IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ERIC ALAN REYNOSO,
Appellant.

No. 2 CA-CR 2017-0023
Filed April 11, 2018

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NOT FOR PUBLICATION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. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20142247001
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
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Counsel for Appellee

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Espinosa and Judge Eppich concurred.

V Á S Q U E Z, Presiding Judge:

¶1 After a jury trial, Eric Reynoso was convicted of trafficking in stolen property in the second degree. The trial court sentenced him to a presumptive term of 3.5 years' imprisonment. On appeal, Reynoso argues the court erred by admitting a surveillance video recording over his foundation objection, failing to sua sponte instruct the jury on the mental state of criminal negligence, instructing on reasonable doubt, and denying his motion for a judgment of acquittal. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to affirming Reynoso's conviction. *See State v. Musgrove*, 223 Ariz. 164, ¶ 2 (App. 2009). One evening in April 2014, J.A. returned to his home in east Tucson to find that someone had broken in through a window and rummaged through his belongings. J.A. called 9-1-1 and reported several items missing, including a Nikon camera, a flash for that camera, and bottles of Fireball Cinnamon Whiskey, Sapphire Gin, and Gentleman Jack Whiskey.

¶3 Five days later, Reynoso sold the Nikon camera and flash to a pawnshop. The police were notified through an online tracking system, and a detective contacted Reynoso for an interview. Reynoso admitted pawning items in the past, including a gaming console and some games, but never mentioned recently pawning a camera or camera equipment. After obtaining a search warrant, the detective found photographs of J.A.'s stolen camera and flash on Reynoso's cell phone. The phone also contained photographs of partially empty bottles of Fireball Cinnamon Whiskey, Sapphire Gin, and Gentleman Jack Whiskey, consistent with J.A.'s description.

¶4 A grand jury indicted Reynoso for trafficking in stolen property in the second degree. He was convicted as charged and sentenced

as described above. This appeal followed.[1] We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Surveillance Video Recording

¶5 Reynoso first argues the trial court erred when it admitted, over his foundation objection, a surveillance video recording of the pawn transaction. Specifically, he contends the witness the state called to authenticate the recording "had no personal knowledge or custody of the video" because he did not work at the pawnshop at the time of the incident. Reynoso therefore maintains the witness "could not provide foundation for a video he had nothing to do with." We review rulings on the admissibility of evidence for a clear abuse of discretion. *State v. King*, 213 Ariz. 632, ¶ 7 (App. 2006).

¶6 "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Ariz. R. Evid. 901(a). When considering whether evidence has been properly authenticated, Arizona has adopted a flexible approach, "allowing a trial court to consider the unique facts and circumstances in each case—and the purpose for which the evidence is being offered." *State v. King*, 226 Ariz. 253, ¶ 9 (App. 2011), *quoting State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 14 (App. 2008). Examples of evidence that satisfy the authentication requirement include: testimony from a knowledgeable witness who explains what the item is; distinctive characteristics—such as appearance, contents, and patterns—taken together under the circumstances; and evidence describing a process and showing it produces an accurate result. Ariz. R. Evid. 901(b).

¶7 For example, in *Haight-Gyuro*, the state sought to admit a video recording of the defendant using a stolen credit card to make purchases at a retail store. 218 Ariz. 356, ¶¶ 2, 14. On appeal, we noted that "to comply with Rule 901(a), there must have been sufficient evidence to allow the jury to conclude the video recording depicted, with reasonable

[1]Reynoso's jury trial occurred in March 2015. He was arrested pursuant to a bench warrant in September 2015 and was sentenced in April 2016. Although this delay would normally prevent Reynoso from filing an appeal, *see* A.R.S. § 13-4033(C), it does not appear from the record that he was given notice he would forfeit this right by voluntarily delaying sentencing for more than ninety days. The delay in sentencing, therefore, does not prevent Reynoso from exercising his right to appeal. *See State v. Bolding*, 227 Ariz. 82, ¶ 20 (App. 2011).

accuracy, the transaction in which the stolen credit card was used." *Id.* ¶ 14. A store employee testified he had set up the store's video surveillance system, had used the receipt's date, time, and register number to determine which camera had recorded the transaction, and described the items purchased with the stolen credit card. *Id.* ¶¶ 15-16. This court found that evidence "sufficient for the jury to conclude that the video recording accurately depicted the transaction in which the stolen credit card had been used." *Id.* ¶ 17.

¶8 Similarly, here, to comply with Rule 901(a), there had to be sufficient evidence to allow the jury to conclude the surveillance video recording depicted, with reasonable accuracy, the pawn transaction. The state called as a witness P.A., the current manager of the pawnshop, to authenticate the recording. Although P.A. did not work at that specific pawnshop at the time of the incident, he was working for the same company as the assistant manager at another location. P.A. testified generally about the process for a pawn transaction, including the paperwork that must be completed and the identification required. He stated that the procedures were the same at all of the stores. P.A. then described the security system, which includes cameras inside and outside of the store. He said he was familiar with the surveillance system at the pawnshop where this incident occurred and had previously reviewed the recording in question. He testified that he recognized the store in the recording as the one where he currently worked and identified the clerk involved in the transaction.[2]

¶9 In addition, P.A. identified the date and time of the recording, as shown on the video itself, which matched the paperwork filled out during the pawn transaction. Viewed as a whole, this testimony and evidence was more than sufficient for the jury to conclude that the surveillance recording accurately depicted Reynoso's pawn transaction. *See Haight-Gyuro*, 218 Ariz. 356, ¶ 14.

¶10 Reynoso nevertheless contends, "[T]here was no testimony regarding the chain of custody to explain how the police actually obtained the video and safeguarded it prior to trial as evidence." However, because

[2]Reynoso suggests P.A. improperly "testified as to the details he saw in a video recording of a pawn transaction." But P.A. focused on the pawn process generally and provided basic information about this transaction, consistent with company practices and how the surveillance system worked.

the recording was otherwise authenticated through P.A.'s testimony identifying it, establishing chain of custody was not necessary to lay a proper foundation. *See State v. Steinle*, 239 Ariz. 415, ¶ 24 (2016) ("[A] foundation may be laid by evidence either identifying the item or establishing chain of custody."); *see also State v. McCray*, 218 Ariz. 252, ¶ 9 (2008). Accordingly, the trial court did not abuse its discretion by admitting the surveillance video recording into evidence. *See King*, 213 Ariz. 632, ¶ 7.

Criminal-Negligence Instruction

¶11 Reynoso next contends the trial court erred in not sua sponte instructing the jury on the lesser mental state of criminal negligence. Because Reynoso failed to request the instruction below, we review for fundamental, prejudicial error. *See State v. Bearup*, 221 Ariz. 163, ¶ 21 (2009). "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." *State v. Henderson*, 210 Ariz. 561, ¶ 20 (2005).

¶12 "A person who recklessly traffics in the property of another that has been stolen is guilty of trafficking in stolen property in the second degree." A.R.S. § 13-2307(A). The offense thus requires a reckless mental state. *See State v. Noriega*, 144 Ariz. 258, 258 (App. 1984); *see also* A.R.S. § 13-105(10)(c) (defining "recklessly").

¶13 Reynoso argues the state "provided no proof of [his] mental state." Speculating that he may have "purchased the [camera and flash] on Craig's List" or "received [them] somehow from someone . . . with access to the home," Reynoso maintains "he was only negligent in turning around and selling [them] to a pawnshop." He therefore reasons, "[A] negligent state of mind is a defense."

¶14 However, there is no lesser-included offense for second-degree trafficking in stolen property, one that incorporates a criminal-negligence mental state or otherwise. *See* § 13-2307(A); *Noriega*, 144 Ariz. at 258. Thus, a criminal-negligence instruction was not appropriate. *See State v. Cisneroz*, 190 Ariz. 315, 316 (App. 1997) ("A lesser-included offense instruction is appropriate only if the offense is in fact lesser included and the evidence supports the giving of the instruction.").

¶15 As Reynoso seems to acknowledge, his theory was not that he committed a lesser crime but that the state failed to prove he committed the crime charged. During closing arguments, defense counsel asserted the state had failed to satisfy its burden of proof. The trial court properly

instructed the jury on the offense of second-degree trafficking in stolen property, the meaning of "recklessly," and the state's burden of proving every element of the offense beyond a reasonable doubt. Accordingly, Reynoso has failed to establish fundamental, prejudicial error. *See Bearup*, 221 Ariz. 163, ¶ 21.

Reasonable-Doubt Instruction

¶16 Reynoso also contends the trial court erred in giving a reasonable-doubt jury instruction based on language from *State v. Portillo*, 182 Ariz. 592 (1995). He argues, "This standard arguably reduces the burden on the State and lowers it from the actual constitutional criminal standard." We review the decision to give a requested jury instruction for an abuse of discretion. *State v. Burbey*, 243 Ariz. 145, ¶ 5 (2017).

¶17 The Arizona Supreme Court has repeatedly considered and rejected similar challenges to the *Portillo* reasonable-doubt instruction. *See, e.g.*, *State v. Forde*, 233 Ariz. 543, ¶ 86 (2014); *State v. Dann*, 220 Ariz. 351, ¶ 65 (2009); *State v. Garza*, 216 Ariz. 56, ¶ 45 (2007). We are bound by the decisions of our supreme court. *See State v. Smyers*, 207 Ariz. 314, n.4 (2004); *see also State v. Thompson*, 194 Ariz. 295, ¶ 20 (App. 1999). Accordingly, we cannot say the trial court abused its discretion in giving a *Portillo* reasonable-doubt instruction. *See Burbey*, 243 Ariz. 145, ¶ 5.

Motion for a Judgment of Acquittal

¶18 Reynoso lastly challenges the trial court's denial of his motion for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. We review de novo the sufficiency of the evidence. *State v. Snider*, 233 Ariz. 243, ¶ 4 (App. 2013). In doing so, we view the evidence in the light most favorable to sustaining the jury's verdict and resolve all inferences against the defendant. *State v. Felix*, 237 Ariz. 280, ¶ 30 (App. 2015).

¶19 A trial court "must enter a judgment of acquittal . . . if there is no substantial evidence to support a conviction." Ariz. R. Crim. P. 20(a). "Substantial evidence is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of [the] defendant's guilt beyond a reasonable doubt.'" *State v. Sharma*, 216 Ariz. 292, ¶ 7 (App. 2007), *quoting State v. Mathers*, 165 Ariz. 64, 67 (1990). "If reasonable [persons] may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial." *State v. Davolt*, 207 Ariz. 191, ¶ 87 (2004), *quoting State v. Rodriguez*, 186 Ariz. 240, 245 (1996) (alteration in *Rodriguez*). Substantial evidence may be either direct or circumstantial. *State v. Pena*, 209 Ariz. 503, ¶ 7 (App. 2005).

¶20 As mentioned above, second-degree trafficking in stolen property occurs when a person recklessly traffics in the property of another that has been stolen.[3] § 13-2307(A). "'Traffic' means to sell, transfer, distribute, dispense or otherwise dispose of stolen property to another person, or to buy, receive, possess or obtain control of stolen property, with the intent to sell, transfer, distribute, dispense or otherwise dispose of the property to another person." A.R.S. § 13-2301(B)(3). "'Recklessly' means, with respect to a result or to a circumstance described by a statute defining an offense, that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists." § 13-105(10)(c).

¶21 Reynoso argues the state presented "no proof of a reckless intent." More specifically, he maintains, "There was no evidence that [he] had any knowledge that the camera [and flash were] stolen." Again, he suggests he "could have obtained the property from Craig's List or through some other legal means."

¶22 The state presented sufficient evidence that Reynoso was aware of and consciously disregarded a substantial and unjustifiable risk that he was trafficking stolen property. *See* § 13-105(10)(c). Officers found photographs of J.A.'s stolen camera, flash, and alcohol on Reynoso's cell phone. Those photographs were taken two days after the burglary at J.A.'s house. *See* A.R.S. § 13-2305(1) ("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."). Although Reynoso argues he could have obtained the property through other legal means, "[t]he jury was not required to accept [Reynoso]'s theory of the case," *State v. Marchesano*, 162 Ariz. 308, 312 (App. 1989), and we will not reweigh the evidence on appeal, *State v. Lee*, 189 Ariz. 590, 603 (1997). In addition, when

[3]The state asserts, "Reynoso claims only that there was insufficient evidence that he acted recklessly as to whether the camera and flash were stolen." It thus maintains he "waived any claim that there was insufficient evidence that he trafficked in stolen property." The "[f]ailure to argue a claim usually constitutes abandonment and waiver of that claim." *State v. Carver*, 160 Ariz. 167, 175 (1989). However, we cannot ignore fundamental error if we see it, *State v. Fernandez*, 216 Ariz. 545, ¶ 32 (App. 2007), and a conviction based on insufficient evidence constitutes such error, *State v. Rhome*, 235 Ariz. 459, ¶ 4 (App. 2014). Accordingly, we address the sufficiency of the evidence in whole.

the detective questioned Reynoso about the pawn transaction, he admitted that he had a "pawn history." However, he stated that he had pawned a gaming console around the time in question—he said nothing about the transaction involving the camera or flash. As the state points out, "A jury could infer that Reynoso purposely withheld information about the camera and flash because he knew it was stolen."

¶23 Moreover, Reynoso's fingerprints matched those on the pawn slip for the camera and flash. The detective said both Reynoso and his yellow truck resembled those on the pawnshop's surveillance recording taken at the time of the transaction. *See State v. Johnson*, 165 Ariz. 555, 556 (App. 1990) (pawning stolen property falls under "dispos[ing] of" in trafficking statute). Thus, viewing the evidence in the light most favorable to upholding the conviction, we conclude the state presented evidence from which reasonable persons could accept as sufficient to support a finding of Reynoso's guilt beyond a reasonable doubt. *See Snider*, 233 Ariz. 243, ¶ 4.

Disposition

¶24 For the reasons stated above, we affirm Reynoso's conviction and sentence.