IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

FEI QIN,
Appellant.

No. 2 CA-CR 2022-0015
Filed May 18, 2023

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NOT FOR PUBLICATION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. CR20210439001
The Honorable Thomas Fink, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 Fei Qin appeals from his conviction and sentence for stalking. He argues the trial court abused its discretion by denying his motion to suppress and fundamentally erred in allowing the victim to testify at trial after previously invoking the privilege against self-incrimination. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *State v. MacHardy*, 254 Ariz. 231, ¶ 2 (App. 2022). Over the course of about nine days in February 2021, Qin repeatedly drove slowly by A.W.'s house, dumped trash at the end of A.W.'s driveway, and on two separate occasions slashed all the tires on A.W.'s truck. At the time, A.W. was a justice of the peace in Pima County. On February 14, A.W. confronted Qin as Qin drove past A.W.'s house. Qin stopped and opened his car door, scraping A.W.'s arm. A.W. pointed his handgun at the ground and ordered Qin to get on the ground. When Qin took a step toward A.W., he fired a warning shot into the ground. Law enforcement officers responded and ultimately arrested Qin. Officers later collected a knife from Qin's vehicle, which was consistent with the slashes to the tires A.W. had saved from the second time his vehicle had been targeted.

¶3 Qin was charged with one count of stalking. A jury found him guilty, and the trial court sentenced him to a presumptive 1.5-year term of imprisonment. Qin appealed, and we have jurisdiction under A.R.S. §§ 12-2101(A)(1), 13-4031, and 13-4033.

Discussion

Denial of Motion to Suppress

¶4 Before trial, Qin moved to suppress "the illegal arrest and fruits obtained . . . therein," arguing that A.W. acted as a state agent when confronting him on February 14. At the conclusion of the evidentiary hearing, the trial court denied the motion, explaining that there was

insufficient evidence to make findings regarding the nature and circumstances of Qin's arrest and concluded there was no evidence that, assuming A.W. in fact made a citizen's arrest, he had been acting as an agent of the state.

¶5 "When determining whether a party acted as an agent of the state, this court looks to (1) whether the government had knowledge of and acquiesced to the party's actions and (2) the intent of the party." *State v. Garcia-Navarro*, 224 Ariz. 38, ¶ 6 (App. 2010). Both elements must exist to support a suppression claim. *Id.* Qin argues on appeal that the trial court improperly shifted the burden to him to prove A.W. was acting as a state agent rather than requiring the state to prove A.W. was not. However, the state conceded during the hearing that it had the burden to prove A.W. was not acting as an agent of the state, and Qin's burden-shifting argument misapprehends the court's ruling. The court simply found that there was no evidence from which it could conclude that A.W. had been acting as a state agent. The court thus impliedly found the state had satisfied its burden of proving that A.W. was not acting as its agent. And contrary to Qin's argument that A.W. had "acted with the intent to be a private police officer," the evidence presented at the suppression hearing supports the court's conclusion that A.W. was not acting as an agent of the state.

¶6 A detective with the Pima County Sheriff's Department testified that the department did not authorize A.W.'s actions the day Qin was arrested, did not acquiesce to his conduct, and did not tell him how to act. He also testified that A.W. told deputies that his intent that day was to get evidence of who had been vandalizing his property. *See State v. Martinez*, 221 Ariz. 383, ¶ 33 (App. 2009) (no state agency if actor had "legitimate independent motivation for conducting the search" (quoting *United States v. Walther*, 652 F.2d 788, 792 (9th Cir. 1981))). The trial court did not abuse its discretion by denying Qin's motion to suppress.

Denial of Motion to Preclude Expert Testimony

¶7 Before trial, Qin moved to preclude the state's expert from testifying that the knife found in his car caused the damage to A.W.'s tires. He maintained the testimony was inadmissible under Rule 702, Ariz. R. Evid. That rule provides that a witness qualified as an expert by knowledge, skill, experience, training, or education may give opinion testimony if (a) the expert's knowledge will help the trier of fact understand the evidence or determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles

and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case. Ariz. R. Evid. 702.

¶8 At the hearing on the motion, a forensic scientist in the firearm and tool mark unit of the Arizona Department of Public Safety testified about his twenty years of experience, including his degrees and training. He explained the general process for evaluating knife marks, his process of analyzing the knife and tire damage in this case, and that the known error rate for this analysis is less than one percent. The trial court concluded that all four prongs of Rule 702 had been satisfied and denied Qin's motion.

¶9 Qin maintains the trial court's ruling was erroneous because prongs (b) and (d) were not met here. We review the trial court's ruling on the admissibility of expert testimony for an abuse of discretion. *State v. Foshay*, 239 Ariz. 271, ¶ 5 (App. 2016). Qin argues that the comparative analysis was based on insufficient facts or data because it is purely subjective, the test cuts were not performed under the same conditions as the cuts to A.W.'s tires, and the expert did not test other knives. But while the expert acknowledged that the "pattern comparison process" is subjective, he also explained that he takes proficiency tests each year and complied with the methodology used by the Association of Firearm and Tool Mark Examiners, which is supported by peer-reviewed studies. *See State ex rel. Montgomery v. Miller*, 234 Ariz. 289, ¶ 24 (App. 2014) (factors for reliability include whether technique has been tested, is subjected to peer review, and is generally accepted within the community). The expert further testified that testing another knife would not have been standard practice. Qin's argument is essentially a challenge to the scientific weight to be placed on the expert's results, a question that is "emphatically the province of the jury to determine." *See State v. Romero*, 239 Ariz. 6, ¶ 16 (2016). Thus, Qin has not demonstrated the court abused its discretion by denying his motion. *See State v. Armstrong*, 208 Ariz. 345, ¶ 40 (2004) ("We will not find that a trial court has abused its discretion unless no reasonable judge would have reached the same result under the circumstances.").

Fundamental Error

¶10 At the evidentiary hearing on Qin's motion to suppress on state agency grounds, A.W. invoked his privilege against self-incrimination and refused to testify regarding the February 14 incident leading to Qin's arrest. Qin argued that when A.W. invoked the privilege at the evidentiary hearing it was "a forever proposition." He therefore could not "cherry pick" and choose to testify regarding the event at trial as it would violate Qin's "confrontational rights." The trial court deferred ruling on the

question at that time then overruled Qin's objection to A.W.'s testimony at trial.

¶11 For the first time on appeal, Qin argues the trial court erred by allowing A.W.'s testimony because it violated due process. He appears to concede our review of this issue is limited to fundamental error. *See State v. Kinney*, 225 Ariz. 550, ¶ 7 (App. 2010) (objection on one ground does not preserve issue for appeal on another ground). To establish fundamental error, Qin must show error that went to the foundation of his case, took from him a right essential to his defense, or that was so egregious he could not possibly have received a fair trial. *See State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018). If error occurred under either of the first two prongs, Qin must also show prejudice. *Id.*

¶12 Qin, however, has failed to cite any authority to support his contention that error occurred, as required by Rule 31.10(a)(7)(A), Ariz. R. Crim. P. That alone is sufficient to find his claim waived on appeal. *See State v. Carver*, 160 Ariz. 167, 175 (1989); *State v. Moody*, 208 Ariz. 424, n.9 (2004) (claim waived because "[m]erely mentioning an argument is not enough"). Notwithstanding an insufficient showing of error, Qin has also failed to argue, let alone establish, prejudice.

¶13 At trial, Qin extensively cross-examined A.W. regarding the February 14 events. *Cf. State v. Hegyi*, 242 Ariz. 415, ¶ 10 (2017) (defendant who testifies at trial may not invoke Fifth Amendment privilege to avoid cross-examination). And, more importantly, the trial court permitted Qin to reassert his suppression motion based on A.W.'s testimony. Thus, any conceivable prejudice Qin may have sustained from A.W.'s invocation of privilege at the evidentiary hearing was remedied by the reassertion of the motion based on A.W.'s trial testimony. On this record, we cannot say the court committed error, fundamental or otherwise.

Disposition

¶14 We affirm Qin's conviction and sentence.