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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STATE OF ARIZONA, Appellee, v. SERENA MARIE CABALLERO, Appellant.	2 CA-CR 2008-0238 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20072200

Honorable Howard Hantman, Judge

AFFIRMED IN PART; VACATED IN PART

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E S P I N O S A, Judge.

¶1 After a jury trial, appellant Serena Marie Caballero was convicted of one count each of criminal damage in the amount of $2,000 or more, fleeing from a law enforcement vehicle, and endangerment with a risk of physical injury. Finding Caballero had two historical prior felony convictions, the trial court sentenced her to concurrent, partially mitigated prison terms totaling four years, with credit for time served, and ordered that she pay attorney fees and an indigent assessment. On appeal, Caballero raises a number of issues that she contends require reversal or reduction of her convictions and sentences. We affirm in part and vacate in part.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the verdicts. *See State v. Cruz*, 218 Ariz. 149, n.1, 181 P.3d 196, 202 n.1 (2008). In August 2006, Pima County Deputy Steven Scott stopped Caballero because the car she was driving did not have a license plate. Although Caballero initially complied, coming to a full stop in a nearby parking area, she sped away as Scott was about to exit his patrol car. Scott pursued at a speed of forty miles per hour for nearly one mile. During the chase, Caballero drove through a four-way stop intersection without slowing and struck a pick-up truck that S. was driving as it crossed the intersection.

¶3 In June 2007, Caballero was charged with one count each of criminal damage in the amount of $10,000 or more, fleeing from a law enforcement vehicle, and endangerment with a substantial risk of imminent death. On the second day of trial, the court

granted Caballero's motion for judgment of acquittal on the criminal damage count, finding no evidence to support damage of $10,000 or more; the court, however, instructed the jury on the lesser-included offense of criminal damages in the amount of $2,000 or more. The jury found Caballero guilty and she was sentenced as described above. This appeal followed.

Discussion

Criminal Damage

¶4 Caballero contends the evidence at trial failed to support a conviction for criminal damage in the amount of $2,000 or more. We will affirm a jury's finding of guilt if it is supported by substantial evidence. *State v. Garza*, 196 Ariz. 210, ¶ 3, 994 P.2d 1025, 1026 (App. 1999). Substantial evidence is proof that reasonable persons could deem adequate and sufficient to find the defendant guilty beyond a reasonable doubt. *State v. Fulminante*, 193 Ariz. 485, ¶ 24, 975 P.2d 75, 83 (1999).

¶5 Evidence was presented at trial that the estimated value of a new 2006 Toyota Tundra pick-up truck, the same model and year as the one S. was driving in August of 2006, ranged from $18,000 to $30,000. The truck received extensive, significant damage, including to the undercarriage on which the entire truck rests. A witness testified that the cost to replace the damaged parts—excluding labor, glass, and trim pieces—would have exceeded $1,500 and that the insurance company purchased the vehicle rather than paying for its repair. Based on this evidence, the jury could reasonably infer the cost of repairs to

the truck exceeded $2,000. *See State v. Printz*, 125 Ariz. 300, 304, 609 P.2d 570, 574 (1980) (when determining value, jury may utilize its common sense).

Jury Instructions

Willits Instruction

¶6 Caballero next contends the court erred in denying her request for a *Willits*[1] instruction because the state allowed the car she was driving to be sold and, thus, she was prevented from examining it.[2] Caballero argues she collided with S. because the car's brakes were defective and an examination of the car would have revealed this exculpatory evidence, which would have shown that she was only negligent rather than reckless, the required mental state for being found guilty of endangerment. *See* A.R.S. § 13-1201(A).

¶7 If the state loses or destroys potentially exculpatory evidence that was accessible to it, a *Willits* instruction informs the jury it may infer the evidence is against the state's interest. *Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d at 93. To be entitled to a *Willits* instruction, a defendant must show both that the state failed to preserve material evidence and that the defendant thereby suffered prejudice. *Id.* We will not reverse a trial court's ruling on a *Willits* instruction absent a clear abuse of discretion. *State v. Bolton*, 182 Ariz.

[1]*State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

[2]Caballero also asserts the trial court erroneously believed a defendant must show the state had acted in bad faith to be entitled to a *Willits* instruction. Because Caballero was not entitled to a *Willits* instruction, as discussed *infra*, we need not address this argument. *See State v. Aguilar*, 218 Ariz. 25, ¶ 22, 178 P.3d 497, 503 (App. 2008) (upholding trial court's ruling if correct on any ground).

290, 309, 896 P.2d 830, 849 (1995). Moreover, rejecting a *Willits* instruction when a defendant does not establish the evidence would have a tendency to exonerate him or her is not an abuse of discretion. *Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d at 93.

¶8 After the collision, the car Caballero was driving was towed and the state provided notice to the car's registered owner. Shortly thereafter, the owner sold the car to the towing company, which then sold it in November 2006. Thus, the state did not have exclusive control of or access to the evidence. *See State v. Walters*, 155 Ariz. 548, 551, 748 P.2d 777, 780 (App. 1987) (no abuse of discretion denying *Willits* instruction where appellant could have obtained allegedly exculpatory evidence sought and state did not have exclusive control of evidence). Additionally, the state did not have a duty to preserve the car because it was not obvious Caballero would later argue its brakes were defective.[3] *See State v. Tyler*, 149 Ariz. 312, 317, 718 P.2d 214, 219 (App. 1986) (no abuse of discretion in rejecting *Willits* instruction for evidence that is not obvious, material, and reasonably accessible to the state). We cannot say the trial court abused its discretion in refusing to give the requested instruction.

Reasonable Doubt Instruction

¶9 Caballero next argues the reasonable doubt instruction the trial court gave pursuant to *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995), improperly "[r]elieved the

[3]Indeed, the facts appear to undermine Caballero's argument that the brakes failed immediately before she collided with the truck S. was driving. For example, Caballero was able to bring the car to a complete stop when Deputy Scott first pulled her over.

[s]tate of its [c]onstitutional [b]urden of [p]roof." Our supreme court repeatedly has rejected similar challenges to the instruction. *See, e.g., State v. Garza*, 216 Ariz. 56, ¶ 45, 163 P.3d 1006, 1016-17 (2007); *State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916 (2006); *State v. Roseberry*, 210 Ariz. 360, ¶ 55, 111 P.3d 402, 411-12 (2005); *State v. Dann*, 205 Ariz. 557, ¶ 74, 74 P.3d 231, 249-50 (2003). We are bound to follow our supreme court's decisions. *See State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003). In fact, Caballero concedes our supreme court has rejected similar arguments. Therefore, we do not address this argument further.

Trial Court Comment

¶10 As an eyewitness was testifying that the road where the collision had occurred was rough and had potholes, the trial judge remarked, "that's everywhere." For the first time on appeal, Caballero argues the court's comment "told the jury [the witness'] testimony was wrong." She maintains this violated article VI, § 27 of the Arizona Constitution prohibiting judicial comments on the evidence.

¶11 Because Caballero failed to object below, we review for fundamental, prejudicial error only. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d, 601, 607 (2005). Fundamental error goes to the foundation of the case, denies the defendant a right essential to his or her defense, and is of such magnitude that the defendant could not have received a fair trial. *State v. Roque*, 213 Ariz. 193, ¶ 65, 141 P.3d 368, 388 (2006). The Arizona Constitution forbids judges from commenting on the evidence at trial. Ariz. Const. art. VI,

§ 27; *Roque*, 213 Ariz. 193, ¶ 66, 141 P.3d at 388. A court violates this provision when it expresses an opinion regarding what the evidence proves or "interfere[s] with the jury's independent evaluation of the evidence." *Roque*, 213 Ariz. 193, ¶ 66, 141 P.3d at 388, *quoting State v. Rodriguez*, 192 Ariz. 58, ¶ 29, 961 P.2d 1006, 1011 (1998).

¶12 Caballero has not sustained her burden of establishing either error or prejudice. Contrary to her assertion, the judge's offhand remark did not imply that the witness was incorrect or suggest that Cabellero's conduct was reckless. Moreover, Caballero did not present the defense that she could not stop at the intersection because of potholes; therefore, the comment, even if improper, could not have undermined her defense and could not reach the level of fundamental error. *Cf. State v. Dann*, 205 Ariz. 557, ¶¶ 49-51, 74 P.3d 231, 245 (2003) (court improperly commented on evidence when it instructed jury that witness's testimony was "not what happened" and witness had "misspoken").

Restitution Order

¶13 At sentencing, the trial court ordered Caballero to pay $400 in attorney fees and a $25 indigent assessment fee. In its sentencing minute entry, the court ordered these fees reduced to a "criminal restitution order [as of July 23, 2008] pursuant to A.R.S. § 13-805." On appeal, Caballero argues the court fundamentally erred because it imposed an illegal sentence by entering the criminal restitution order (CRO) before Caballero completed her prison sentence.[4] Because she did not raise this issue at trial, we again review for

[4]Although in her reply brief, Caballero appears to withdraw this argument, we are not bound by a defendant's erroneous concession, particularly if fundamental error is involved.

fundamental, prejudicial error only. *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d, at 607. Imposition of an illegal sentence, however, constitutes fundamental error. *State v. Joyner,* 215 Ariz. 134, ¶ 5, 158 P.3d 263, 266 (App. 2007); *State v. Soria*, 217 Ariz. 101, ¶ 4, 170 P.3d 710, 711 (App. 2007).

¶14 A trial court retains jurisdiction of a case to modify how court-ordered payments are made until they are paid in full or until the defendant completes his or her sentence. § 13-805(A). Additionally, the trial court must enter a CRO for unpaid fees owed to the state and for restitution owed to individuals. § 13-805(A)(1)-(2). The court is required to enter the CRO when "the defendant completes . . . [his or her] sentence." § 13-805(A).[5]

See State v. Fernandez, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court of appeals will not ignore fundamental error when it finds it), *cert. denied*, ___ U.S. ___, 129 S. Ct. 460 (2008). We also note that our decision in *State v. Lewandowski* was published the day after Caballero filed her reply brief and that she has since cited it in a notice of supplemental authority. No. 2 CA-CR 2008, 2009 WL 838581 (Ariz. Ct. App. Mar. 31, 2009).

[5]Section 13-805(A) further provides:

> [t]he trial court shall retain jurisdiction of the case for purposes of modifying the manner in which court-ordered payments are made until paid in full or until the defendant's sentence expires.
>
> At the time the defendant completes the defendant's period of probation or the defendant's sentence, the court shall enter both:
>
> > 1. A criminal restitution order in favor of the state for the unpaid balance, if any, of any fines, costs, incarceration costs, fees, surcharges or assessments imposed.

¶15 Under the plain language of the statute[6] and contrary to the state's assertion, a court "shall" enter the CRO for an outstanding balance owed to the state "at the time" a defendant "completes . . . [his or her] sentence." § 13-805(A). In our recent decision, *State v. Lewandowski*, No. 2 CA-CR 2008-0057, ¶ 8, 2009 WL 838581 (Ariz. Ct. App. Mar. 31, 2009), we concluded that a trial court "does not . . . [have] authority to enter the CRO before [a defendant's] . . . term of imprisonment has expired."

¶16 The statute also provides that, similar to a civil judgment, a CRO accrues interest at a ten percent annual rate until it is paid in full. A.R.S. §§ 13-805(C), 44-1201(A).[7] Caballero argues premature entry of the CRO causes interest to impermissibly accrue while she is serving her prison sentence. We answered this precise question in *Lewandowski*, noting that this situation violated A.R.S. § 13-805, and established prejudice. *Lewandowski*, 2009 WL 838581, ¶¶ 11, 15. Because Caballero's claim is identical to that presented in *Lewandowski*, we find its holding dispositive and vacate the trial court's CRO.

> 2. A criminal restitution order in favor of each person entitled to restitution for the unpaid balance of any restitution ordered.

[6]To determine the meaning of a statute, we first look to its plain language and presume its words have their obvious meaning. *See State v. Garcia*, 219 Ariz. 104, ¶ 6, 193 P.3d 798, 800 (App. 2008). We do not look beyond a statute's language and employ principles of statutory construction unless it is ambiguous. *See Nordstrom v. Cruikshank*, 213 Ariz. 434, ¶ 14, 142 P.3d 1247, 1252 (App. 2006).

[7]"Enforcement of a criminal restitution order by any person who is entitled to restitution or by the state includes the collection of interest that accrues pursuant to § 44-1201 in the same manner as any civil judgment. A criminal restitution order does not expire until paid in full." A.R.S. § 13-805(C).

Disposition

¶17 We affirm Caballero's convictions and sentences, with the exception of that portion of the trial court's sentencing order reducing the imposed fee and assessment to a CRO, which we vacate.

PHILIP G. ESPINOSA, Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge