IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DAVID RYAN HOWE,
Appellant.

No. 2 CA-CR 2017-0334
Filed May 14, 2019

Appeal from the Superior Court in Pima County
No. CR20164266001
The Honorable Richard S. Fields, Judge

AFFIRMED

COUNSEL

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

Scott A. Martin, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

B R E A R C L I F F E, Judge:

¶1 David Howe appeals from his convictions for attempted armed robbery, attempted aggravated robbery, aggravated assault with a deadly weapon or dangerous instrument, and kidnapping; each of which the jury found to be a dangerous-nature offense. The trial court sentenced him to a combination of concurrent and consecutive prison sentences, some presumptive and some "slightly" or "partially" aggravated, totaling 23.5 years. We affirm.

Issues

¶2 On appeal, Howe contends the trial court allowed a witness to be told about the testimony of a prior witness in violation of Rule 615, Ariz. R. Evid., and Rule 9.3, Ariz. R. Crim. P.,[1] and implicitly commented on the evidence in violation of article VI, § 27 of the Arizona Constitution. He further contends his Sixth Amendment right to a jury trial, as interpreted by *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny, was violated by the court's failing to have the jury find certain facts affecting sentencing for the kidnapping charge. The state contends Rule 615 was never invoked, the court did not comment on the evidence, and *Apprendi* and its progeny do not require the jury to find a fact that may reduce a defendant's sentence when it is not an element of the crime. The issues on appeal are: 1) whether either Rule 615 or Rule 9.3 was invoked and, if so, then violated; 2) whether the trial judge improperly commented on the evidence; and 3) whether the fact that a kidnapping victim was released in accord with A.R.S. § 13-1304(B) must be found by the jury.

[1]The language of Rule 9.3, Ariz. R. Crim. P., was amended effective January 1, 2018, after Howe's trial concluded. *See* Ariz. Sup. Ct. Order R-17-0002. Because those changes do not affect our ruling, we cite the current version of the rule for ease of reference.

Factual and Procedural Background

¶3 We view the facts in the light most favorable to sustaining the verdicts and sentences. *See State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 2 (App. 2013). In September 2016, two masked men, later identified as Howe and Alex Haider, entered an unlocked back door of a pizza parlor. Haider sprayed S.B., an employee, with pepper spray. Howe brandished a knife and commanded S.B. to get under a counter. Haider then punched S.B. in the "left side." Haider and the restaurant manager, G.N., got into a physical altercation. While Haider and G.N. were scuffling, Howe stabbed G.N. multiple times—in the back, abdomen, thigh, knee, and back of the knee. Howe and Haider then left the restaurant but not until after Haider "stomp[ed]" on G.N.'s head. S.B. then emerged from under the counter and called 9-1-1.

¶4 Haider turned himself in to police, and Howe was later located and arrested. A grand jury indicted Howe for attempted armed robbery of G.N., attempted aggravated assault against G.N., aggravated assault with a deadly weapon/dangerous instrument against G.N., and kidnapping of S.B.

¶5 At Howe's trial, Brittany Bertsch, who is both Haider's girlfriend and Howe's cousin, identified Haider and Howe as the two assailants. Bertsch testified that she drove them to and from the robbery. Haider, who had earlier pleaded guilty for his role in the crime, testified pursuant to his plea agreement. He testified first that he, rather than Bertsch, had driven the car to and from the pizza parlor. At that point, the trial judge stopped the proceeding and excused the jury from the courtroom. He told the jurors: "I think I'm going to take a short break, maybe about ten minutes. So, ladies and gentlemen, if you'll go back to the jury room. Don't go too far. You're excused."

¶6 Once the jury was out of the courtroom, the judge stated to counsel, "I just heard the answer about he was driving. I think he deserves to know that the testimony of [Bertsch], and I think he deserves to know that if he lies he's going to lose his plea, and I think maybe we ought to talk about that right now." Howe's counsel objected, telling the trial court, "[Y]ou can't have other witnesses in the courtroom to hear the testimony of other witnesses." The court then suggested that counsel remind Haider of the penalties of perjury, stating that he was "not going to tolerate any lies." Howe did not object to the court's suggestion that Haider be warned of the penalties of perjury, and, in fact, Howe's counsel said she was "fine with" Haider's counsel so advising him. Haider met with his counsel, and, when

the trial resumed, changed his testimony to say that Bertsch had driven the car.

¶7 The jury found Howe guilty, and the trial court sentenced him as described above. This appeal followed, and we have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, 13-4033(A)(1).

Analysis

Violation of "the Rule"

¶8 Howe argues the trial court deprived him of "his protection against tailored testimony" under Rule 9.3, Ariz. R. Crim. P., and Rule 615, Ariz. R. Evid. The court did so, he asserts, by intervening during Haider's testimony and directing his counsel to warn him that "if he lies he's going to lose his plea," all of which caused Haider to change his testimony.

¶9 Generally, when a defendant objects to a ruling at trial, it is preserved for appeal and for analysis under the "harmless error" standard. *State v. Henderson*, 210 Ariz. 561, ¶ 18 (2005). Under that level of review, the state bears the burden, if error is found, of showing that the error was harmless beyond a reasonable doubt. *Id.* If a defendant fails to object at trial, any error, if it exists, will be evaluated under the "fundamental error" standard. *Id*. ¶ 19. To demonstrate reversible, fundamental error, a defendant must show a trial error exists and "(1) the error went to the foundation of the case, [or] (2) the error took from the defendant a right essential to his defense," and he was prejudiced "*or* (3) the error was so egregious that he could not possibly have received a fair trial." *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018). Howe asserts that he objected below but that, if the issue was not sufficiently preserved, the error was fundamental. *See Henderson*, 210 Ariz. 561, ¶ 19.

¶10 We review the interpretation and application of court rules *de novo*. *See Spring v. Bradford*, 243 Ariz. 167, ¶ 11 (2017) (interpretation of court rules reviewed *de novo*), *see also State v. Burkett*, 179 Ariz. 109, 111 (App. 1991) (application of rule is issue of law reviewed *de novo*). Under the rules of criminal procedure, a trial court "may, and at the request of either party must, exclude prospective witnesses from the courtroom during opening statements and other witnesses' testimony" and, as part of any exclusion order, "instruct the witnesses not to communicate with each other about the case until all of them have testified." Ariz. R. Crim. P. 9.3(a)(1), (3). Rule 615 of the rules of evidence echoes this and provides, "At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony." These rules are separately and variously

referred to as the rule of "sequestration" or of "exclusion," or simply as "the rule." *State v. Presley*, 110 Ariz. 46, 48 (1973) (sequestration); *State v. Kelley*, 110 Ariz. 196, 197 (1973) (exclusion); *State v. Stolze*, 112 Ariz. 124, 126 (1975) ("the Rule"). The purpose of the Rule is to prevent a witness from tailoring his testimony to match that of another witness. *Spring*, 243 Ariz. 167, ¶ 14. The Rule is not self-executing; unless the court *sua sponte* orders exclusion of witnesses ("may"), a party must request exclusion of witnesses—that is, "invoke" the Rule—before the court is required to ("must") order witnesses excluded from the courtroom. *See State v. Edwards*, 154 Ariz. 8, 13-14 (App. 1986); Ariz. R. Evid. 615.

¶11 Here, the record does not reflect that either party invoked the Rule at the outset of trial, and Howe concedes this. Neither does the record reflect that the trial court *sua sponte* or otherwise expressly ordered witnesses to be excluded from the courtroom. Consequently, there could be no violation of the Rule or of any exclusion order. But, even if we were to construe Howe's ultimate objection—"You can't have other witnesses in the courtroom to hear the testimony of other witnesses"—as a simultaneous invocation of the Rule and objection to its violation, the record does not reflect that the court thereafter recited, repeated, or otherwise described Bertsch's testimony to Haider. Howe fails, therefore, to show any violation of the Rule after its invocation. There was, then, no error committed to be evaluated under either the harmless error or fundamental error standard. *State v. Rose*, No. 2 CA-CR 2018-0136, ¶ 17, 2019 WL 1760481 (Ariz. Ct. App. Apr. 22, 2019); *see Escalante*, 245 Ariz. 135, ¶ 21 ("[T]he first step in fundamental error review is determining whether trial error exists.").

Commenting on the Evidence

¶12 Howe next argues the trial court violated article VI, § 27 of the Arizona Constitution by improperly commenting on the evidence by "telegraph[ing]" to the jury that Haider's testimony was untruthful. Howe concedes the issue was not preserved below, and asks this court to review for structural and fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19, *see also State v. Hancock*, 240 Ariz. 393, ¶ 7 (App. 2016).[2] He claims the trial

[2]Structural error, which is always reversible, deprives a defendant of "basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair." *State v. Ring*, 204 Ariz. 534, ¶ 45 (2003) (omission in *Ring*) (quoting *Neder v. United States*, 527 U.S. 1, 8 (1999)).

court "abandoned its role as the neutral, impartial overseer of the trial and instead effectively directed the jury to interpret the evidence consistently with what the trial court personally believed was true" and committed structural error. He also argues that the error was fundamental because Howe could not possibly have received a fair trial.

¶13 Article VI, § 27, in relevant part, provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The purpose is "to prohibit judges presiding at trials from expressing their opinion as to the evidence presented." *Eastin v. Broomfield*, 116 Ariz. 576, 581 (1977). "The word 'comment' as used in the Constitution has the usual connotation of an expression of opinion." *State v. Willits*, 96 Ariz. 184, 189 (1964).

¶14 The extent of the trial court's "comment" here was telling the jury he wanted a "short break," recessing the trial, and excusing the jury. We decline to conclude that this was a "comment" on the evidence, let alone an impermissible one. It is pure speculation to conclude that the jurors took the call for a break in trial as anything other than as a call for a break in the trial. Consequently, we see no error, much less fundamental or structural error. *Rose*, 2019 WL 1760481, ¶ 17.

Kidnapping Sentence

¶15 A person commits kidnapping "by knowingly restraining another person with the intent to," in relevant part, "3. Inflict death, physical injury or a sexual offense on the victim, or to otherwise aid in the commission of a felony; or 4. Place the victim or a third person in reasonable apprehension of imminent physical injury to the victim or the third person." A.R.S. § 13-1304(A)(3), (4). Kidnapping is a class two felony. § 13-1304(B). If, however, the victim is "released voluntarily by the defendant without physical injury in a safe place before arrest and before accomplishing" one of the enumerated offenses in § 13-1304(A), it is a class four felony. *Id.* A class four felony carries with it a lesser possible sentence than a class two felony. *See* A.R.S. § 13-702(D).

¶16 Howe argues his kidnapping conviction should be reduced from a class two felony to a class four felony for sentencing purposes because the jury did not make a finding as to the victim's release pursuant to § 13-1304(B). This, Howe argues, is in violation of his Sixth Amendment right to a jury trial. Because this argument was not raised below, we review for fundamental error. *Henderson*, 210 Ariz. 561, ¶ 19.

¶17 The Sixth Amendment to the United States Constitution requires "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The "statutory maximum" is the sentence the judge is permitted to impose based only upon the jury's verdict without any additional findings. *Blakely v. Washington*, 542 U.S. 296, 303 (2004). Our supreme court has held that, when there have been no aggravating factors proven to a jury beyond a reasonable doubt, "the statutory maximum sentence for *Apprendi* purposes . . . is the [statutory] presumptive sentence." *State v. Martinez*, 210 Ariz. 578, ¶ 17 (2005).

¶18 Howe argues that *Apprendi* and its progeny require a jury finding on whether the victim, S.B., was released in a manner that satisfies § 13-1304(B). The state argues that, in accordance with *State v. Tschilar*, 200 Ariz. 427 (App. 2001), release under § 13-1304(B) "is not an element of kidnapping, [and] it does not have to be found by the jury beyond a reasonable doubt." In *Tschilar*, the court determined § 13-1304(B) "ha[d] no bearing on the jury's determination that the offense of kidnapping had been committed" and consequently there was no Sixth Amendment violation by failing to have the jury find the fact of the victim's release. 200 Ariz. 427, ¶¶ 14, 19. Indeed, the court determined:

> *Apprendi* is not implicated in the execution of A.R.S. section 13-1304. Conviction by a jury for kidnapping pursuant to section 13-1304(A) authorizes the trial court to sentence a defendant for the commission of a class 2 felony. A determination that the kidnapping victims were released unharmed as defined by section 13-1304(B) simply leaves the range of punishment unchanged or reduces the range to that of a class 4 felony. Thus, the fact of release as found by the court does not expose a defendant to a punishment *exceeding* that permitted by the verdict; it only offers the possibility of a punishment *less than* that allowed by the verdict.

Id. ¶ 19 (emphasis added).

¶19 Howe asks this court to disagree with *Tschilar*, claiming it was wrongly decided because it relied on the reasoning in *State v. Eagle*,

196 Ariz. 188 (2000). Howe argues that, because *Eagle* was decided on Fifth Amendment grounds, its reasoning does not extend to the Sixth Amendment claim made here and in *Tschilar*.

¶20 In *Eagle*, our supreme court addressed whether Eagle's consecutive sentences for kidnapping and sexual assault violated his Fifth Amendment protection against double jeopardy. 196 Ariz. 188, ¶ 2. Eagle argued that the completion of a sexual assault, as enumerated in § 13-1304(A), was an element of "class 2 kidnapping" under § 13-1304(B). *Id.* This, Eagle argued, made both crimes the same offense for which he could not be punished twice. *Id*. The court concluded that § 13-1304(A) "completely defines the crime of kidnapping as it exists in Arizona" and the elements are "a knowing restraint coupled with one or more of the specifically listed intentions." *Id.* ¶ 7. It determined that § 13-1304(B) "deals entirely with classifications of punishment" and "presupposes that the required elements of a kidnapping, as set forth in [§ 13-1304(A)], have been proven." *Id*. ¶ 8. And that "[t]he crime is punishable as a class 2 felony *unless* certain mitigating but nonessential conditions are found, in which case it may be punished less severely." *Id*. The court ultimately held that "the voluntary release of a victim" in a manner compliant with § 13-1304(B) is not an element of the crime but "is a mitigating factor relevant solely for sentencing purposes," and, as such, the defendant and not the state bears the burden of proving release by a preponderance of the evidence. *See id.* ¶ 17 (defendant bears burden of proving mitigating factors by preponderance of evidence).

¶21 We find nothing in *Eagle* logically limiting its conclusions as to the nature of § 13-1304(B) to a double-jeopardy analysis. Rather, it is a plain description of the elements of the crime of kidnapping in § 13-1304(A) and the mitigating nature of § 13-1304(B), which are applicable to any analysis. We are therefore bound by our supreme court's interpretation of § 13-1304 and we agree with *Tschilar*. *State v. Long*, 207 Ariz. 140, ¶ 23 (App. 2004) ("[T]his court is bound by decisions of the Arizona Supreme Court and has no authority to overturn or refuse to follow its decisions."); *see also Neil B. McGinnis Equip. Co. v. Henson*, 2 Ariz. App. 59, 61 (1965) (noting the two divisions of the Court of Appeals are a "single Court" and we will disagree with Division One only "upon the most cogent of reasons"). Because whether, when, and how a kidnapping victim is released are not elements of kidnapping, but solely may be mitigating factors for the trial court to consider in sentencing, in accord with *Tschilar*, they need not have been found by the jury. Consequently, the Sixth Amendment was not violated here and no error, fundamental or otherwise, occurred. *Rose*, 2019 WL 1760481, ¶ 17.

¶22 Even so, under *Eagle*, Howe bore the burden of proving by a preponderance of the evidence that he released S.B. in a manner that satisfied § 13-1304(B), but he brought forward no such evidence. 196 Ariz. 188, ¶ 17. Indeed, the evidence at trial showed that Howe and Haider pepper sprayed and punched S.B., and forced him under a counter at knife-point, and that Howe stabbed G.N. multiple times. Ultimately, S.B. left his place of captivity only after he saw Haider and Howe leave the restaurant. Thus, Howe could not have demonstrated that a jury could have found that he "released" S.B. at all, let alone "unharmed," and before, among other things, placing him "or [G.N.] in reasonable apprehension of imminent physical injury." § 13-1304(A)(4). Therefore, Howe could not prove he was prejudiced even if fundamental error had occurred. *Henderson*, 210 Ariz. 561, ¶ 27.

Disposition

¶23 Because we find no error, we affirm Howe's conviction and sentences.