucharew*, 205 Ariz. 16, ¶ 33, 66 P.3d at 69.

¶16 Peinado further asserts that giving this instruction "denied [him] his constitutional rights to present a defense and to confront his accuser." But he has not explained how the instruction had any impact on his defense. And he has not cited any authority to support his claim that he had a right to confront J.C. Penney. We therefore deem this claim waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's brief "shall contain the contentions of the appellant . . . and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on"); *State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004) ("'Failure to

argue a claim usually constitutes abandonment and waiver of that claim.'"), *quoting State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989).

Disposition

¶17 For the foregoing reasons, Peinado's conviction and sentence are affirmed.