IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ROBERT JACOB GARCIA,
Appellant.

No. 2 CA-CR 2019-0270
Filed August 25, 2021

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NOT FOR PUBLICATION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. CR20190997001
The Honorable Kimberly H. Ortiz, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Judge Brearcliffe and Judge Espinosa concurred.

V Á S Q U E Z, Chief Judge:

¶1 Following a jury trial, Robert Garcia was convicted of armed robbery and the trial court sentenced him to a mitigated prison term of 10.5 years. On appeal, Garcia argues the court violated his Confrontation Clause rights by precluding evidence directly related to the victim's credibility. He also contends the court erred by permitting evidence of two separate acts for the single count of armed robbery, rendering the charge duplicitous and creating the risk of a non-unanimous jury verdict. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *State v. Felix*, 237 Ariz. 280, ¶ 2 (App. 2015). In February 2019, V.Q. was walking on a trail behind a convenience store when Garcia approached him and asked to borrow his cell phone. V.Q., who claimed he did not know Garcia but recognized him from around the area, handed Garcia his phone but asked him to return it after Garcia answered a call from another cell phone. Garcia responded, "[D]o you think I'm a thief?" and "I'll show you [a] thief" before demanding V.Q. give him his watch as well. V.Q. protested at first but after Garcia produced a knife, V.Q. felt "really panicked" and surrendered his watch. In speaking to a detective after the incident, V.Q. claimed he had "mental problems . . . messing with me right now," was "on pills for my anger problems as well as my depression," "felt really triggered," and "was this close away to starting like a confrontation but I know I can't do that."

¶3 Sheriff's deputies later arrested Garcia, finding V.Q.'s phone and a knife on his person. V.Q.'s watch was never recovered. V.Q. identified Garcia as the person who took his phone and watch. Garcia was indicted and convicted of one count of armed robbery. He was sentenced as described above and this appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Confrontation Clause

¶4 Garcia argues the trial court violated his right to confront and cross-examine a witness when it precluded him from questioning V.Q. about statements V.Q. had made to the detective following the incident. We review evidentiary rulings and limitations on witness examination for an abuse of discretion, *State v. Romero*, 248 Ariz. 601, ¶ 22 (App. 2020), but we review constitutional issues implicating the Confrontation Clause de novo.[1] *State v. Goudeau*, 239 Ariz. 421, ¶ 35 (2016). "The trial court exercises considerable discretion in determining the proper extent of cross-examination, and we will not disturb the court's ruling absent a clear showing of prejudice." *State v. Doody*, 187 Ariz. 363, 374 (App. 1996).

¶5 Before trial, the state moved to prevent Garcia from asking any questions about V.Q.'s anger problems or depression. Garcia opposed the state's motion, arguing that V.Q.'s statements—"I felt really triggered" and "I have anger problems"—were relevant to demonstrate the victim's motive to fabricate or exaggerate what happened. The trial court granted the state's motion, precluding Garcia from eliciting V.Q.'s statements, finding them to be irrelevant under Rule 402, Ariz. R. Evid. The court further found that even if V.Q.'s statements were marginally relevant, their "probative value would be substantially outweighed by the danger of undue prejudice" and would "confuse the issues" because they were unrelated to the charge of armed robbery.

¶6 On appeal, as he did below, Garcia contends V.Q.'s statements demonstrate a strong reaction, providing a "good motive to exaggerate and/or lie about what happened." He further maintains V.Q. was the sole witness and his "credibility was the central factor to be

[1] Although the state argues constitutional error is subjected to harmless error review and non-constitutional error is reviewed for prejudice, it concedes our supreme court has held the test is the same for both. "If it can be said that the error, beyond a reasonable doubt, had no influence on the verdict of the jury, then we will not reverse." *State v. McVay*, 127 Ariz. 450, 453 (1980). We therefore do not address the state's argument that the supreme court was mistaken in *McVay*; we are bound by that court's decisions and do not have the authority to modify or disregard its rulings. *State v. Smyers*, 207 Ariz. 314, n.4 (2004).

weighed by the jury," which made his right to cross-examine especially important.

¶7 "[C]ross-examination is a vital part of the right of confrontation conferred" by the Sixth Amendment's Confrontation Clause. *State v. Fleming*, 117 Ariz. 122, 125 (1977); *see also* Ariz. Const. art. II, § 24 ("In criminal prosecutions, the accused shall have the right . . . to meet the witnesses against him face to face . . . ."). Thus, trial courts cannot deny defendants "the opportunity of presenting to the trier of fact information which bears either on the issues in the case or on the credibility of the witness." *Fleming*, 117 Ariz. at 125. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Ariz. R. Evid. 401. However, "trial judges retain wide latitude . . . to impose reasonable limits on such cross-examination" concerning "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *see, e.g.*, *State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 8 (App. 2013).

¶8 We agree with the trial court's determination that V.Q.'s precluded statements were irrelevant "to the fact in consequence of determining the action" and did not "make[] it more or less probable." Garcia has cited no evidence or authority suggesting there is a connection between a person's "strong reaction" to being robbed and a tendency to lie. And, in any event, Garcia has not shown V.Q.'s passing reference to "anger issues" makes it more likely his reaction to being robbed was any stronger than the average person's would have been. Any person, not just one with mental health issues, conceivably could have a strong reaction to their property being taken with force; the existence of mental health issues does not make it more or less probable V.Q. would have had a strong reaction, and Garcia presented no offer of proof to the contrary. *See State v. Zuck*, 134 Ariz. 509, 513 (1982) ("[B]efore psychiatric history of a witness may be admitted . . . , the proponent of the evidence must make an offer of proof showing how it affects the witness's ability to observe and relate the matters to which he testifies."). Furthermore, the trial court permitted Garcia to question V.Q. about the inconsistent statements he had made and a detective testified V.Q. was "nervous, excited, a little angry" when he was interviewing him at the scene. Thus, the court did not abuse its discretion when it found V.Q.'s statements about his mental issues irrelevant to his credibility.

¶9 And even assuming for the sake of argument that V.Q.'s statements were relevant, the trial court gave two additional reasons for precluding them. First, the court found the danger of unfair or undue prejudice outweighed their probative value. *See* Ariz. R. Evid. 403. Second, the court found the statements would confuse the issues as they were unrelated to the charge of armed robbery. *See* Ariz. R. Evid. 403. Garcia does not address these additional grounds for the court's ruling on appeal and has therefore waived any alleged error as to them.[2] Ariz. R. Crim. P. 31.10(a)(7)(A) (an opening brief must include argument with "supporting reasons for each contention"); *see State v. Bolton*, 182 Ariz. 290, 298 (1995) ("Failure to argue a claim on appeal constitutes waiver of that claim.").

Unanimous Verdict

¶10 Garcia argues V.Q.'s testimony at trial rendered the armed robbery charge duplicitous and "created the risk of a non-unanimous verdict" when he testified that Garcia had taken his cell phone and his watch. He maintains reversal is required because the indictment and verdict form did not specify which allegation supports the single count of armed robbery. Because Garcia failed to object below, we review solely for fundamental error and prejudice. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20 (2005). Fundamental error is established by "showing that (1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, *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). If fundamental error is established under one of the first two factors, this court must also conduct a "fact intensive inquiry" to determine whether prejudice also occurred. *Id.* (quoting *Henderson*, 210 Ariz. 561, ¶ 26).

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[2] Even assuming Garcia did not waive his challenge to the trial court's Rule 403 ruling, the court did not abuse its discretion by finding evidence of V.Q.'s mental health issues substantially more prejudicial than probative and could confuse the issues for the jury as Garcia made no offer of proof to show V.Q.'s mental health issues affected his credibility. *See, e.g.*, *State v. Champagne*, 247 Ariz. 116, ¶ 53 (2019) (while evidence of witness's mental health may be relevant for credibility purposes, a trial court can exclude under Rule 403 unless an offer of proof is made showing how the "witness's ability to observe and relate the matters to which he testifies" is affected (quoting *State v. Delahanty*, 226 Ariz. 502, ¶ 18 (2011))).

¶11 Article II, § 23 of the Arizona Constitution guarantees a criminal defendant the right to a unanimous jury verdict. *State v. Millis*, 242 Ariz. 33, ¶ 21 (App. 2017). When an indictment is duplicitous by alleging "multiple distinct and separate offenses in one count," it creates "the risk of a non-unanimous jury verdict." *State v. O'Laughlin*, 239 Ariz. 398, ¶ 5 (App. 2016). Under the "same transaction test" however, the state can introduce evidence of separate acts as "part of a single criminal transaction" if the defendant does not offer different defenses or there is no "reasonable basis for distinguishing" the separate acts. *State v. Klokic*, 219 Ariz. 241, ¶¶ 15, 32 (App. 2008).

¶12 A person commits armed robbery if he is "armed with a deadly weapon" or "[u]ses or threatens to use a deadly weapon or dangerous instrument" in the course of committing a robbery. A.R.S. § 13-1904(A). Robbery is committed when a person "threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property." A.R.S. § 13-1902(A). A knife constitutes a deadly weapon. *State v. Williams*, 110 Ariz. 104, 105 (1973).

¶13 Garcia claims he presented multiple defenses at trial. First, he argued that he was just "messing with V.Q. when he refused to give the phone back" which led to V.Q. becoming upset and telling "the police a story to get them to help him get his phone back." Second, Garcia claimed he never displayed a knife or threatened V.Q. Third, he maintained it was possible V.Q.'s watch did not even exist.

¶14 There is no meaningful difference between the first and second defenses—both center on a claim that V.Q. fabricated Garcia's use of a knife. As for the third defense, even if V.Q. did not have a watch, that defense would not defeat the armed robbery charge because Garcia still kept V.Q.'s cell phone after producing his knife. Garcia does not suggest the jury might have concluded he took the watch but not the cell phone. Therefore, Garcia's sole defense essentially was that V.Q. had lied about the knife, which relates to both Garcia keeping V.Q.'s cell phone and taking V.Q.'s watch. *See Klokic*, 219 Ariz. 241, ¶ 36 (noting when same defense is offered for two criminal acts with no basis to distinguish them, they constitute single criminal transaction). Because these individual acts constitute a single criminal transaction and do not create the risk of a non-unanimous verdict, Garcia cannot establish the existence of any error, let alone fundamental, prejudicial error.

Disposition

¶15 Garcia's conviction and sentence are affirmed.