

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JAVIN ELISEO SEGURA,
Appellant.

No. 2 CA-CR 2017-0206
Filed April 17, 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NOT FOR PUBLICATION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. CR20153271002
The Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

COUNSEL

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

The Law Offices of Stephanie K. Bond, P.C., Tucson
By Stephanie K. Bond
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MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Brearcliffe concurred.

S T A R I N G, Presiding Judge:

¶1 After a jury trial, Segura was convicted of robbery, aggravated robbery, assault, and kidnapping. On appeal, he argues the admission of a Taser into evidence infringed his rights under the Confrontation Clause, the Taser was irrelevant evidence, and there was insufficient evidence for a jury to convict him. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the jury's verdict and resolve all inferences against Segura. *State v. Felix*, 237 Ariz. 280, ¶ 30 (App. 2015). On July 31, 2015, L.E., a poker dealer at a local casino, earned a little over \$300 in tips. After work, she went to a department store to purchase some kitchen items and load a portion of her earned tips onto her store credit card.

¶3 When she went to pay for her items, L.E. placed her bright red, Relic brand purse on top of her shopping cart and took out her wallet. Inside of her wallet, she had separated her total cash into the amounts she would use at the store and for paying bills. A line formed behind L.E. as she made two separate transactions, first paying for her items and then loading \$60 onto her credit card. Due to a hearing impairment, L.E.'s focus was primarily on the cashier and not her surroundings.¹

¶4 After greeting a security guard, L.E. proceeded to her car and drove home. Other than the cashier at the register and the guard, she did not speak with anyone at the store or notice anyone in particular.

¹L.E. has a bilateral hearing impairment that causes her difficulty when trying to listen to low vocal ranges, especially men's voices. L.E. attempts to combat her hearing loss with the assistance of hearing aids. Even so, the majority of her communication with others can only be done through direct, line-of-sight lip reading.

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¶5 When L.E. pulled into her driveway, she noticed the lid to her trashcan was open. Walking towards the trashcan to close the lid, L.E. heard a vehicle approaching slowly behind her, but, assuming it was only slowing because of the street's speed bumps, she paid no attention to it. At the time, she was carrying her purse over her shoulder. As she prepared to close the trashcan, L.E. heard what sounded like someone speaking to her. She turned and saw a man whom she had never seen before standing behind her. The man was Hispanic and "very short," with dark hair on an "almost shaved" head and some facial hair.

¶6 L.E. asked the man to repeat himself. The man told her, "Give me your purse, bitch." L.E. then noticed the man had pressed a Taser to her side. The Taser was the type that fired projectiles and "look[ed] like a gun," similar to those carried by police officers. L.E. begged him, "Please don't do this. Please don't do this." The man, however, told L.E. to stop arguing and give him the purse. Frightened, she did so.

¶7 The man went towards the passenger side of a white Hyundai sport utility vehicle (SUV) with grey trim, which had blocked the end of L.E.'s driveway. When L.E. attempted to follow the man and look at the Hyundai's license plate, he threatened to use the Taser. Once the man got into the passenger seat, the SUV reversed down the street before turning and driving away. Although L.E. saw another man sitting in the driver's seat, she did not see him clearly.

¶8 When police officers arrived, L.E. told them what had happened and provided descriptions of the man who had taken her purse and of the SUV. One of the officers examined L.E.'s store receipt, copied the time and register location of her purchases, and proceeded to the store. At the store, the officer, aided by loss prevention staff, located video surveillance recordings of L.E. before, during, and after her transactions.

¶9 The surveillance recordings showed a group of four men walking into the store twenty minutes before L.E. arrived. The group included Segura and another man later identified as Gary Pannell. As L.E. made her transactions, Segura and Pannell can be seen near the register. Just before L.E. finished her transactions, Segura and Pannell head towards the exit, and can be seen waiting outside. Once L.E. left the store, Pannell and Segura separated, and Segura grabbed an empty shopping cart and pushed it towards L.E. While L.E. loaded her items into her car, Segura gets into a white Hyundai SUV with grey trim. The SUV left the parking lot seconds before L.E. left, and both vehicles travelled in the same direction.

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¶10 Several days after the robbery, an officer located Pannell at another department store and recovered a Taser from him—the same projectile-firing model as those used by police officers. Then, about a week after the robbery, Segura was located at a hotel, near a room being rented by his girlfriend, S.S. Officers obtained a search warrant for the room and recovered a red Relic purse. Inside the purse, officers found a pawn slip with S.S.’s name on it.

¶11 The same day Segura was detained, officers conducted a photographic lineup at L.E.’s home. From the lineup, L.E. immediately recognized Segura and indicated he was the one who had taken her purse, noting specifically his cheekbones and the spacing of his eyes.

¶12 Segura was charged with armed robbery, aggravated robbery, aggravated assault with a deadly weapon or dangerous instrument, and kidnapping. At trial, L.E. not only identified the purse recovered from S.S.’s hotel room as her own, but also identified Segura as the person who had taken her purse. In addition, a Y-STR DNA² profile matching Segura was found on the straps and opening of the purse.³ Also, L.E. identified the SUV in which Segura left the store as similar to the SUV she later saw him enter after taking her purse. The jury convicted Segura of robbery, aggravated robbery, assault, and kidnapping, and further found Segura had committed the offenses under aggravating circumstances.⁴

¶13 The court sentenced Segura to concurrent terms of imprisonment, the longest of which was 9.25 years. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

²Deoxyribonucleic acid.

³A Y-STR profile involves an analysis of markers specific to the Y-Chromosome, subject to the limitation that some immediate male relatives have the same Y-STR profile, and the probability of an equal match is much higher than with a full DNA profile (one in thousands vs. one in trillions or quadrillions).

⁴The trial court granted motions for acquittal as to the greater offenses of armed robbery and aggravated assault, but allowed the lesser-included offenses of robbery and assault to be determined by the jury.

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Discussion

¶14 On appeal, Segura makes three arguments: (1) the trial court erred in admitting into evidence the Taser found on Pannell because it violated his rights under the Confrontation Clause; (2) the Taser was irrelevant and its probative value was outweighed by the danger of unfair prejudice; and (3) there was insufficient evidence to convict him of the charged offenses. Generally, “[w]e review evidentiary decisions for an abuse of discretion, giving deference to the trial court’s determination regarding relevance.” *State v. Dann*, 220 Ariz. 351, ¶ 122 (2009). But, we review de novo evidentiary rulings implicating the Confrontation Clause. *State v. Bocharski*, 218 Ariz. 476, ¶ 33 (2008). Whether there exists sufficient evidence to support a conviction is a question of law we review de novo. *Felix*, 237 Ariz. 280, ¶ 30.

Confrontation Clause

¶15 As he did below, Segura contends the admission of the Taser violated his right to confront the witnesses against him because he was unable to cross-examine co-defendant Pannell about the Taser. Segura argues he was “unable to effectively cross[-]examine regarding the timing” of when Pannell had the Taser, and whether he had it at the time of the offense.

¶16 The Confrontation Clause of the Sixth Amendment provides “the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI. As construed by the Supreme Court, it bars the “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). Critically, the Confrontation Clause concerns only “testimonial statements.” *Davis v. Washington*, 547 U.S. 813, 821 (2006); *State v. King*, 212 Ariz. 372, ¶ 19 (App. 2006) (“The Supreme Court in *Crawford* emphasized that the Confrontation Clause is directed primarily to testimonial hearsay statements.”). Testimony is “a solemn declaration or affirmation made for the purpose of establishing or proving some fact.”⁵ *Michigan v. Bryant*, 562 U.S. 344, 353-54 (2011), quoting *Crawford*, 541 U.S. at

⁵Testimony includes “*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.” *Crawford*, 541 U.S. at 51.

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51. Because the Confrontation Clause solely concerns statements, *see Crawford*, 541 U.S. at 53-54, and, as the state observes, “A [T]aser is an object, not a statement,” the admission of the Taser did not violate the Confrontation Clause.

Relevancy

¶17 Segura next argues the court erred in admitting the Taser because it was not relevant. Relevant evidence is admissible unless otherwise provided by the rules of evidence or another authority. Ariz. R. Evid. 402. Relevant evidence is evidence that “has any tendency to make a fact more or less probable” and involves a fact that “is of consequence in determining the action.” Ariz. R. Evid. 401. “Relevancy is not an inherent characteristic of proffered evidence; instead, it is the relationship between the proffered evidence and the fact sought to be proved. . . . [T]o be relevant, evidence need only alter the probability, not prove or disprove the existence, of a consequential fact.” *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 496 (1987).

¶18 The Taser was relevant because it had a tendency to make it more probable that Segura had committed the offenses with which he was charged. Although the Taser was not found on Segura’s person, it resembled the weapon described by L.E. and it was found on a person Segura was seen with on the day of the robbery and later at the hotel where he was detained.

¶19 Segura argues, however, that because the store security recordings did not specifically show Pannell getting into the white SUV, because L.E. could not identify the driver of the SUV as Pannell, and because the Taser was located three days after the robbery, without Segura being present, the Taser was irrelevant. Segura’s argument does not truly challenge the relevancy of the Taser, but instead focuses on the identification of the Taser as the device used by Segura during the robbery. But “[l]ack of positive identification goes to the weight of evidence, not its admissibility.” *State v. Lacy*, 187 Ariz. 340, 349 (1996); *State v. Blazak*, 114 Ariz. 199, 203 (1977) (argument concerning lack of positive identification of ski mask as one used by defendant went only to weight of identification testimony and not to admissibility). Accordingly, the trial court did not err in finding the Taser relevant and admissible.

¶20 Segura also argues that even if the Taser were relevant, its probative value was substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury. *See* Ariz. R. Evid.

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403. Segura did not raise this argument below; therefore we review only for fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20 (2005); see *State v. Lopez*, 217 Ariz. 433, ¶ 4 (App. 2008) (objection on one ground does not preserve issue on another). Because Segura does not argue on appeal that any error was fundamental, the claim is waived. See *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008).

Sufficiency of the Evidence

¶21 Lastly, Segura contends there is insufficient evidence to maintain his convictions. When reviewing a claim of insufficient evidence, we “reverse only if no substantial evidence supports the conviction.” *State v. Fimbres*, 222 Ariz. 293, ¶ 4 (App. 2009), quoting *State v. Pena*, 209 Ariz. 503, ¶ 7 (App. 2005). “Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant’s guilt beyond a reasonable doubt.” *State v. Spears*, 184 Ariz. 277, 290 (1996). “Sufficient evidence may be comprised of both direct and circumstantial evidence.” *Felix*, 237 Ariz. 280, ¶ 30; see also *State v. Bustamante*, 229 Ariz. 256, ¶ 5 (App. 2012) (“No distinction exists between circumstantial and direct evidence.”). “If reasonable persons could differ on whether the evidence establishes a fact at issue, that evidence is substantial.” *State v. Garfield*, 208 Ariz. 275, ¶ 6 (App. 2004).

¶22 Viewing the evidence in the light most favorable to sustaining the jury’s verdict and resolving all inferences against him, *Felix*, 237 Ariz. 280, ¶ 30, there was sufficient evidence to convict Segura. Surveillance cameras recorded Segura and Pannell entering the same store as L.E. Shortly before L.E. leaves, Segura and Pannell are seen leaving and waiting outside together until L.E. exits the store. Segura and Pannell separate, and Segura is seen taking an empty shopping cart and pushing it in the direction of L.E., before entering a white Hyundai SUV similar to the one Segura entered after robbing L.E. on her driveway. Several days after the robbery, Pannell was found with a Taser matching the weapon L.E. described as being wielded by Segura on her driveway. And, a week after the robbery, L.E. picked out Segura in a photo lineup. Segura was also observed near the room of his girlfriend, which contained a purse L.E. identified at trial as her own. That purse contained DNA consistent with Segura’s on its straps and opening. Then, at trial, L.E. again identified Segura as the person who took her purse.

¶23 Segura notes the discrepancies between the clothing the surveillance video showed him wearing that day and L.E.’s description, and the fact that he has a large number of tattoos on his body, which were

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not part of L.E.'s description. Those discrepancies, however, are an issue of credibility, a province of the jury we will not invade. *See Bustamante*, 229 Ariz. 256, ¶ 5 ("The credibility of witnesses and the weight given to their testimony are issues for the jury, not the court.").

Disposition

¶24 For the foregoing reasons, we affirm Segura's convictions and sentences.