IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ERIC CHRISTOPHER RODRIGUEZ,
Appellant.

No. 2 CA-CR 2017-0287
Filed October 30, 2018

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20164134001
The Honorable Kenneth Lee, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
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Counsel for Appellee

James Fullin, Pima County Legal Defender
By Jeffrey Kautenburger, Assistant Legal Defender, Tucson
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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Vásquez and Judge Eppich concurred.

E S P I N O S A, Judge:

¶1 Following a jury trial, Eric Rodriguez was convicted of fraudulent scheme and artifice, theft, organized retail theft, possession of methamphetamine, and possession of drug paraphernalia. The trial court sentenced him to concurrent jail and prison terms, the longest of which are 4.5 years. On appeal, Rodriguez argues the court erred in failing to sever the drug charges from the theft-related charges and failing to provide interrogatories on the verdict forms for the organized retail theft counts. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the jury's verdict. *State v. Kindred*, 232 Ariz. 611, ¶ 2 (App. 2013). The charges against Rodriguez stemmed from multiple occasions in 2016 when he went to a home-improvement store and purchased merchandise after "taking a universal product code from one item and affixing it to another item, and then presenting [it] at the point of sale at the switched price." In August 2016, D.G., the store's "asset protection specialist," observed Rodriguez engage in "ticket switching" and researched his purchase history with the store, as well as archived security video which showed Rodriguez doing the same thing on numerous occasions dating back to April of 2016. Later in August, D.G. recognized Rodriguez from his investigation, observed him ticket switching, and called police. A responding officer arrested Rodriguez and searched his car, finding plastic baggies of methamphetamine and a pipe in the center console.

¶3 Rodriguez was indicted on one count of fraudulent scheme and artifice, one count of theft of property or services,[1] eleven counts of computer tampering, ten counts of organized retail theft, one count of possession of a dangerous drug, and one count of possession of drug

[1]The state dismissed this charge before trial.

paraphernalia. Each organized retail theft count alleged a "violation of A.R.S. § 13-1819(A)(1) and/or (A)(2)." The jury found Rodriguez not guilty of eleven counts of computer tampering but guilty of seven lesser-included offenses of theft, three counts of organized retail theft, one count of fraudulent scheme and artifice, one count of possession of methamphetamine, and one count of possession of drug paraphernalia. We have jurisdiction over this appeal pursuant to Ariz. Const. art. VI, § 9, A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Denial of Severance Motion

¶4 Before trial, Rodriguez moved to sever the two drug charges from the remaining theft-related charges, arguing "evidence of the theft charges would not be admissible in the trial for the drug[-]related charges and vice versa." The trial court denied the motion, ordering that all counts be tried together.

¶5 We review the denial of a motion to sever offenses for abuse of discretion.[2] *State v. Prion*, 203 Ariz. 157, ¶ 28 (2002). Joinder is proper if the offenses "are of the same or similar character[,] are based on the same conduct or are otherwise connected together in their commission[,] or are alleged to have been a part of a common scheme or plan." Ariz. R. Crim. P. 13.3(a). But joinder is not a "catch-all for cases in which some logical connection exists between unrelated crimes." *Prion*, 203 Ariz. 157, ¶ 35. Rule 13.3(a)(2), Ariz. R. Crim. P., permits joinder only when crimes are so intertwined that evidence of one could be used to prove the other. *Id.* ¶ 32. And, severance must be granted "if necessary to promote a fair determination" of the defendant's guilt or innocence. Ariz. R. Crim. P. 13.4(a).

¶6 Rodriguez argues severance was required because "[t]he only 'connection' between the two sets of charges" was "extremely attenuated," and evidence of the charges was not cross-admissible. He further asserts he was prejudiced because "methamphetamine, in particular, is widely regarded as an exceptionally pernicious, addictive, and behavior-altering

[2]Rodriguez renewed the motion to sever after voir dire of the jury, but before the jury was impaneled and sworn, which the court again denied. The state argues that because Rodriguez did not renew the motion during trial, we are limited to fundamental error review, citing *State v. Goudeau*, 239 Ariz. 421, ¶ 54 (2016). Because we conclude any error was harmless, we find it unnecessary to determine when a trial begins for purposes of Rule 13.4(c), Ariz. R. Crim. P.

drug that on its own inhere[s] prejudicial potential" and cannot be said "to have had no influence on the guilty verdicts of organized retail theft." The state responds that the drug-related counts were properly joined with the theft-related counts because they were "connected together in their commission" and the drug offenses were relevant and admissible to show Rodriguez's motivation for engaging in theft.

¶7 We need not resolve this issue, however, because even assuming, without deciding, that the denial of severance was erroneous, we conclude under the particular facts and evidence introduced at trial that any error was harmless. *See State v. Burns*, 237 Ariz. 1, ¶ 38 (2015). Even when severance may have been improperly denied, nevertheless the weight and nature of the evidence may render any such error harmless. *Id.* (erroneous denial of severance harmless where evidence of defendant's guilt overwhelming). The evidence in this case overwhelmingly supported each of Rodriguez's convictions. Rodriguez admitted, before his car was searched, that the officer would find a quantity of methamphetamine within, and he also eventually admitted at trial in closing arguments that he committed the lesser-included offenses of theft. Further, as discussed in detail below, there was overwhelming evidence that Rodriguez committed three counts of organized retail theft.

¶8 Additionally, the trial court instructed the jury to consider each offense separately and not be influenced by any other count. And by finding Rodriguez guilty of the lesser-included offenses of theft on all but three organized retail theft charges and acquitting him on all of the computer tampering charges, the jury demonstrated its ability to follow the court's instructions and review the evidence with discernment and objectivity. *See State v. Stuard*, 176 Ariz. 589, 600 (1993) (jury's acquittal of some charges demonstrated jury followed instructions and considered evidence separately on each charge); *United States v. Miller*, 116 F.3d 641, 683 (2d Cir. 1997) ("An acquittal by the jury on some counts may be evidence that the trial was not unfair."). While a jury instruction alone may not be sufficient to prevent prejudice, taken together with the overwhelming evidence of Rodriguez's guilt and the lack of any state emphasis on the drug charges in relation to the theft charges, we conclude that any error was harmless beyond a reasonable doubt. *See Burns*, 237 Ariz. 1, ¶¶ 37-38.

Verdict Forms

¶9 Rodriguez also challenges the trial court's failure to give the jury "interrogatory-style verdict forms on the organized retail theft counts

in order to cure the otherwise duplicitous indictment charges."[3] A duplicitous indictment is one which "charges 'two or more distinct and separate offenses in a single count.'" *State v. Klokic*, 219 Ariz. 241, ¶ 10 (App. 2008) (quoting *State v. Schroeder*, 167 Ariz. 47, 51 (App. 1990)). Such an indictment can create the hazard of a non-unanimous jury verdict. *Id.* ¶ 12. Because the Arizona Constitution guarantees a defendant the right to a unanimous jury verdict in a criminal case, "[a] violation of that right constitutes fundamental error." *State v. Davis*, 206 Ariz. 377, ¶ 64 (2003). A duplicitous indictment can be cured, however, "when the basis for the jury's verdict is clear, when the state elects for the jury which act constitutes the crime, or when the trial court instructs the jury that it must agree unanimously on the specific act constituting the crime." *Paredes-Solano*, 223 Ariz. 284, ¶ 17.

¶10 Rodriguez correctly points out that "organized retail theft per A.R.S. § 13-1819(A)(1) is a distinct and separate crime from the crime of organized retail theft per A.R.S. § 13-1819(A)(2) because they require proof of different elements not found in the other." In fact, subsection (A)(1) requires proof of an intent to resell or trade merchandise, while (A)(2) only requires proof of intent to deprive. Additionally, the latter requires proof that a defendant used "an artifice, instrument, container, device or other article" to facilitate the removal of the merchandise, while subsection (A)(1) does not require such proof. *See State v. Cope*, 241 Ariz. 323, ¶ 9 (App. 2016). Nevertheless, any error in the indictment here was cured without the need for an interrogatory.

¶11 First, the trial court instructed the jury that it "must unanimously agree on the way or ways in which the organized retail theft occurred." *See Paredes-Solano*, 223 Ariz. 284, ¶ 17. The court also gave a general unanimity instruction, stating, "The verdict must represent the

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[3]Rodriguez concedes his motion challenging the organized retail theft counts of the indictment as "unconstitutionally duplicitous as charged" was untimely, arguably limiting appellate review to fundamental error. *See State v. Paredes-Solano*, 223 Ariz. 284, ¶ 6 (App. 2009) (objections to indictment must be raised at least twenty days before trial "and the failure to do so forfeits the objection absent fundamental error"); *see also State v. Escalante*, 245 Ariz. 135 (2018). Because we conclude any error was cured and did not prejudice him, we need not determine the applicable appellate review standard where Rodriguez untimely objected but the trial court nevertheless addressed the merits of his argument in denying his motion.

considered judgment of each juror. In order to return a verdict it is necessary that each juror agree thereto. In other words, ladies and gentlemen, your verdict must be unanimous." We presume the jury followed the court's instructions. *State v. Prince*, 226 Ariz. 516, ¶ 80 (2011).

¶12 Second, although Rodriguez asserts "one cannot determine if the jurors agreed unanimously as to subsection (A)(1) or (A)(2) or, potentially, both or a mix of both," that potential infirmity does not mandate reversal because there was overwhelming evidence presented as to each theory of organized retail theft. *See State v. Waller*, 235 Ariz. 479, ¶¶ 34-36 (App. 2014) (defendant not prejudiced when evidence supporting duplicitous counts overwhelming); *State v. Kelly*, 149 Ariz. 115, 117 (App. 1986) (same).

¶13 There was no dispute that Rodriguez engaged in theft; indeed the evidence on this point was irrefutable and he conceded the fact in his closing argument, satisfying the element in both (A)(1) and (A)(2) of removing merchandise "from a retail establishment without paying the purchase price." A.R.S. § 13-1819(A)(1), (A)(2). As for the requirement of subsection (A)(2) specifying the use of "an artifice, instrument, container, device or other article to facilitate the removal" of the merchandise, Rodriguez took UPC code labels from lower-priced items and placed them on higher-priced items before making the fraudulent purchases. The state argued in closing that this established "artifice" by intentionally "trick[ing] or deceiv[ing] the [self-checkout] computer into thinking he was paying for something that he wasn't." Although the statute does not define "artifice," we look to the standard dictionary definition,[4] which defines it as "[d]eception or trickery" or "something contrived or made up to achieve an end, especially be deceiving." *The American Heritage Dictionary* 101 (5th ed. 2011). Rodriguez's conduct clearly met this definition, and we conclude there was overwhelming evidence for the jury to find Rodriguez committed organized retail theft under A.R.S. § 13-1819(A)(2).

¶14 There was also ample evidence that Rodriguez committed organized retail theft under subsection (A)(1) with "the intent to resell or trade the merchandise." The jury convicted Rodriguez for incidents on May 27, August 14, and August 27. D.G. testified about each date, along with contemporaneous security video of Rodriguez scanning the switched tickets at the self-checkout station each time. D.G. testified that on May 27,

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[4]*See* A.R.S. § 1-213 ("Words and phrases shall be construed according to the common and approved use of the language.").

Rodriguez obtained a Dewalt leaf blower by ticket switching. A Dewalt leaf blower was listed in Rodriguez's handwritten memo pad, introduced by the state, which a detective described as a "ledger" listing "different tools" "with prices next to it," "a credit card number," "bar code[] stickers affixed to it," and a handwritten reminder to "check price on Dewalt Kit." On August 14, Rodriguez obtained a Dewalt nail gun via ticket switching, which he offered for sale in text messages also introduced at trial. Finally, D.G. testified that on August 27, Rodriguez obtained a Milwaukee fuel combo kit, laundry detergent, and an LED security camera by ticket switching. The state presented not only Rodriguez's text messages, but accompanying photographs from his cell phone, offering various items for sale including a Milwaukee fuel combo kit, his admissions to pawning items and posting them at online resale sites, and Rodriguez's handwritten ledger, as noted above. As the state pointed out in closing, it did not need to prove Rodriguez actually resold the items, only that he had that intent when he removed them from the store. *See* A.R.S. § 13-1819(A)(1). In short, there was overwhelming evidence for the jury to convict Rodriguez of organized retail theft under either A.R.S. § 13-1819(A)(1) or (A)(2). Accordingly, Rodriguez was not prejudiced by the court's refusal to provide the jury with interrogatories on the verdict forms.

Disposition

¶15 Rodriguez's convictions and sentences are affirmed.