FILED BY CLERK
AUG 30 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ANITA ELAINA VEGA, Appellant.	)	2 CA-CR 2009-0392 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091114001

Honorable Terry L. Chandler, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Michael J. Miller
Tucson
Attorneys for Appellant

E S P I N O S A, Judge.

¶1 After a jury trial, appellant Anita Vega was convicted of five counts of second-degree trafficking in stolen property and sentenced to concurrent prison terms of 6.5 years. On appeal, Vega argues the trial court erred in instructing the jury by commenting on the evidence and shifting the burden of proof from the state to the defense. We affirm.

Facts and Procedural History

¶2 We view the facts in the light most favorable to sustaining the verdict, resolving all reasonable inferences against the defendant. *State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994). On January 20, 2009, the home of R. and his wife was burglarized sometime between 9:30 and 11:00 a.m. Items taken included a sports card collection in specialized containers valued at $3,800 and an assortment of jewelry worth over $8,000. That same day, F., who was unemployed, telephoned Vega and asked her to help him sell some jewelry, which she agreed to do. Over the next seventeen days, Vega drove F. to a number of pawn shops and a sports memorabilia shop, selling the jewelry and trying unsuccessfully to sell the cards. Vega conducted each of the transactions, identifying herself through signature and fingerprints.

¶3 Vega was charged with five counts of second-degree trafficking in stolen property and one count of theft by control. The jury found her guilty of all five trafficking charges, and the trial court sentenced her as specified above. This court has jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Absence of Other Persons

¶4 For the first time on appeal, Vega contends the following jury instruction constituted a comment on the evidence, in violation of article VI, § 27 of the Arizona Constitution:

> It is no defense to the crime charged against the defendant that another person or persons not now on trial might have participated or cooperated in the crime. You should not guess the reason for the absence from the courtroom of such other person or persons. The only matter before you for your decision is the guilt or innocence of the defendant.

Because she did not object on this ground in the trial court, she has forfeited the right to seek relief for all but fundamental, prejudicial error.[1] *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). She has failed to sustain this burden. Vega neither explains how this instruction amounted to a comment on the evidence nor how it prejudiced her in any way. Rather, she simply asserts that "[w]ithout this instruction, th[is] court cannot say beyond a reasonable doubt that the jury would not have credited [her] testimony and acquitted her." Vega has not meaningfully argued this issue, and we cannot say the court erred by giving this instruction, fundamentally or otherwise. *See*

[1]Vega insists she preserved this issue for review, claiming the argument she asserted in the trial court implied she was objecting on the ground that the instruction was a comment on the evidence. Thus, she contends, she is entitled to a review for harmless error, rather than fundamental error. But because she has failed to colorably argue this issue on appeal, it is waived regardless of the standard of review we otherwise would employ. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's brief "shall contain the contentions of the appellant . . . and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on"); *State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004) (claim waived where argument insufficient for review).

State v. Fernandez, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it), *cert. denied*, __ U.S. __, 129 S. Ct. 460 (2008). Consequently, this claim has been waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

Permissible Inferences

¶5 Vega also argues the trial court improperly shifted the burden of proof from the state to the defense when it instructed the jury as follows:

> Proof of possession of property recently stolen, unless satisfactorily explained, may give rise to an inference that the person in possession of the property was aware of the risk that it had been stolen or in some way participated in its theft.

This instruction mirrors the language of A.R.S. § 13-2305(1). We view jury instructions "in their entirety when determining whether they adequately reflect the law." *State v. Gallegos*, 178 Ariz. 1, 10, 870 P.2d 1097, 1106 (1994). "If the instructions 'are substantially free from error, the defendant suffers no prejudice by their wording.'" *Id.*, *quoting State v. Walton*, 159 Ariz. 571, 584, 769 P.2d 1017, 1030 (1989).

¶6 Vega relies on *State v. Mohr*, 150 Ariz. 564, 724 P.2d 1233 (App. 1986), in which this court found the following jury instruction unconstitutional:

> [P]roof that the Defendant was in possession of property recently stolen, unless satisfactorily explained, gives rise to the inference that the Defendant in possession of the property was aware of the risk that it had been stolen or in some way participated in its theft.

Id. at 567. We found the instruction created an improper mandatory presumption because it permitted "no room for the jury to exercise its discretion" as to the weight of the

evidence, and it "shifted the burden of proof to appellant on the element of knowledge in each offense." *Id.* We then concluded that a jury instruction pursuant to A.R.S. § 13-2305(1) complies with due process "only if it is stated in permissive fashion." *Id.* at 569.

¶7 The instruction the trial court gave here contains permissive language as required by *Mohr*. Vega nonetheless argues the instruction impermissibly shifted the burden of proof to her because it required that she "satisfactorily explain" her possession of stolen property, making the inference mandatory rather than permissive, contradicting the language of the instruction suggesting the inference is permissive. But the plain wording of the instruction undermines Vega's contention. The instruction made clear that, absent a satisfactory explanation of her possession of recently stolen property, the jury was not required to infer guilt.[2] *Cf. County Court of Ulster County v. Allen*, 442 U.S. 140, 161 (1979) (inference permissive when "it could be ignored by the jury even if there was no affirmative proof offered by defendants in rebuttal").

¶8 Vega also suggests that under the specific circumstances of her case, the jury was "likely" to "shift the burden to the defense" based on this instruction. But the record before us permits the inference that it is unlikely the jury misinterpreted the

[2]Vega also argues the trial court should have supplied the jury with a more complete explanation of how the defense might "satisfactorily explain[]" her possession of stolen property, and should have cautioned the jury that any defense offered did not shift the burden of proof. She did not, however, provide the court an alternative instruction, or even raise the issue below, and has not alleged, much less established, that this resulted in error that can be characterized as fundamental; she therefore has waived this issue. *See State v. Totress*, 107 Ariz. 18, 20, 480 P.2d 668, 670 (1971) (failure to object below waives all but fundamental error); *Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140 (failure to argue error fundamental waives issue on appeal).

instruction. During closing argument, Vega's counsel stressed that the burden of proof rested with the state, and that Vega was not required to prove her own innocence. Counsel also questioned the sufficiency of the evidence to support the challenged inference. *See State v. Johnson*, 205 Ariz. 413, ¶ 11, 72 P.3d 343, 347 (App. 2003) (appellate court may consider closing arguments in evaluating challenged instructions). Also, during rebuttal argument, the prosecutor acknowledged the state had the burden of proving Vega was guilty of the charged offenses and made clear that Vega was not required to offer any evidence. Additionally, the jury's question as to the meaning of "recklessly" suggests it properly focused on whether Vega had the requisite intent to commit the crimes. Accordingly, we see no error.

Disposition

¶9 For the foregoing reasons, Vega's convictions and the sentences imposed are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge