

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RYAN M. TODD,
Appellant.

No. 2 CA-CR 2013-0290
Filed April 4, 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NOT FOR PUBLICATION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 Pima County
No. CR20124068001
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

COUNSEL

Thomas C. Horne, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Diane Leigh Hunt, Assistant Attorney General, Tucson
Counsel for Appellee

Lori J. Lefferts, Pima County Public Defender
By Abigail Jensen, Assistant Public Defender, Tucson
Counsel for Appellant

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MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Judge Miller and Judge Brammer¹ concurred.

H O W A R D, Chief Judge:

¶1 After a jury trial, Ryan Todd was convicted of kidnapping with the intent to inflict death, physical injury or a sexual offense and endangerment involving risk of physical injury. On appeal, he argues the trial court erred by refusing to give a third-party culpability instruction to the jury. Because we find no error, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *See State v. Martin*, 225 Ariz. 162, ¶ 2, 235 P.3d 1045, 1046 (App. 2010). In October 2012, S. exited her vehicle after driving home from work and saw a man wearing a mask who started running toward her. He caught up to S. and "slammed [her] up against [her] car," punched her in the head, told her to be quiet, and then shoved her onto the ground. When he tried to cover S.'s mouth with his hands, she bit down on his finger and the man ran away. S. saw him drive away in a car without its lights on, still wearing the mask. Neighbors from S.'s apartment complex assisted S. and called the police.

¶3 Police contacted Todd, the registered owner of a vehicle matching a license plate number and description given by a security guard who, about an hour earlier, had observed a man in a similar mask walking "suspiciously" around another parking lot. Inside the main compartment of Todd's vehicle, police found a white mask and

¹The Hon. J. William Brammer, Jr., a retired judge of this court, is called back to active duty and is assigned to serve on this case pursuant to orders of this court and the supreme court.

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two pairs of gloves. They also found a college identification card for A.N., a friend of Todd's, inside a backpack in the trunk. At trial, Todd claimed A.N. could have committed the offenses. DNA² samples taken from the victim yielded inconclusive results, but a sample taken from the mask found in Todd's vehicle matched his DNA. Neither Todd's hands nor the gloves found in his vehicle had any apparent bite marks on them.

¶4 Todd was convicted as detailed above and sentenced to a presumptive term of 15.75 years' imprisonment for the kidnapping, and time served for the endangerment. We have jurisdiction over Todd's appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

Third-Party Culpability Instruction

¶5 Todd argues the trial court erred by refusing to instruct the jury on third-party culpability. We review a court's decision to refuse a jury instruction for an abuse of discretion. *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995). "We are required to affirm a trial court's ruling if legally correct for any reason and, in doing so, we may address the state's arguments to uphold the court's ruling even if those arguments otherwise could be deemed waived by the state's failure to argue them below." *State v. Boteo-Flores*, 230 Ariz. 551, ¶ 7, 288 P.3d 111, 113 (App. 2012).

¶6 The trial court must instruct the jury "on any theory reasonably supported by the evidence." *State v. Moody*, 208 Ariz. 424, ¶ 197, 94 P.3d 1119, 1162 (2004). But the court is not required to give a requested instruction when other instructions adequately cover its substance. *State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009 (1998).

¶7 "No Arizona case has required a third-party culpability instruction" because "the substance of the instruction [is] adequately covered" by the instructions "on the presumption of innocence and the State's burden of proving beyond a reasonable doubt all elements of the crimes charged." *State v. Parker*, 231 Ariz. 391,

²Deoxyribonucleic acid.

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¶¶ 55-56, 296 P.3d 54, 68 (2013). So long as the trial court has properly instructed the jury on the presumption of innocence and the state's burden of proof, the third-party culpability instruction is not required. *Id.* ¶ 56.

¶8 Here the trial court denied Todd's request for a third-party culpability instruction because it did not consider the evidence substantial enough to support the instruction. The state presented no argument on the issue. Even assuming the evidence was substantial enough to warrant an instruction on third-party culpability, such an instruction was not required because the court properly instructed the jury on the presumption of innocence and the state's burden of proof. Those instructions adequately covered the substance of the requested third-party culpability instruction. *Parker*, 231 Ariz. 391, ¶ 56, 296 P.3d at 68.

¶9 Todd argues we may distinguish *Parker* for two reasons. First, he suggests *Parker* was decided under a fundamental error standard of review rather than the harmless error standard of review that should apply here. But the supreme court stated it was reviewing for an abuse of discretion, not for fundamental error. *Id.* ¶ 53. And *Parker* makes clear that denying a third-party culpability instruction is not error at all so long as the trial court instructs the jury on the presumption of innocence and the burden of proof. *Id.* ¶ 56. That is what the court did here.

¶10 Second, Todd argues that in *Parker* the parties agreed the evidence was sufficient to support the instruction, whereas here, the trial court erroneously decided the evidence was not sufficient. But as we concluded above, even if the court erred in its assessment of the evidence, that error would not require reversal under *Parker* because the third-party culpability instruction simply was not required in light of the court's other instructions. *Id.* Accordingly, Todd's claim must fail.³

³Todd also argues in a footnote in his opening brief that he received an illegal sentence of 236 days for his conviction of endangerment, in violation of A.R.S. § 13-707(A)(1), which permits a maximum of six months imprisonment for class 1 misdemeanors

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Disposition

¶11 For the foregoing reasons, Todd's convictions and sentences are affirmed.

such as his under A.R.S. § 13-1201(B). However, "when an entire sentence has been served prior to consideration of that *sole* issue on appeal, the validity of its imposition is a moot question." *State v. Hartford*, 145 Ariz. 403, 405, 701 P.2d 1211, 1213 (App. 1985). Because Todd's sentence was for time served, it necessarily was complete upon pronouncement. And he does not argue the alleged error is relevant to any other issue on appeal. Therefore, the issue is moot, and he cannot now attack the validity of his sentence for endangerment. *See id.*