IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

BRANDON RAYMOND MOSMAN,
Appellant.

No. 2 CA-CR 2015-0170
Filed November 17, 2016

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NOT FOR PUBLICATION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. CR20142525001
The Honorable Javier Chon-Lopez, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Steven R. Sonenberg, Pima County Public Defender
By Erin K. Sutherland, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 After a jury trial, Brandon Mosman was convicted of two counts of second-degree trafficking in stolen property. The trial court sentenced him to concurrent prison terms of 11.25 years. On appeal, Mosman argues the court erred by limiting his cross-examination of a detective. He also contends the state presented insufficient evidence to support one of his convictions and he was convicted of an offense for which he was not indicted. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding Mosman's convictions. *See State v. Allen*, 235 Ariz. 72, ¶ 2, 326 P.3d 339, 341 (App. 2014). On May 18, 2014, R.S. drove his car to the Marana Sports Park to play two softball games. When R.S. returned to his car a few hours later, he found a back window "smashed in" and his car stereo system missing from the trunk. He called the police and reported his Hitron amplifier and speaker box that held two Pioneer subwoofers stolen. Although R.S. gave the responding officer a photograph of the speaker box with a Sony amplifier attached, he did not report at that time that the Sony amplifier had also been stolen.

¶3 Mosman pawned the Sony amplifier the following morning and the speaker box two days later. When an officer showed R.S. photographs of the pawned items, R.S. confirmed that

they belonged to him and concluded that the Sony amplifier also must have been in his car at the time of the theft.[1]

¶4 A grand jury indicted Mosman for two counts of second-degree trafficking in stolen property. The jury convicted him as charged, and the trial court sentenced him as described above. This appeal followed.[2] We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Cross-Examination

¶5 Mosman argues the trial court erred by limiting his cross-examination of a detective. He maintains this limitation violated his due process right to present a complete defense. "A trial court's ruling regarding the scope of cross-examination is reviewed for an abuse of discretion." *State v. Ellison*, 213 Ariz. 116, ¶ 52, 140 P.3d 899, 915 (2006). However, we review evidentiary rulings that implicate constitutional issues de novo. *Id.* ¶ 42.

¶6 At trial, defense counsel cross-examined a detective about his initial contact with Mosman. The following exchange occurred:

---

[1]At the time of trial, officers still had not recovered the Hitron amplifier.

[2]The trial court originally ordered that the prison terms in this case run concurrently with a prison term from another case in which the court had revoked Mosman's probation. However, upon Mosman's motion, the court resentenced him to time served in the other case and 11.25-year concurrent prison terms in this case. This sentencing issue was the subject of the state's cross-appeal, which was dismissed after resentencing. Mosman filed a notice of appeal after the original sentencing and again after resentencing once he obtained an order granting a delayed appeal. *See* Ariz. R. Crim. P. 31.3(b) ("A notice of delayed appeal shall be filed within 20 days after service of an order granting a delayed appeal . . . .").

> Q. So [Mosman] knew what he was being charged with after he met with you?
>
> A. Correct.
>
> Q. And details about the charges?
>
> A. I gave him a general understanding of what the investigation was concerning and let him know what the charges were.
>
> Q. Okay. So you told him that there was an investigation into something that happened at the sports park in Marana?
>
> A. I don't recall exactly what I said but I mentioned that there had been an incident. I don't recall whether I said sports park or—

The state then objected, claiming that this line of questioning would open the possibility of informing the jury that Mosman had "invok[ed] his rights." Defense counsel explained there was a jail recording of Mosman telling his friends that "he was [arrested for] the sports park." Counsel stated that he wanted to establish that the detective told Mosman "this happened at the sports park before the [recorded conversation]." The trial court sustained the objection, struck the question, and directed the jury not to "speculate as to any answer."

¶7 Later that day, the trial court admitted the jail recording that included two video excerpts from the visit between Mosman and his friends. In the first video, Mosman said, "[T]hey hit me with the, the shit up in Marana . . . at that sports park." In the second video, Mosman explains that an officer told him, "I'm here for an incident that happened at some park in Marana," and that the officer "showed [him] a picture of the sub[woofer]s." Shortly thereafter, defense counsel raised the issue again, noting that Mosman

"specifically says that the officer told him about the incident at the sports park and the sub[woofer]s in the second video recording." He asserted he should be permitted to argue that Mosman "knew from the officer about the incident." The court reaffirmed its prior ruling, noting defense counsel was "not to argue that."

¶8 The next day, defense counsel pointed out that the trial court admitted the jail recording into evidence and that he "should be allowed to address every single piece of evidence." Defense counsel asserted, "[T]o preclude me from addressing that issue precludes a right to his meaningful defense." After a discussion, the court ruled that defense counsel could argue Mosman initially learned about the incident from the detective.

¶9 On appeal, Mosman contends the trial court erred by "limiting [his] cross-examination of the detective regarding what he had told [Mosman] about the theft of the items [Mosman] pawned." Mosman asserts that "there was no legal basis for precluding [him] from questioning the detective about what he had told him." Mosman further suggests that this limitation violated his due process right to present a complete defense because it "denied [him] the opportunity of presenting the trier of fact with information that bore heavily on the only matter at issue in this case—his knowledge of the stolen nature of the property."[3]

[3]Mosman also contends that the limitation violated his federal and state rights to confront the witnesses against him. *See* U.S. Const. amend. VI; Ariz. Const. art. II, § 24. However, he did not raise this confrontation argument below. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (argument not raised below forfeited for all but fundamental error); *State v. Holder*, 155 Ariz. 83, 85, 745 P.2d 141, 143 (1987) (fundamental-error review applies to alleged constitutional error). And because Mosman does not argue on appeal that the error was fundamental, we deem the argument waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

¶10 "The Due Process Clause of the Fourteenth Amendment requires that 'criminal defendants be afforded a meaningful opportunity to present a complete defense.'" *State v. Lehr*, 227 Ariz. 140, ¶ 39, 254 P.3d 379, 389 (2011), *quoting California v. Trombetta*, 467 U.S. 479, 485 (1984). This includes the right to cross-examine the state's witnesses. *State v. Gilfillan*, 196 Ariz. 396, ¶ 19, 998 P.2d 1069, 1075 (App. 2000). Trial courts, however, retain wide latitude to impose reasonable restrictions on cross-examination. *State v. Fleming*, 117 Ariz. 122, 125, 571 P.2d 268, 271 (1977).

¶11 Here, the state objected to defense counsel's questioning of the detective because it would improperly introduce Mosman's invocation of his right to remain silent. Specifically, the state argued, "[H]e wants to ask him when he talked to him and the defendant said nothing back. It's sort of a sword and shield." But defense counsel clarified that he "was trying to establish [Mosman] was informed this happened at the sports park before the [recording], and that's as far as [he was] going with it." Defense counsel could have posed such questions without introducing Mosman's invocation of rights. *See State v. Bravo*, 158 Ariz. 364, 380, 762 P.2d 1318, 1334 (1988) (approving use of "carefully framed questions that avoided any mention of the defendant's exercise of his constitutional rights to remain silent and to consult counsel"), *quoting Wainwright v. Greenfield*, 474 U.S. 284, 295 (1986). The state does not offer any additional basis for preclusion, and we agree with Mosman that the trial court erred in limiting the cross-examination.

¶12 However, not all error requires reversal. *State v. Smith*, 136 Ariz. 273, 276, 665 P.2d 995, 998 (1983). We "will affirm a conviction despite [an] error if it is harmless, that is, if the state, 'in light of all of the evidence,' can establish 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), *quoting State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993); *see also State v. Hickman*, 205 Ariz. 192, ¶¶ 28-29, 68 P.3d 418, 424-25 (2003) (even constitutional error reviewed for harmless error).

¶13 Mosman failed to make an adequate offer of proof for purposes of our review. Rule 103(a)(2), Ariz. R. Evid., requires a

defendant claiming error in the exclusion of evidence to "inform[] the court of its substance by an offer of proof, unless the substance was apparent from the context." An offer of proof serves two purposes: "enabling the trial court to appreciate the context and consequences of an evidentiary ruling and enabling the appellate court to determine whether any error was harmful." *Molloy v. Molloy*, 158 Ariz. 64, 68, 761 P.2d 138, 142 (App. 1988).

¶14 Here, defense counsel asked the detective whether he told Mosman that the incident had occurred at the Marana Sports Park. The detective responded by explaining that he did not recall what he had said, but he was prevented from finishing his answer by the state's objection. Although defense counsel explained why he wanted to ask the question, the record does not show what the detective's complete answer would have been. And without that answer, we have "no basis for further review." *State v. Doody*, 187 Ariz. 363, 373, 930 P.2d 440, 450 (App. 1996); *see State v. Towery*, 186 Ariz. 168, 179, 920 P.2d 290, 301 (1996) ("[W]hen the context of the examination fails to reveal the nature of the expected answer, the proponent of the precluded evidence must seek permission . . . to make the offer of proof so that the reviewing court can determine whether the trial judge erred in precluding the evidence."). Indeed, on appeal both parties attempt to rely on the detective's partial answer in support of their respective positions, which only further illustrates the importance of knowing the full answer. *See Towery*, 186 Ariz. at 179, 920 P.2d at 301 ("[S]omething more than speculation about possible answers is required to show prejudice."). Finally, Mosman's assertion that it was sufficient for counsel to refer to the recording of Mosman discussing the sports park as an offer of proof is unavailing because it is not a substitute for the detective's actual response.

¶15 Moreover, the trial court admitted into evidence the jail recording in which Mosman stated that an officer told him he was there about "an incident that happened at some park in Marana" and "showed [him] a picture of the sub[woofer]s." This is precisely the testimony defense counsel wanted to elicit from the detective. *See State v. Carlos*, 199 Ariz. 273, ¶ 24, 17 P.3d 118, 124 (App. 2001) (improper preclusion of cumulative testimony harmless). And the

court allowed defense counsel to argue the point in closing, exactly as he had requested. In the absence of an adequate offer of proof, and in light of these factors, we conclude any error in the limitation of the detective's cross-examination was harmless. *See State v. Vega*, 228 Ariz. 24, ¶ 30, 262 P.3d 628, 635 (App. 2011).

Sufficiency of the Evidence

¶16 Mosman next contends there was insufficient evidence to support his conviction for second-degree trafficking of the Sony amplifier. We review de novo the sufficiency of the evidence. *State v. Snider*, 233 Ariz. 243, ¶ 4, 311 P.3d 656, 658 (App. 2013). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. West*, 226 Ariz. 559, ¶ 16, 250 P.3d 1188, 1191 (2011), *quoting State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990). We will reverse only if no substantial evidence supports the conviction. *State v. Rivera*, 226 Ariz. 325, ¶ 3, 247 P.3d 560, 562 (App. 2011). "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *Id.*, *quoting State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). Substantial evidence may be direct or circumstantial. *State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005).

¶17 A person commits second-degree trafficking in stolen property by "recklessly traffic[king] in the property of another that has been stolen." A.R.S. § 13-2307(A). "'Traffic' means to sell, transfer, distribute, dispense or otherwise dispose of stolen property to another person . . . ." A.R.S. § 13-2301(B)(3). "Proof of possession of property recently stolen, unless satisfactorily explained, may give rise to an inference that the person in possession of the property was aware of the risk that it had been stolen or in some way participated in its theft." A.R.S. § 13-2305(1).

¶18 Mosman maintains the state failed to present substantial evidence showing that the Sony amplifier was stolen or that it belonged to R.S. He asserts that R.S. testified the Sony

amplifier "might have been his, that it looked like his, and that it was probably his," but only after "significant prompting" from the state. He also contends that R.S. "never [un]equivocally stated that it had been taken from his vehicle during the break-in."

¶19 The evidence does not support Mosman's argument. At trial, R.S. testified that, while he did not report the Sony amplifier missing on the night of the theft, he later realized it was taken when the officer showed him a photograph of it from the pawn shop. Both R.S. and the officer testified that R.S. had identified the Sony amplifier recovered from the pawn shop as his. And R.S. was adamant that it belonged to him. We acknowledge that R.S.'s testimony was somewhat confusing. For example, on cross-examination, he testified that he was "not positive" the Sony amplifier was in the trunk after the theft. But any "inconsistencies in [his] testimony affected [his] credibility." *State v. Peeler*, 126 Ariz. 254, 256, 614 P.2d 335, 337 (App. 1980). And the jury, not this court, resolves conflicts in the evidence and weighs witness credibility. *State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d 43, 46 (App. 2004).

¶20 In addition to the evidence that the Sony amplifier belonged to R.S. and was stolen, the state also established that Mosman pawned the amplifier the morning following the theft. The state presented evidence that Mosman pawned R.S.'s speaker box, which he promptly reported stolen, two days after the theft. This is substantial evidence supporting Mosman's conviction for second-degree trafficking of the Sony amplifier. *See Snider*, 233 Ariz. 243, ¶ 4, 311 P.3d at 658.

Indictment

¶21 Relying primarily on *State v. Mikels*, 119 Ariz. 561, 563, 582 P.2d 651, 653 (App. 1978), Mosman lastly asserts he was convicted of an offense for which he was not indicted. He maintains the grand jury was only presented with evidence of the Hitron amplifier, but, at trial, the state presented evidence that Mosman pawned the Sony amplifier. Because Mosman did not raise this argument below, he has forfeited review for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115

P.3d 601, 607 (2005). And because he does not argue on appeal that the error is fundamental, we could find this argument waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008). However, a conviction for an offense for which a defendant was not indicted is "fundamental error requiring a reversal." *Merrill v. State*, 42 Ariz. 341, 348-49, 26 P.2d 110, 113 (1933). Therefore, we consider whether fundamental, prejudicial error occurred. *See State v. Smith*, 203 Ariz. 75, ¶ 12, 50 P.3d 825, 829 (2002) (court may consider waived argument in its discretion).

¶22 The state and federal constitutions provide defendants with a right to know "the nature and cause of the accusation" against them. U.S. Const. amend. VI; Ariz. Const. art. II, § 24; *see State v. Sims*, 114 Ariz. 292, 295, 560 P.2d 810, 813 (1977) ("Due process requires that an accused be on notice of the offense charged."). This ensures that defendants have an opportunity to prepare and present a defense. *State v. Branch*, 108 Ariz. 351, 355, 498 P.2d 218, 222 (1972). Thus, "[i]t is axiomatic that '[c]onviction upon a charge not made would be sheer denial of due process.'" *State v. Rivera*, 207 Ariz. 69, ¶ 8, 83 P.3d 69, 72 (App. 2004) (second alteration in *Rivera*), *quoting DeJonge v. Oregon*, 299 U.S. 353, 362 (1937).

¶23 The state presented the following testimony to the grand jury:

> On Sunday, May 18th, 2014 our victim reported that their speakers and amplifier were taken from their vehicle which was parked at Sportspark. When they returned to the vehicle approximately 10:30 in the evening, saw that his rear window had been broken out and the items were taken from his trunk.
>
> On Monday, May 19th, 2014 approximately 10:09 a.m. the defendant pawned the car stereo amplifier. On

> May 20th, 2014 approximately 5:36 p.m. the defendant pawned the Pioneer Subwoofer.

In pertinent part, the indictment provides that Mosman "recklessly trafficked in the property of another, that had been stolen, to wit: car ster[e]o amplifier, belonging to [R.S.]"

¶24 Mosman concedes, "[T]here was no variance between the allegation in the indictment and the proof offered—[he] was charged with trafficking an amplifier, and the State presented evidence that he had pawned an amplifier." However, he maintains the only amplifier that was reported stolen on the day of the incident was the brown Hitron amplifier and, therefore, "that [wa]s the only stolen amplifier before the grand jury." Because "[t]he only evidence of trafficking of an amplifier presented at trial was in reference to the red Sony amplifier," Mosman reasons that he "was convicted of an offense that was not presented to the grand jury."

¶25 We agree with Mosman that the grand jury testimony gave the impression that the same amplifier that was reported stolen on May 18 was the one pawned on May 19. Because R.S. realized the Sony amplifier—the one for which Mosman was convicted—was missing only after the officer discovered it had been pawned, the grand jury was "laboring under a mistake of fact." *Mikels*, 119 Ariz. at 563, 582 P.2d at 653. But that mistake of fact does not require automatic reversal of Mosman's conviction. *See* Ariz. R. Crim. P. 13.5(b) (grand jury indictment may be amended to correct mistakes of fact; charging document deemed amended to conform to evidence adduced at court proceeding); *State v. Bruce*, 125 Ariz. 421, 423, 610 P.2d 55, 57 (1980) (amendment proper where it does not change nature of offense or prejudice defendant).

¶26 Mosman's reliance on *Mikels* is misplaced. In *Mikels*, this court vacated the defendant's conviction because the grand jury had indicted the defendant for "separate and distinct acts of sodomy" occurring on different days and in different places from which he was later convicted. 119 Ariz. at 563, 582 P.2d at 653. Thus, we explained that the jury was not merely "laboring under a mistake of fact." *Id.*

¶27 But this case is akin to *Rivera*, where we rejected the defendant's argument that his "convictions may have been for crimes for which he was not indicted." 207 Ariz. 69, ¶ 7, 83 P.3d at 72. We explained that, unlike in *Mikels*, the defendant was "indicted for, tried for, and convicted of one discrete crime occurring at a distinct time and place." *Id.* ¶ 14. Only "[t]he prosecution's theory of the case shifted at trial to reflect the evidence." *Id.* ¶ 15.

¶28 Here, the indictment broadly charged Mosman with second-degree trafficking of a stolen "car ster[e]o amplifier" on May 19. The evidence adduced at trial clarified that the "car ster[e]o amplifier" was a Sony amplifier. Thus, the nature of the offense remained the same. *See State v. Fimbres*, 222 Ariz. 293, ¶ 38, 213 P.3d 1020, 1030 (App. 2009) (nature of offense changes if it includes change in factual allegations). In addition, Mosman has not argued that he did not have sufficient notice of the charge against him. Indeed, two weeks after Mosman was indicted, the state moved to return the Sony amplifier and speaker box to R.S., but Mosman objected, noting that the amplifier "may be important evidence in his defense." *See Bruce*, 125 Ariz. at 423, 610 P.2d at 57 (rejecting claim of prejudice from amendment of indictment where defense counsel had notice of discrepancies in indictment before trial). Thus, Mosman has not met his burden of showing fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

Disposition

¶29 For the forgoing reasons, we affirm Mosman's convictions and sentences.