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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. CHARLES R. PINSON, Appellant.	2 CA-CR 2008-0391 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20081824

Honorable Stephen C. Villarreal, Judge

AFFIRMED

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V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant Charles Pinson was convicted of burglary in the third degree and criminal damage. On appeal, Pinson challenges his conviction for criminal damage, contending the trial court erred when it instructed the jury it must accept the parties' factual stipulation. For the reasons that follow, we affirm.

Facts and Procedural Background

¶2 On the night of April 30, 2008, Pinson acted as a lookout while another man, Bernie Baca, forced open the front door of an automotive parts store in midtown Tucson, entered the store, and walked out with a motorized scooter. Both men were charged with third-degree burglary and criminal damage in an amount between one thousand and two thousand dollars in value. At trial, the parties stipulated that the damage to the door was valued at $1,689.97. The jury found Pinson guilty of both charges, and the trial court sentenced him to concurrent, mitigated prison terms of three years for burglary and one year for criminal damage. This appeal followed.

Discussion

¶3 Pinson argues the trial court erroneously instructed the jury that it must accept the parties' stipulation regarding the specific dollar amount of damage to the door "as being proven." Pinson did not object to this instruction below. In the absence of any objection at trial, we review a trial court's instruction on the significance of a stipulation for fundamental error. *State v. Tucker*, 215 Ariz. 298, ¶ 15, 160 P.3d 177, 187 (2007). To succeed under this

standard, a defendant must show both that any error was fundamental and that it caused him prejudice. *State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005).

¶4 The parties stipulated that "[o]n April 30, 2008, Bernie Baca entered the Pep Boys Store at 4491 East Speedway without permission, took property belonging to Pep Boys causing damage to the entrance door in the amount of $1,689.97." Before and after reading the stipulation, the court instructed the jury that it was to "accept those facts as having been proved." Pinson contends that because there was no evidence of the value of the damage other than through the stipulation, his conviction of the charge of criminal damage with a value of between one and two thousand dollars "can only be attributed to . . . the trial court's erroneous instruction that the jury was obligated to treat the stipulated value of $1,689.97 as being proven."[1]

¶5 "In the criminal context, our courts have found stipulations to be conclusive evidence, binding on the parties, for which the parties need offer no further proof." *State v. Virgo*, 190 Ariz. 349, 353, 947 P.2d 923, 927 (App. 1997). But, "a jury may accept or reject any aspect of a stipulation and the jury must always find that the State proved the elements of the offense beyond a reasonable doubt." *State v. Allen*, 220 Ariz. 430, ¶ 16, 207 P.3d 683, 686 (App. 2008). It is therefore improper for a trial court to suggest to the jury that it is bound by a stipulation. *Id.* (stipulation binding on parties, but not on the jury).

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[1]Pinson "concedes that he cannot demonstrate prejudice as to the burglary charge because no reasonable jury could have reached a different verdict in light of Baca's testimony combined with the rest of the trial evidence."

¶6 Relying on *State v. Carreon*, 210 Ariz. 54, ¶ 47, 107 P.3d 900, 910 (2005), the state contends any error in the trial court's comments was not fundamental. We agree. In *Carreon*, the trial court instructed the jury that a stipulation that the defendant was prohibited from possessing firearms, an element of a charge of misconduct involving weapons, "'should be considered by you as fact during your deliberations.'" *Id.* ¶ 44. Our supreme court noted that "[t]he judge should not have instructed the jury that the stipulation satisfied the State's burden of proving an element of the crime." *Id.* ¶ 47. However, finding the defendant had neither objected at trial nor presented any argument to contradict the stipulation, and that "the final jury instructions correctly defined the effect of a stipulation," it concluded no fundamental error had occurred. *Id.* ¶¶ 47-48.

¶7 The burden of persuasion on fundamental error review is shifted to the defendant, to "discourage [him] from 'tak[ing] his chances on a favorable verdict, reserving the "hole card" of a later appeal on [a] matter that was curable at trial, and then seek[ing] appellate reversal.'" *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Valdez*, 160 Ariz. 9, 13-14, 770 P.2d 313, 317-18 (1989) (first alteration added), *overruled in part on other grounds by Krone v. Hotham*, 181 Ariz. 364, 366-67, 890 P.2d 1149, 1152 (1995). To prevail, therefore, Pinson must show that any error in the trial court's instruction caused him prejudice. *Id.* ¶ 20. However, like *Carreon*, Pinson has failed to present any argument contradicting the facts asserted in the stipulation.

¶8 Furthermore, as in *Carreon*, the final jury instructions in this case correctly stated that any stipulation should be considered as part of the evidence. Pinson does not allege this instruction was erroneous, and we are not persuaded by his speculation that the jury did not consider it because it was "buried" with other instructions. Indeed, the court also instructed the jury that it should consider all of the court's instructions, and we presume that it did so. *See State v. Newell*, 212 Ariz. 389, ¶ 69, 132 P.3d 833, 847 (2006). Thus, even though the court's verbal instruction that the jury was to accept the facts in the stipulation as "having been proved" was erroneous, Pinson has failed to show he was prejudiced by that instruction. *See Carreon*, 210 Ariz. 54, ¶ 48, 107 P.3d at 910; *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607.

Disposition

¶9 For the reasons stated above, we affirm Pinson's conviction and sentence for criminal damage.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge