

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JOSHUA LEE BRYSON,
Appellant.

No. 2 CA-CR 2013-0148
Filed February 19, 2014

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NOT FOR PUBLICATION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); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Cochise County
Nos. CR201000127 and CR201200417
The Honorable Wallace R. Hoggatt, Judge

AFFIRMED

COUNSEL

Thomas C. Horne, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Kathryn A. Damstra, Assistant Attorney General, Tucson
Counsel for Appellee

Sidney F. Wolitzky, Tucson
Counsel for Appellant

STATE v. BRYSON
Decision of the Court

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Howard concurred.

MILLER, Judge:

¶1 Joshua Bryson was convicted after a jury trial of transportation of methamphetamine, possession of drug paraphernalia, and failure to appear for a court hearing in connection with a felony. He was sentenced to concurrent and consecutive terms totaling eleven years' imprisonment. On appeal, he contends the trial court erred in admitting a bag of methamphetamine into evidence, denying his motion for judgment of acquittal on the charge of failure to appear, instructing the jury regarding failure to appear, and allowing a county attorney to testify at trial. For the following reasons, we affirm his convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all inferences against Bryson. *See State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 914 (2005). In February 2010, a Sierra Vista police officer pulled Bryson over for speeding. During the stop, the officer noticed Bryson was acting nervous and repeatedly looking toward the right side of the vehicle. A canine officer later conducted a "free-air sniff" and alerted on the vehicle. Officers found a digital scale and a bag containing more than forty grams of methamphetamine in the glove compartment, and a soda can with a false compartment elsewhere in the vehicle.

¶3 Bryson told officers he was staying at a nearby motel and that there was drug paraphernalia in his motel room. When officers arrived at the motel, Bryson's father was in the room. With the consent of Bryson and his father, officers searched the room and found drug paraphernalia, including a digital scale, small baggies,

STATE v. BRYSON
Decision of the Court

and a ledger. A detective who conducted an interview with Bryson testified that he had said he had recently returned to the Sierra Vista area because it had “a need for good quality methamphetamine,” and had detailed how he had traveled to Tucson to purchase the methamphetamine found in the vehicle, from whom he had purchased it, how much he had paid, and to whom he planned to sell it.

¶4 Bryson was charged with knowingly possessing a dangerous drug for sale, transporting a dangerous drug for sale, and possession of drug paraphernalia. In October 2010, he pled guilty to attempted possession of methamphetamine for sale, but acceptance of the plea was deferred until sentencing. Bryson failed to appear at his sentencing and the trial court issued a bench warrant. In the summer of 2012, he was arrested in Missouri and returned to Arizona. Bryson moved to withdraw his plea and vacate the sentencing, which the court granted. In a separate indictment, the state charged Bryson with failure to appear and the cases were consolidated for trial.

¶5 The jury convicted Bryson of all charges. Before sentencing, the trial court dismissed count one, possession of a dangerous drug for sale, on double jeopardy grounds. On the drug counts, Bryson was sentenced to concurrent, somewhat mitigated sentences totaling eight years. On the charge of failure to appear, Bryson waived his right to a jury trial on the allegation that his failure to appear occurred while out on bond, and was sentenced to a total of three years, to be served consecutively to the sentences for the drug charges. This appeal followed.

Admission of Methamphetamine

¶6 Bryson contends the trial court erred in admitting the bag of methamphetamine into evidence because the state “did not properly authenticate the exhibit through a chain of custody that reasonably demonstrated the evidence was intact and unaltered.” He argues there are gaps in the chain of custody between when the bag was seized from the vehicle and when it was brought to court because no evidence log or other documentation was reviewed at

STATE v. BRYSON
Decision of the Court

trial to show the “path of the evidence,” and witnesses did not testify about everything that happened to it.

¶7 We review a trial court’s conclusion that evidence has an adequate foundation for an abuse of discretion. *State v. McCray*, 218 Ariz. 252, ¶ 8, 183 P.3d 503, 507 (2008). The proffer of drug evidence requires the state to prove chain of custody between the time the substance is seized and when it is presented at trial. *State v. Davis*, 110 Ariz. 51, 53, 514 P.2d 1239, 1241 (1973). “To establish a chain of custody, the state must show continuity of possession, but it need not disprove ‘every remote possibility of tampering.’” *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996), quoting *State v. Hardy*, 112 Ariz. 205, 207, 540 P.2d 677, 679 (1975). The state need not call every person who could have come into contact with the evidence. *McCray*, 218 Ariz. 252, ¶ 9, 183 P.3d at 507. To the extent that the chain is incomplete, those concerns go to weight of the evidence rather than its admissibility. *State v. Morales*, 170 Ariz. 360, 365, 824 P.2d 756, 761 (App. 1991); see *McCray*, 218 Ariz. 252, ¶ 15, 183 P.3d at 508 (gaps or conflicts in officer’s testimony regarding chain of custody went to weight rather than admissibility).

¶8 Here, the bag of methamphetamine was admitted during the testimony of a lieutenant for the Cochise County Sheriff’s Office. The lieutenant testified that he removed the substance from the vehicle during the traffic stop, brought it back to the police station, marked it as evidence, placed it in the evidence room, and filled out the required forms “to show who had what when.” He also placed the chain of custody form in the evidence locker. At trial, the bag of methamphetamine was in an envelope marked with a case number, item number, the lieutenant’s name, a number corresponding to him, and writing consistent with having been sent to the lab for analysis.¹ The lieutenant testified that he had reviewed the chain of custody form, and that the chain was consistent,

¹A criminalist later testified that he tested the contents of the bag for methamphetamine, writing his initials, the date, the item number and the case number on the envelope containing the baggie. He also testified that he was the one who checked the evidence out for testing.

STATE v. BRYSON
Decision of the Court

showing that the item remained in the custody of the Cochise County Sheriff's department with the exception of when it was sent to the lab. He also testified that the item was in substantially the same condition as when he removed it from the vehicle.

¶9 Bryson argues the state presented “no reasonable evidence . . . that only police technicians and lab technicians” handled the drugs during the three years between seizure and trial. More specifically, he contends the state should have presented evidence about how the evidence room is managed and how the evidence was checked in and out for testing. Assuming the absence of such evidence constitutes gaps in the change of custody, the omissions go to the weight of the evidence, not its admissibility. *McCray*, 218 Ariz. 252, ¶ 15, 183 P.3d at 508. The lieutenant testified that the chain of custody was consistent, and Bryson has not suggested that there was any specific misconduct with respect to the evidence. The trial court did not abuse its discretion in admitting the methamphetamine. *See State v. Moreno*, 26 Ariz. App. 178, 185, 547 P.2d 30, 37 (1978) (no abuse of discretion in admitting heroin despite state's failure to establish every link in custody chain where no evidence anyone other than technicians and property custodians handled it).

Failure to Appear

Rule 20 Motion

¶10 Bryson contends the trial court erred in denying his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., as to the charge of failure to appear. Although he concedes that he did not appear at his December 2, 2010 sentencing hearing, he contends the state failed to prove that the hearing was in connection with a felony. *See* A.R.S. § 13-2507(A) (where required to appear in connection with felony, person commits failure to appear if he does not appear).

¶11 We review the trial court's denial of a Rule 20 motion de novo. *State v. Parker*, 231 Ariz. 391, ¶ 69, 296 P.3d 54, 70 (2013). A judgment of acquittal is appropriate only when there is no substantial evidence to support the conviction. Ariz. R. Crim.

STATE v. BRYSON
Decision of the Court

P. 20(a); *State v. West*, 226 Ariz. 559, ¶ 6, 250 P.3d 1188, 1190 (2011). “[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *West*, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191, quoting *State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990).

¶12 The state offered the testimony of a county attorney who appeared at the December 2 sentencing hearing, as well as several minute entries showing that Bryson had been present in court when the date for sentencing was set and had subsequently failed to show on the scheduled date. The county attorney, however, did not expressly state that the sentencing was in connection with a felony, and the minute entries did not reference the specific offenses charged in the case.

¶13 Despite the lack of testimony about the original charges for which Bryson failed to appear, the trial court did not err in denying the Rule 20 motion. First, the court may take judicial notice of its own records.² See *In re Sabino R.*, 198 Ariz. 424, ¶ 4, 10 P.3d 1211, 1212 (App. 2000). The indictment in this case stated that Bryson had been charged with one count of knowingly possessing methamphetamine for sale, one count of knowingly transporting methamphetamine for sale, and one count of possession of drug paraphernalia. Further, Bryson’s withdrawn plea agreement stated that he would plead guilty to attempted possession of methamphetamine for sale, a class three felony. Second, the ultimate question of whether an offense constitutes a felony is a question of law to be decided by the trial court. Cf. *State v. Smith*, 126 Ariz. 534, 536, 617 P.2d 42, 44 (App. 1980) (whether out-of-state conviction is felony or misdemeanor in Arizona is question of law). Under Arizona law, the three charges from the original indictment are all felonies, as is the count in the plea agreement. See A.R.S. §§ 13-3407(B)(2) (possession of dangerous drug for sale a class two felony), 13-3407(B)(7) (transportation of dangerous drug for sale a

²Although the trial court did not expressly state that it was taking judicial notice in denying the Rule 20 motion, Bryson concedes that the court took judicial notice.

STATE v. BRYSON
Decision of the Court

class two felony), 13-3415(A) (possession of drug paraphernalia a class six felony), 13-1001 (C)(2) (attempt a class three felony if offense is a class two felony). The court did not err in finding there was substantial evidence to support the conviction for failure to appear in connection with a felony.

Jury Instruction

¶14 Bryson also contends the trial court erred in giving the jury an instruction that the offenses for which he failed to appear were felonies. We review a trial court's decision to give a jury instruction for an abuse of discretion. *State v. Fierro*, 220 Ariz. 337, ¶ 4, 206 P.3d 786, 787 (App. 2008). The purpose of a jury instruction is "to inform the jury of the applicable law in understandable terms." *State v. Miller*, 226 Ariz. 190, ¶ 8, 245 P.3d 454, 456 (App. 2011), quoting *State v. Noriega*, 187 Ariz. 282, 284, 928 P.2d 706, 708 (App. 1996); see also Ariz. Const. Art. VI, § 27 ("Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.").

¶15 Here, the trial court instructed the jury:

The crime of failure to appear in the first degree requires proof that the defendant:

1. Was required by law to appear in connection with any felony; and
2. Knowingly failed to appear as required, regardless of the disposition of the charge requiring the appearance.

Each of the offenses charged in Cochise County Superior Court Case Number CR201000127 is a felony offense.

STATE v. BRYSON
Decision of the Court

As noted above, whether the offenses were felonies was a question of law for the trial court to determine. *See Smith*, 126 Ariz. at 536, 617 P.2d at 44. Further, the offenses for which Bryson failed to appear were felonies. A.R.S. §§ 13-3407(B)(2), 13-3407(B)(7), 13-3415(A). The trial court provided the jury a proper statement of the law.

¶16 Bryson contends the jury instruction was in error because the court could not “take judicial notice of an element of an offense the prosecution has the burden of proving.” Because we find that the instruction concerned a matter of law, not fact, we need not address this argument further. *See Smith*, 126 Ariz. at 536, 617 P.2d at 44 (whether offense is felony is question of law to be decided by trial court). The trial court’s instruction on failure to appear was not an abuse of discretion.

Testimony by Prosecutor

¶17 Bryson contends the trial court erred in denying his motion to strike the testimony of the county attorney who testified about Bryson’s failure to appear because he worked in the same office as the prosecutor on this case. We review a trial court’s decision on whether to preclude witness testimony for an abuse of discretion. *State v. Moody*, 208 Ariz. 424, ¶ 135, 94 P.3d 1119, 1152 (2004).

¶18 Bryson relies on *State v. Tuzon*, 118 Ariz. 205, 208, 575 P.2d 1231, 1234 (Ariz. 1978), for the proposition that the attorney’s testimony “confuse[d] the distinctions between argument and testimony and should [have been] permitted only if required by a compelling need.”³ *Tuzon*, however, is distinguishable from this case.

³Bryson notes that the United States Supreme Court has recognized a constitutional right to a fair trial, but he does not offer further analysis, nor did he raise a constitutional issue below. Bryson has forfeited the right to seek relief on this ground absent fundamental error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19–20, 115 P.3d 601, 607 (2005). Additionally, because Bryson does not argue

STATE v. BRYSON
Decision of the Court

¶19 In *Tuzon*, the defendant sought the testimony of a county attorney who had spoken to the victim's family while investigating the crime, but who was not acting as the prosecutor at trial. 118 Ariz. at 208, 575 P.2d at 1234. The defendant wanted the attorney to testify about prior inconsistent statements by the victim's widow. *Id.* Our supreme court held that the trial court did not err in granting a protective order because "[c]alling a prosecutor as a witness for the defendant inevitably confuses the distinctions between advocate and witness, argument and testimony, and should be permitted only if required by a compelling need." *Id.*

¶20 The confusion possible in *Tuzon* is not present here. The attorney was asked to testify for the state, not on behalf of the defendant, and the state clarified during direct examination that the attorney had not prosecuted Bryson's case. The attorney testified about several minute entries indicating that Bryson had been present in court when he was ordered to appear, and had not appeared on the scheduled date. He also explained that prosecutors cover court proceedings for other attorneys, and that he was covering Bryson's sentencing hearing on the day Bryson failed to appear. He said he did not participate in the prosecution of Bryson's case and he did not recall handing anything related to the case other than the sentencing hearing. The trial court did not abuse its discretion in allowing the attorney's testimony and denying Bryson's subsequent motion to strike.⁴

that any error was fundamental and prejudicial, he has waived our review of his claim. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (concluding argument waived because defendant "d[id] not argue the alleged error was fundamental").

⁴Bryson also relies on a comment in the Arizona Rules of Professional conduct regarding the risk of prejudice when the roles of advocate and witness are combined. *See* ER 3.7 cmt. 2, Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42 ("The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation."). He concedes, however, that "Arizona rules do permit a lawyer to act as an advocate at a trial in which another

STATE v. BRYSON
Decision of the Court

Disposition

¶21 For the foregoing reasons, we affirm Bryson's convictions and sentences.

lawyer in the advocating lawyer's firm is likely to be called as a witness." ER 3.7, Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42.