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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

MARIO RIVERA, *Appellant*.

No. 1 CA-CR 15-0562
FILED 10-4-2016

Appeal from the Superior Court in Maricopa County
No. CR2013-110648-001
The Honorable Karen A. Mullins, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Alice Jones
Counsel for Appellee

The Stavris Law Firm PLLC, Scottsdale
By Christopher Stavris
Counsel for Appellant

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MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Judge Margaret H. Downie joined.

T H O M P S O N, Judge:

¶1 Mario Rivera (defendant) appeals his convictions and sentences for burglary in the third degree and possession of burglary tools. For the following reasons, we affirm.

FACTS¹ AND PROCEDURAL HISTORY

¶2 On February 5, 2013, J.W. returned to her apartment, opened the front door, and saw a man inside drop a knife and run out the back patio door. J.W. immediately called police who, after responding, were unable to locate a suspect. Marks on the patio door indicated the suspect used the knife to pry open the door. A number of electronic items, video games, and a bike were missing from J.W.'s home. Although J.W. did not see the suspect's face, she described his hair and build for police.

¶3 On March 5, 2013, Phoenix Police Officer Gantt responded to a call regarding two black-clothed men on bicycles peering into parked vehicles at J.W.'s apartment complex. Upon arriving at the scene, Gantt observed defendant, wearing a black jacket, and another man near a Suburban with the vehicle's hood up. When the men noticed Gantt, they closed the hood and fled. Gantt apprehended defendant, and after searching his pockets, found a toy truck and a "tiny screwdriver set[.]"

¶4 After Gantt informed defendant of his *Miranda* rights, defendant explained that he was authorized to work on the Suburban's "braking system[.]" but he could not provide the name of the vehicle's owner. Defendant further explained that all the Suburban's doors were

¹ "We view the facts in the light most favorable to upholding the verdicts and resolve all reasonable inferences against the defendant." *State v. Harm*, 236 Ariz. 402, 404 n.2, ¶ 3, 340 P.3d 1110, 1112 n.2 (App. 2015) (quoting *State v. Valencia*, 186 Ariz. 493, 495, 924 P.2d 497, 499 (App. 1996)).

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unlocked so he was able to enter the vehicle and unlock the hood. However, Gantt observed that only the rear passenger door was unlocked, and when confronted with this information, defendant said he used that door to gain entry into the vehicle.

¶5 Other officers located the niece of the Suburban's owner, J.M., and she identified the toy truck found in defendant's possession as belonging to her son, explaining it had been on the Suburban's rear seat the previous evening when she last parked the vehicle at home.² Gantt took defendant into custody, and defendant admitted that he found the toy in the Suburban.

¶6 Defendant's "long curly hair . . . clicked" with Gantt as matching the description provided by J.W. of the suspect who had burglarized her apartment a month earlier. Police provided J.W. with a photo lineup, and, based on defendant's hair and build, she identified him as the man she saw in her apartment in February.

¶7 For the March 5 incident, the state charged defendant by information with one count of burglary in the third degree (nonresidential structure), a class 4 felony (count 1), and possession of burglary tools, a class 6 felony, specifically alleging: "[Defendant], on or about the 5th day of March, 2013, possessed a screwdriver, an explosive, tool instrument or other article, adapted or commonly used for committing any form of burglary and intended to use or permitted its use in the commission of a burglary" (count 2). With respect to the incident at J.W.'s residence, the state charged defendant with burglary in the third degree, incorrectly alleging the date of the occurrence to be "on or about the 5th day of March, 2013[.]" (count 3). Before trial, the state, without objection, successfully moved to amend the alleged date in count 3 from March 5 to February 5, 2013. The state similarly, and mistakenly, amended the date of the offense in count 2 from March 5 to February 5, 2013.

¶8 At trial, J.W. was unable to identify defendant as the man with the knife in her apartment, and, at the state's request, the court dismissed count 3 with prejudice. As for the remaining counts, defendant sought a judgment of acquittal pursuant to Arizona Rule of Criminal Procedure (Rule) 20 because the victim's name in count 1 did not perfectly match the name contained in the information, and, as to count 2, there was no evidence of a screwdriver being used during the course of a nonresidential

² J.M. did not live at the apartment complex where Gantt located the Suburban.

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burglary allegedly committed on February 5, 2015. In response, the state moved to amend the information to conform to the trial evidence.

¶9 The court denied defendant’s Rule 20 motion, and, over defendant’s objection, granted the state’s motion to amend. Specifically, the victim’s name in count 1 was amended from “DAVID SANTIAGO” to “DAVID SANTIAGO LOPEZ” and count 2 was amended to reflect the initially alleged date of March 5, 2013.

¶10 The jury found defendant guilty on counts 1 and 2. The jury also found that the state sufficiently proved defendant committed the offenses while on probation for a felony offense. The court sentenced defendant as a category 3 repetitive offender and imposed concurrent presumptive prison terms, the longest of which is 10 years. Defendant obtained relief under Rule 32.1(f) to pursue a delayed notice of appeal, which he timely filed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1) (2016), 13-4031 (2016), and -4033(A)(1) (2016).³

DISCUSSION

I. Rule 20

¶11 Defendant argues the court erred in denying his Rule 20 motion. Our review is de novo. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993).

¶12 A judgment of acquittal is only appropriate “if there is no substantial evidence to warrant a conviction.” Ariz. R. Crim. P. 20(a); *State v. Fulminante*, 193 Ariz. 485, 493, ¶ 24, 975 P.2d 75, 83 (1999). “Substantial evidence is evidence that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant’s guilt beyond a reasonable doubt.” *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980) (internal quotation omitted). We will not reverse the superior court’s denial of a motion for a judgment of acquittal or a jury’s guilty verdict unless there is a complete absence of probative facts supporting the trier-of-fact’s decision. *State v. Johnson*, 215 Ariz. 28, 29, ¶ 2, 156 P.3d 445, 446 (App. 2007); *State v. Carlisle*, 198 Ariz. 203, 206, ¶ 11, 18 P.3d 391, 394 (App. 2000).

³ Absent material changes from the relevant date, we cite a statute’s current version.

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¶13 Regarding count 1, defendant contends that the only evidence supporting his conviction was his incriminating statements to officer Gantt. Such “uncorroborated” evidence, according to defendant, requires reversal of his conviction pursuant to the corpus delicti doctrine.⁴

¶14 Because defendant did not raise this argument in superior court, we review for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (stating failure to object to alleged trial error results in fundamental error review). “Before we may engage in a fundamental error analysis, however, we must first find that the trial court committed some error.” *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342, (1991).

¶15 As relevant here, a person commits burglary in the third degree by “[e]ntering or remaining unlawfully in . . . a nonresidential structure . . . with the intent to commit any theft or any felony therein.” A.R.S. § 13-1506(A)(1) (2010). By definition, the Suburban in this case is a “nonresidential structure.” A.R.S. § 13-1501(10), (12) (2010).

¶16 “The corpus delicti doctrine ensures that a defendant’s conviction is not based upon an uncorroborated confession or incriminating statement.” *State v. Morris*, 215 Ariz. 324, 333, ¶ 34, 160 P.3d 203, 212 (2007). The rule requires the state to present sufficient evidence— independent of the statements—to raise a reasonable inference that the “alleged injury to the victim . . . was caused by criminal conduct rather than by . . . accident.” *Id.* (quotation and citation omitted). The evidence supporting the inference may be circumstantial, *State v. Hall*, 204 Ariz. 442, 453, ¶ 43, 65 P.3d 90, 101 (2003), and needs only to support a reasonable inference that “the crime charged was actually committed by some person,” *State v. Hernandez*, 83 Ariz. 279, 282, 320 P.2d 467, 469 (1958).

¶17 Here, sufficient evidence independent of defendant’s statements establishes corpus delicti for the burglary of an unoccupied structure. Defendant matched the description of the subjects observed

⁴ We decline the state’s request to address, as a matter of first impression, whether the corpus delicti doctrine still is valid under Arizona law. Our supreme court recently decided a case involving corpus delicti. *See State v. Carlson*, 237 Ariz. 381, 387-89, ¶¶ 8-16, 351 P.3d 1079, 1086-87 (2015). We do not have authority to modify or disregard the decisions of our supreme court. *See State v. Newnom*, 208 Ariz. 507, 508, ¶ 8, 95 P.3d 950, 951 (App. 2004).

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suspiciously peering into parked vehicles, and officer Gantt observed defendant near the opened hood of the Suburban. Defendant attempted to flee after noticing Gantt's arrival at the scene. J.M. testified that the toy truck defendant had in his pocket belonged to her son and was left in the back of the Suburban the previous evening. Finally, defendant was not authorized to enter the Suburban. This evidence supports an inference, not only that the Suburban was burglarized, but that defendant was the person who unlawfully entered the Suburban intending either to steal the toy truck or to open the vehicle's hood to gain unlawful access to the engine.⁵ No error, fundamental or otherwise, occurred in denying defendant's Rule 20 motion as to count 1.

¶18 As for count 2, defendant argues the state failed to present evidence that he possessed an instrument commonly used to commit a burglary or that he possessed such an item with the intent to commit a burglary. Defendant contends that, because no evidence indicated a screwdriver was used to enter the Suburban, the evidence only showed that he possessed the screwdriver set.

¶19 A person commits possession of burglary tools by "[p]ossessing any . . . tool . . . commonly used for committing any form of burglary . . . and intending to use . . . such an item in the commission of a burglary." A.R.S. § 13-1505(A)(1) (2010). Intent is generally proven by circumstantial evidence. *State v. Lester*, 11 Ariz. App. 408, 410, 464 P.2d 995, 997 (1970) ("[T]he requisite intent is a state of mind which is seldom, if ever, susceptible of proof by direct evidence and must ordinarily be proven by circumstantial evidence.") (citing *State v. Gammons*, 260 N.C. 753, 756, 133 S.E.2d 649, 651 (1963)).

¶20 The state elicited testimony from officer Gantt that confirmed the screwdriver set found on defendant could "assist someone in breaking into a car[.]" This testimony, in conjunction with the evidence supporting the conviction on count 1 and the evidence of defendant looking into parked vehicles, reasonably infers that defendant possessed the screwdrivers for the purpose of "breaking into a car." Whether defendant

⁵ To satisfy the corpus delicti rule, the evidence corroborating a defendant's statements need not support an inference that criminal conduct was actually committed by the defendant. See *State v. Thomas*, 78 Ariz. 52, 59, 275 P.2d 408, 413 (1954), *overruled in part on other grounds by State v. Pina*, 94 Ariz. 243, 245, 383 P.2d 167, 168 (1963).

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actually used a screwdriver to do so is immaterial. The trial court did not err in denying defendant's Rule 20 motion on count 2.

II. Amended Information

¶21 Defendant argues the court erred in granting the state's trial motion to amend the information. "We review for an abuse of discretion." *State v. Johnson*, 198 Ariz. 245, 247, ¶ 4, 8 P.3d 1159, 1161 (App. 2000).

¶22 A charging document may only be amended without a defendant's consent "to correct mistakes of fact or remedy formal or technical defects." Ariz. R. Crim. P. 13.5(b). An amendment is "formal or technical" if it does not "change the nature of the offense charged or . . . prejudice the defendant in any way." *State v. Barber*, 133 Ariz. 572, 577, 653 P.2d 29, 34 (App. 1982). Thus, so long as the amendment does not change the nature of the offense or create prejudice, it is permissible. *State v. Fimbres*, 222 Ariz. 293, 303, ¶ 38, 213 P.3d 1020, 1030 (App. 2009).

¶23 Neither of the amendments made to the information at trial changed the nature of the charged offenses in counts 1 and 2. Further, modifying the victim's name in count 1 and correcting the mistakenly amended date in count 2 did not prejudice defendant.⁶ *See Barber*, 133 Ariz. at 577, 653 P.2d at 34 (holding that, at the close of evidence, correcting a name in the indictment did not change the nature of the substantive charge); *State v. Self*, 135 Ariz. 374, 380, 661 P.2d 224, 230 (App. 1983) (holding that, at the close of evidence, amending indictment's alleged offense date to one month later "did not operate to change the nature of the offense charged or to prejudice the appellant in any way").

¶24 To the extent defendant contends count 2's amendment at trial prejudiced him because he defended that charge believing it related to his alleged possession of a knife at J.W.'s home, we are not persuaded. First, the information specifically refers to a "screwdriver" not a "knife." Second, the record indicates defendant addressed the possession of burglary tools charge by eliciting testimony from officer Gantt regarding his lack of knowledge as to whether defendant used the screwdrivers found in his pocket to gain access to the Suburban. Defendant's line of questioning reveals he had sufficient notice that count 2 related to his possession of the

⁶ Defendant appears to argue the court erred in permitting an amendment to the date of the offense alleged in count 1. However, no such amendment occurred.

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screwdrivers in connection with the burglary of the Suburban on March 5, 2013. No abuse of discretion occurred in amending the information at trial.

III. Prosecutorial Misconduct

¶25 Defendant claims several instances of prosecutorial misconduct individually and cumulatively required the trial court to declare a mistrial.

¶26 To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that '(1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial.' *State v. Moody*, 208 Ariz. 424, 459, ¶ 145, 94 P.3d 1119, 1154 (2004) (citations omitted). A defendant must demonstrate that the prosecutor's misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). "Reversal on the basis of prosecutorial misconduct requires that the conduct be 'so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *State v. Atwood*, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992) (quoting *United States v. Weinstein*, 762 F.2d 1522, 1542 (11th Cir. 1985) (internal quotation and citation omitted)).

Comments on Defendant's Custody Status

¶27 Over defendant's objection, the state introduced into evidence a redacted copy of a telephone call Defendant made from jail on March 17, 2013. During the call, defendant made incriminating statements, and he also stated his name, date of birth, and booking number. To lay foundation for the recording, the state introduced, without objection, the testimony of a jail employee who explained how inmates are booked, how they initiate calls using their booking number, and how the calls are recorded. The state also introduced, without objection, 1) testimony that defendant was "booked" into jail the day of the incident involving the Suburban and 2) a copy of defendant's booking photograph, which depicts his name, date of birth, and booking number.

¶28 The court admonished the prosecutor "not to refer to the jail during closing argument in front of the jury. You can refer to the telephone call that they heard, but not call it a jail call, because there is no reason to continue to say that over and over again." Once during closing argument and once during rebuttal argument, the prosecutor, without objection, mentioned "jail call" and once referred to defendant "being in custody" at the time of the call.

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¶29 Defendant argues the testimony of the jail employee and the statements during closing argument amount to misconduct based on a purported violation of the court's ruling. Because defendant did not object to the testimony or the prosecutor's statements, we review for fundamental error. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607.

¶30 Neither the jail employee's testimony nor the closing statements resulted from misconduct. The testimony did not violate the court's order prohibiting references to the "jail call" because the order was expressly limited to closing arguments. And, although the court ordered the prosecutor not to refer to the call as a "jail call," his two statements during closing arguments were not overly repetitive, which was the court's primary concern, and any impropriety did not rise to the level of misconduct.⁷ See *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984) (stating that in double jeopardy context, prosecutorial misconduct is not merely "legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial . . ."). Additionally, the prosecutor's remark that defendant was "in custody" was a proper statement on the evidence, not an improper comment on defendant's in-custody status during trial. See *State v. Bible*, 175 Ariz. at 602, 858 P.2d at 1205 ("[D]uring closing arguments counsel may summarize the evidence, make submittals to the jury, urge the jury to draw reasonable inferences from the evidence, and suggest ultimate conclusions."); *State v. Eddington*, 226 Ariz. 72, 78, ¶ 16, 244 P.3d 76, 82 (App. 2010) (noting knowledge of a defendant's in-custody status during trial creates "an 'unacceptable risk' that the presumption of innocence will be eroded") (citing *Estelle v. Williams*, 425 U.S. 501, 504-05 (1976)).

¶31 Even assuming that the prosecutor's closing statements constituted misconduct, given the evidence at trial satisfying the elements of defendant's charges, we do not find that these brief comments affected the outcome of the verdicts or was "so egregious" as to deprive defendant of a fair trial. See *State v. Hernandez*, 170 Ariz. 301, 307, 823 P.2d 1309, 1315 (App. 1991). Furthermore, the absence of any objection at trial reinforces the conclusion that defendant was not prejudiced by the remarks. See *State v. Gonzales*, 105 Ariz. 434, 437, 466 P.2d 388, 391 (1970) ("Our refusal to reverse because of the prosecutor's remarks is further supported by defense counsel's failure to object to the remarks at the time they were made."); see also *Le v. Mullin*, 311 F.3d 1002, 1013 (10th Cir. 2002) ("Counsel's failure to

⁷ We note that, during her closing argument, defense counsel also referred to the fact defendant was in jail when he made the telephone call.

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object to the comments, while not dispositive, is also relevant to a fundamental fairness assessment.”).

¶32 No error, fundamental or otherwise, occurred.

Motion to Amend

¶33 Defendant contends that the prosecutor’s “hesitation” until after the state’s case-in-chief to amend the date of the offense for count 2 amounted to misconduct. We disagree. It is clear from the record that the prosecutor did not realize until defendant moved for Rule 20 relief that the date of the offense for count 2 was mistakenly amended before trial to February 5, 2013.⁸ *See supra* ¶ 7. The prosecutor promptly moved to amend the information. As a result, no hesitation, and hence no misconduct, occurred.

Reference to “Felony”

¶34 The court instructed the jury: “The crime of burglary in the third [degree] requires proof that the defendant: One. Entered or remained unlawfully in or on a nonresidential structure; and Two. Did so with the intent to commit any theft therein.” During closing arguments, the prosecutor reiterated the elements of burglary in the third degree, and, in doing so, twice mentioned “with the intent to commit a theft or felony therein.” Defendant moved for a mistrial based on the prosecutor’s reference to a felony. The prosecutor apologized for the “misstatement” and suggested a curative instruction. When the court asked if defendant would like the instruction, defense counsel stated, “No. I don’t want to bring attention to it.” The court denied the motion for mistrial, finding: “I think in the grand scheme of things it’s not significant enough for a mistrial. I don’t believe it deprives [defendant] of a fair trial in this case.”

¶35 Because the trial court is in the best position to determine the effect of a prosecutor’s comments on the jury, we will not disturb the trial court’s ruling absent a clear abuse of discretion. *State v. Blackman*, 201 Ariz.

⁸ Contrary to defendant’s argument, the prosecutor should not have known as a result of J.M.’s testimony that February 5, 2013, was the incorrect date of the offense alleged in count 2. Indeed, the prosecutor began questioning the witness by incorrectly referring to the date of February 5, 2013, as the date of the Suburban’s burglary, and J.M. did not correct him. The prosecutor referred to the correct date of March 5, 2013, when he questioned officer Gantt.

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527, 545, ¶ 76, 38 P.3d 1192, 1210 (App. 2002); *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997).

¶36 Although the prosecutor admitted his mistake in mentioning “felony” during his argument relating to the elements of burglary in the third degree, his discussion of the evidence focused entirely on defendant’s theft of the toy truck. Thus, the record supports the court’s determination that the two references to “felony” did not warrant a mistrial. Defendant’s refusal of the curative instruction also illustrates the remarks’ insignificance. Such insignificant mistakes do not amount to misconduct that require a mistrial. *See Pool*, 139 Ariz. at 108-09, 677 P.2d at 271-72. The court acted well within its discretion in denying defendant’s motion for mistrial.

Aggravation Phase

¶37 To prove its allegation under A.R.S. § 13-708(C) that defendant committed the offenses while on probation for a felony conviction, defendant’s probation officer testified during the aggravation phase that, in March 2013, defendant was on unsupervised probation for a felony drug conviction. The state also introduced into evidence the applicable sentencing minute entry, and, for identification purposes, the state referred to the booking photo that was introduced during the guilt phase trial.

¶38 Defendant contends that the prosecutor committed misconduct by introducing this evidence. This argument is without merit. The state was required to prove its allegation for sentence enhancement purposes, and the evidence presented was entirely proper. Defendant presents no authority to the contrary. *See Moody*, 208 Ariz. at 452, n.9, ¶ 101, 94 P.3d at 1147 n.9 (“In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant’s position on the issues raised.”) (quoting *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989)). No misconduct occurred.

¶39 Because no misconduct occurred on any of the individual bases, no cumulative effect of misconduct requires reversal. *See State v. Bocharski*, 218 Ariz. 476, 492, ¶ 75, 189 P.3d 403, 419 (2008) (“Absent any finding of misconduct, there can be no cumulative effect of misconduct sufficient to permeate the entire atmosphere of the trial with unfairness.”).

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CONCLUSION

¶40

Defendant's convictions and sentences are affirmed.



AMY M. WOOD • Clerk of the Court
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