IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JASON WAYNE BROWN,
Appellant.

No. 2 CA-CR 2015-0323
Filed November 8, 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NOT FOR PUBLICATION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. CR20141984001
The Honorable Javier Chon-Lopez, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

H O W A R D, Presiding Judge:

¶1 Jason Brown appeals from his convictions and sentences for possession of a narcotic drug, possession of a narcotic drug for sale, and possession of drug paraphernalia. Brown argues the trial court erred by admitting text messages that he asserts were improperly authenticated and inadmissible prior-act evidence. Brown also claims the court erred by denying his motion to dismiss on the ground of prejudicial, pre-indictment delay. Because we find no error, we affirm Brown's convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the verdicts. *State v. Damper*, 223 Ariz. 572, n.1, 225 P.3d 1148, 1150 n.1 (App. 2010). In October 2012, Brown placed a call to a 911 dispatcher seeking medical help for a gunshot wound unrelated to this case. A Tucson Police Department (TPD) officer responded and saw Brown burying a baggie containing what was eventually determined to be cocaine base. He also saw Brown using a cell phone. The officer seized both the cocaine base and the phone. After obtaining and executing a search warrant for Brown's residence, TPD officers discovered over six ounces of cocaine base, "scales and baggies." Brown was charged with possession of cocaine base for sale, possession of cocaine base, and possession of drug paraphernalia.

¶3 Brown filed a motion to dismiss the case based on pre-indictment delay. The trial court denied the motion, concluding Brown failed to show the state had intentionally delayed the indictment to gain a tactical advantage and failed to show any resulting prejudice. The state then filed a motion in limine, seeking to admit certain sets of text messages found on the cell phone Brown

had been using at the time of his arrest. Brown filed his own motion, seeking to exclude the evidence on the grounds it constituted inadmissible "prior bad act evidence" and was more prejudicial than probative. After a hearing, the court ruled that two sets of text messages were admissible. The first set read as follows:

> **Incoming**: Yo
> **Outgoing**: Got blues playboy
> **Incoming**: Oh fasho playa!! Ill letchu know.. Hey my momz asked if you can float her some hard till tomorrow??
> **Outgoing**: Naw not right now get at me tho
> **Incoming**: Ill tell her.. Ill hit you up if Anyonez lookin bruh..

The second set read:

> **Incoming**: Can you get that funk??
> **Outgoing**: How much
> **Incoming**: A T-shirt.. whatz the pr??
> **Outgoing**: 100
> **Incoming**: Iz it fire??
> **Outgoing**: Yea
> **Incoming**: I'll letchu know right now..
> **Outgoing**: For sure
> **Incoming**: Is that the lowest you can do it for bruh??
> **Outgoing**: Yea i thank so
> **Incoming**: Lemme know if you find it any lower bruh..
> **Outgoing**: Alright[1]

¶4 Following a jury trial, Brown was convicted of all charges and sentenced to concurrent, minimum prison terms, the

[1]At the hearing on the motion in limine, the state alleged that an expert would testify that many of these terms related to the sale of cocaine base or other illegal drugs.

longest of which was fourteen years. This timely appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

Text Messages

¶5 Brown first argues the trial court abused its discretion by admitting text messages taken from the cell phone he had been using at the time of his arrest because those messages were not properly authenticated under Rule 901(a), Ariz. R. Evid. He points out the state introduced no evidence the phone was his or was registered to him, and contends that although he was using it when he first encountered police, it is logically possible that he had picked up "any phone that he could find" due to being injured at the time, implying it could have belonged to someone else. Consequently, Brown argues, the state failed to show "that the text messages on the phone were sent by or intended for . . . Brown." "We review the court's ruling on authentication for an abuse of discretion." *State v. Forde*, 233 Ariz. 543, ¶ 74, 315 P.3d 1200, 1220 (2014).

¶6 To authenticate an item of evidence, the "proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." *Id.*, *quoting* Ariz. R. Evid. 901(a). The trial court should admit such evidence if "evidence exists from which the jury could reasonably conclude that [the item] is authentic." *State v. Lavers*, 168 Ariz. 376, 386, 814 P.2d 333, 343 (1991). If that standard is met, any uncertainty goes to the weight rather than the admissibility of the evidence. *State v. George*, 206 Ariz. 436, ¶ 31, 79 P.3d 1050, 1060 (App. 2003).

¶7 The cell phone Brown possessed at the time officers located him and saw him burying cocaine, after responding to his 911 call, contained text messages concerning selling cocaine base. Those facts constitute evidence sufficient to support the inferences either that the phone was his or that he could have controlled it in the preceding four days. Although, as Brown argued below and on appeal, it is theoretically possible that he had just found the phone in his "vicinity" during an emergency and that the phone was not his and the text messages were not meant for him, any such possibility went to the weight rather than the admissibility of the

evidence. *Id.* The trial court did not abuse its discretion in concluding the cell phone had been properly authenticated. *See Forde*, 233 Ariz. 543, ¶ 74, 315 P.3d at 1220.

¶8 Brown also contends the state failed to prove the text messages were intended for him, and thus they could not be authenticated under Rule 901(a). In *Forde*, our supreme court considered whether the state had authenticated a text message sent from a phone seized by law enforcement officers to a number associated with the defendant for a cell phone that was in the defendant's possession at the time she was arrested. 233 Ariz. 543, ¶¶ 74-76, 315 P.3d at 1220-21. The court held this was "sufficient evidence authenticating the message" because "[t]he evidence permitted the jury to reasonably conclude that the text message from [the seized] phone was intended for [the defendant]." *Id.* ¶¶ 75-76.

¶9 Similarly, Brown possessed the phone that contained the text messages at the time he was arrested, permitting the inference it was either his phone or was within his control to the extent that he could have used it to send the at-issue text messages. Brown has not meaningfully distinguished *Forde*; he does not explain why the registration or ownership of the phone should be determinative. Again, once the proponent of evidence has made the required showing, uncertainty regarding authentication goes to weight of the evidence rather than its admissibility. *George*, 206 Ariz. 436, ¶ 31, 79 P.3d at 1060. Thus, we cannot say that the trial court abused its discretion in finding that the evidence was properly authenticated. *See Lavers*, 168 Ariz. at 386, 814 P.2d at 343.

¶10 Brown next challenges the admission of the text messages under Rules 402, 403, and 404(b), Ariz. R. Evid. As he argued below, Brown characterizes the text messages as improper "prior bad acts" evidence, irrelevant, and prejudicial. We review a trial court's evidentiary rulings for an abuse of discretion. *State v. Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d 865, 874 (2004).

¶11 In order to admit evidence of prior acts, it "(1) . . . must be admitted for a proper purpose under Rule 404(b); (2) . . . must be relevant under Rule 402; (3) [and] the trial court may exclude [it] if its probative value is substantially outweighed by the potential for

unfair prejudice under Rule 403." *State v. Lee*, 189 Ariz. 590, 599, 944 P.2d 1204, 1213 (1997). Thus, admission of the text messages required a three-part analysis. First, Rule 404(b) prohibits the admission of evidence of "other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." It does allow such evidence to be admitted "for other purposes, such as proof of motive, . . . intent, . . . [or] knowledge." *Id*.

¶12 Here, the trial court found that "even if [the text messages] were [evidence of] prior bad acts, they do go for a proper purpose under [Rule] 404(b), which would be to show either intent, knowledge, [or] motive." Brown appears to contend that, because his intent was not at issue in this case, the court erred by admitting the evidence on that ground.

¶13 However, Brown was charged with possession of a narcotic drug for sale. His text messages, which were sent four and two days before his arrest and concerned selling narcotic drugs, make it more likely that he knowingly possessed the drugs for sale. Knowledge is an element of possession for sale. A.R.S. § 13-3408(A)(2) ("A person shall not knowingly: . . . Possess a narcotic drug for sale."). Thus, because the prior-act evidence was not admitted to prove conformity with past behavior, but rather to prove an element of the present offense, it was admitted for a proper purpose under Rule 404(b). Therefore, the court did not abuse its discretion by admitting the evidence.[2]

¶14 Second, Rule 402 states that "[r]elevant evidence is admissible" unless otherwise prohibited. "Relevant evidence is that which has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence' and '[t]he standard of relevance is not particularly high.'" *State v. Foshay*, 239 Ariz. 271,

[2]We also note that Brown has not made a sufficient argument related to the Rule 404(b) factors, and any argument on that ground could be deemed waived. Ariz. R. Crim. P. 31.13(c)(1)(vi); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).

¶ 35, 370 P.3d 618, 625 (App. 2016), *quoting State v. Fish*, 222 Ariz. 109, ¶ 48, 213 P.3d 258, 274 (App. 2009).

¶15 Here, the trial court noted the evidence was offered to show intent, knowledge, and motive. Text messages referring to drug selling have a "tendency to make [the] fact" that Brown knowingly possessed the cocaine base in his apartment for sale "more . . . probable." Ariz. R. Evid. 401(a). Contrary to Brown's argument, the text messages are no less relevant for this purpose even though they were sent four and two days before Brown's arrest.

¶16 Third, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice." Ariz. R. Evid. 403. "'Unfair prejudice' is prejudice that could cause a jury to render a decision on an improper basis, 'such as emotion, sympathy or horror.'" *State v. Jean*, 239 Ariz. 495, ¶ 9, 372 P.3d 1019, 1023 (App. 2016), *quoting State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993).

¶17 Here, the trial court did not abuse its discretion in finding that the probative value of the evidence was not substantially outweighed by its prejudicial effect. The text messages were probative of Brown's knowing possession of illegal drugs for sale. They referred solely to potential sales of illegal drugs and the court did not abuse its discretion by implicitly finding that the admission of the text messages would not tend to cause a jury to render a verdict based on "emotion, sympathy or horror," even if those text messages were for a different occurrence than the one at issue. *Id.*, *quoting Schurz*, 176 Ariz. at 52, 859 P.2d at 162. Additionally, the text messages did not indicate that Brown had actually engaged in any illegal drug sales, only that he was potentially receptive to involvement in illegal drug sales. Thus, the text messages were not unduly prejudicial, and the court did not err in admitting them.

Pre-Indictment Delay

¶18 Brown next argues the trial court erred when it denied his motion to dismiss the charges based on prejudicial, pre-

indictment delay. "A person claiming a due process violation [for pre-indictment delay] must show that the prosecution intentionally slowed proceedings to gain a tactical advantage or to harass the defendant, and that actual prejudice resulted." *State v. Lacy*, 187 Ariz. 340, 346, 929 P.2d 1288, 1294 (1996). "[A] defendant . . . must demonstrate prejudice above and beyond that which is inherent in the workings of a clogged judicial system . . . [and] the proof must be definite and not speculative." *State v. Broughton*, 156 Ariz. 394, 397-98, 752 P.2d 483, 486-87 (1988). We review a court's ruling on a motion to dismiss an indictment for an abuse of discretion, *State v. Pecard*, 196 Ariz. 371, ¶ 24, 998 P.2d 453, 458 (App. 1999), but we review constitutional issues de novo, *see State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007).

¶19 Here, Brown argues "the State . . . has provided no reason and had no motivation for such a lengthy pre-indictment delay aside from intentionally gaining a tactical advantage over Brown." This argument misses the fact that the burden is on the defendant to show intentional delay. *Lacy*, 187 Ariz. at 346, 929 P.2d at 1294. Brown has alleged no facts and cited no authority to suggest that an unexplained delay in indictment warrants dismissal under the due process clause. Brown has failed to show that the prosecution intentionally delayed the proceedings. The trial court did not err in denying Brown's motion to dismiss.

Disposition

¶20 Based on the foregoing, we affirm Brown's convictions and sentences.