IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

FRANCISCO DANIEL RENDON,
Appellant.

No. 2 CA-CR 2015-0418
Filed November 8, 2016

Appeal from the Superior Court in Pima County
No. CR20144214001
The Honorable Paul E. Tang, 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

Harriette P. Levitt, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

M I L L E R, Judge:

¶1 After a jury trial, appellant Francisco Rendon was convicted of four counts of armed robbery, four counts of aggravated robbery, two counts of theft of a credit card, and one count each of aggravated assault and kidnapping. The trial court sentenced him to slightly mitigated prison terms, some consecutive and some concurrent, for a total of 28.5 years. On appeal, Rendon argues he "was denied his constitutional right to due process by virtue of the court's interference with the trial" when it asked the parties, near the close of the state's evidence, whether defendants contested jurisdiction to hear the case in Pima County. For the following reasons, we affirm Rendon's convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Harm*, 236 Ariz. 402, n.2, 340 P.3d 1110, 1112 n.2 (App. 2015). In the early morning hours of September 21, 2014, D.R. and V.G. were walking to their vehicle, which was parked "near Stone, kind of close to the Tucson Police Department," after attending a concert "at the Rialto." Rendon and another man robbed D.R. and V.G. at gunpoint, taking their cellular telephones, cash, and V.G.'s debit card. V.G. was assaulted and restrained during the robbery, and her debit card was used twice soon after the robbery, followed by a third unsuccessful attempt, at a convenience store located at Mission Road and 36th Street.

¶3 Shortly before midnight the following night, L.T. and C.L., who live in Tucson near Fourth Avenue, were walking home

from a bar when they were similarly robbed at gunpoint by Rendon and another man. A few hours later, someone made an unsuccessful attempt to use L.T.'s debit card, which had been taken in the robbery, at a convenience store near 1800 Mission Road. At trial, a Tucson Police Department detective used a "Poster Board" aerial photograph to mark the locations of the robberies and the convenience stores where the victims' stolen debit cards had been presented, and she estimated the relative distances between those locations.

¶4 After the state concluded its examination of the detective, its final witness, but before resting its case, the judge called the parties to the bench and asked, "Are you guys still fighting the jurisdiction?"[1] The prosecutor stated: "I'll ask to reopen, [or ask the court to] take judicial notice that this is Pima County." The judge declined to take judicial notice that the events had occurred in Pima County.

¶5 Counsel for Rendon's codefendant then objected to the judge "assisting the prosecution." Rendon's counsel joined in the objection, stating: "I understand where the Court is coming from, but the Court is a neutral party here, and I strenuously object to the Court assisting the prosecutor." The judge then stated, "[L]et's say that [the state] rests, and then this comes up. And I'm going to ask him that question anyway, and, of course it's within my discretion to allow him to reopen, isn't it?" Rendon's counsel agreed the judge would have discretion to allow the prosecutor to reopen under such circumstances, but he objected to "the Court bringing the issue up, because as the Court is well aware, that is a jurisdictional issue[, and a] jurisdictional issue is never waived."

¶6 Codefendant's counsel characterized the trial court's inquiry as "asking [the prosecutor] before he rests . . . if he has established jurisdiction" and alleged the court had asked the

[1]In the parties' joint pretrial statement, defense counsel had stricken a proposed stipulation that "[t]he incident[s] in question took place in Pima County."

question for the prosecutor "to get the hint." When the judge asked her opinion whether "this somehow impaired [his] ability to be fair," she responded, "I think you're assisting the prosecution, so in a way, I think it is unfair." Over the defendants' objections, the court granted the prosecutor's request to reopen his examination of the detective, who then confirmed that all of the events discussed had occurred in Pima County. The parties declined to make a further record on the matter.

Discussion

¶7 As the sole issue raised on appeal, Rendon argues "[i]t was fundamental reversible error for the court to interfere with the presentation of evidence in this case." He relies on *State v. Brown*, 124 Ariz. 97, 100, 602 P.2d 478, 481 (1979), for the proposition that "[a] judge should avoid even the appearance of partiality," described as "'a hostile feeling or spirit of ill-will,' or 'undue friendship or favoritism towards one of the litigants.'" *Id., quoting In re Guardianship of Styer*, 24 Ariz. App. 148, 151, 536 P.2d 717, 720 (1975). But in *Brown*, the defendant had moved to disqualify the trial judge for cause, based on the judge's ex parte communications with the prosecutor, his direction that the state charge the defendant with perjury, and his sua sponte order forfeiting the defendant's bond. *Id.* at 98-99, 602 P.2d at 479-80. Our supreme court found the trial judge's conduct "gave an appearance" of hostility or ill will toward the defendant and concluded the superior court had erred in denying his motion to disqualify the judge. *Id.* at 100, 602 P.2d at 481.

¶8 Here, in contrast, Rendon did not move to disqualify the judge based on an appearance of undue favoritism in his rulings, and we review only for fundamental, prejudicial error. *See State v. Granados*, 235 Ariz. 321, ¶ 13, 332 P.3d 68, 72-73 (App. 2014) (defendant who "fails to object on the basis of a trial judge's bias below by filing a motion and affidavit pursuant to Rule 10.1 . . . forfeits review for all but fundamental, prejudicial error"); *State v. Curry*, 187 Ariz. 623, 631, 931 P.2d 1133, 1141 (App. 1996) (defendant who made oral motion for recusal during trial but "failed to file any written motion or affidavit . . . therefore waived [judicial bias] issue

absent fundamental error"). Relief based on fundamental error is limited to "those rare cases that involve 'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

¶9 Rendon does not argue venue was improper, or that he was therefore denied his right to be tried in the county where the crimes were committed. He asserts only that venue "had not been proven" before the trial court's comments caused the state to ask a witness, "Did all the events you discussed occur in Pima County?" He maintains he was prejudiced because, in the absence of the positive response that question elicited, he would have been entitled to post-verdict judgments of acquittal, notwithstanding the guilty verdicts, because "jurisdiction is a matter which is never waived."

¶10 Rendon's argument conflates venue with jurisdiction. Under the Arizona constitution, a criminal defendant has the right to "trial by an impartial jury of the county in which the offense is alleged to have been committed." Ariz. Const. art. II, § 24; *see also* A.R.S. § 13-109(A). Although this court has said that "proper venue is a jurisdictional requirement," *State v. Agnew*, 132 Ariz. 567, 577, 647 P.2d 1165, 1175 (App. 1982), our supreme court has clarified that "jurisdiction is the power of a court to try a case," while "venue concerns the locale where the power may be exercised," *State v. Willoughby*, 181 Ariz. 530, 543, 892 P.2d 1319, 1332 (1995). And unlike subject matter jurisdiction, which may be raised at any time, *State v. Chacon*, 221 Ariz. 523, ¶ 5, 212 P.3d 861, 863-64 (App. 2009), "venue may be waived or changed," *Willoughby*, 181 Ariz. at 537 n.7, 892 P.2d at 1326 n.7.

¶11 Moreover, venue can be proven to the trial court under the preponderance of evidence standard, by direct or circumstantial evidence. *State v. Mohr*, 150 Ariz. 564, 566-67, 724 P.2d 1233, 1235-36

(App. 1986); *see also Willoughby*, 181 Ariz. at 538, 892 P.2d at 1327. Rejecting a similar claim in *Quayle v. State*, 19 Ariz. 91, 102, 165 P. 331, 336 (1917), our supreme court noted that venue can be "readily established by the simple means of a few questions" and admonished prosecutors as follows:

> It is an inexcusable neglect for the prosecution to omit direct proof of the venue in the trial of every criminal case, and trust to the uncertainty of the proof of facts from which the venue may be inferred; yet sometimes this occurs, and this is one of the times . . . .

But the court nonetheless found "ample" evidence "from which to reasonably draw the inference that the crime was committed in Navajo county as alleged," citing testimony that the crime occurred "within one-half mile of the Harvey House in the town of Winslow" and stating, "Winslow is in Navajo county." *Id.*

¶12 At Rendon's trial, victims testified they were robbed near identifiable landmarks in what a Tucson Police Department detective characterized as "downtown" Tucson and "the 4th Avenue college district." The victims' stolen debit cards were presented at convenience stores that were identified by nearby intersections of commonly known Tucson streets. Had there been any potential ambiguity with respect to venue, it would have been resolved by the use of an aerial photograph to mark locations where the offenses had occurred.

¶13 As in *Quayle*, ample evidence established that Rendon's crimes were committed in Tucson. Indeed, nothing in this record supports any other inference.[2] *See State v. Detrich*, 178 Ariz. 380, 384, 873 P.2d 1302, 1306 (1994) (absent some evidence that defendant

[2]In fact, the trial court signaled its belief that the parties' venue issue was resolved with a self-deprecating introductory statement: "I have a dumb question."

"drove the victim out of the county before sexually abusing her," venue established by circumstantial evidence). And Tucson is in Pima County. *Id.* (trial or appellate court may take judicial notice that "Tucson is in Pima County, Arizona").

Disposition

¶14 The propriety of venue in Pima County Superior Court was never challenged by pretrial motion and there was no evidence adduced at trial that called into question whether venue was proper in Pima County. Accordingly, the court's question regarding the matter did not constitute fundamental error or prejudice Rendon. Rendon's convictions and sentences are affirmed.