

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000033-001 DT

06/02/2011

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
T. Melius
Deputy

STATE OF ARIZONA

JOHN TUTELMAN

v.

MICHAEL HASHEM SALMAN (001)

MICHAEL HASHEM SALMAN
7601 N 31ST AVE
PHOENIX AZ 85051

PHX MUNICIPAL CT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 2010-9013343.

Defendant-Appellant Michael Hashem Salman (Defendant) was convicted in Phoenix Municipal Court of 67 counts involving zoning violations. Defendant contends the evidence was not sufficient to support these convictions, and that these convictions violated his constitutional right to religious freedom. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

The Harvest Christian Fellowship Community Church (HCFCC) owns the property located at 7601 North 31st Avenue, Phoenix, Arizona (the Property). (State's Exhibit 12) Defendant, his wife, and their children reside on the Property. (R.T. of Aug. 19, 2010, at 546.) In 2008, HCFCC applied for a property tax exemption as a church. (R.T. of Aug. 16, 2010, at 54.) Defendant was the person signing the application. (*Id.* at 54, 61, 63.) In March and April 2008, Robin Hurt, who worked in the Maricopa County Assessor's Office, inspected the Property to determine whether it qualified for the requested tax exemption. (*Id.* at 52-53, 55, 63, 71.) In his inspection, he dealt with Defendant. (*Id.* at 53, 64-65, 72.) Mr. Hurt saw a sign on the outside of the Property with the name of the church on it, and inside saw a podium, folding chairs, and other things that were typical in a place of religious worship. (*Id.* at 57-58, 63, 66.) Mr. Hurt determined the Property was being used as a place of religious worship, and as a result of this determination, granted the tax exemption. (*Id.* at 58.)

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000033-001 DT

06/02/2011

Since 2005, Frank Dancil worked as a Site Development Supervisor for the Planning and Development Services Department of the City of Phoenix. (R.T. of Aug. 16, 2010, at 111–12.) In May 2008, the City had received complaints that Defendant was using the property as a place of religious worship, so Mr. Dancil inspected the Property. (*Id.* at 112–13, 116; R.T. of Aug. 17, 2010, at 211; R.T. of Aug. 18, 2010, at 450.) In Mr. Dancil’s opinion, Defendant was the person who was in full control of the Property because he was the person who had applied for permits, and was the only person with whom Mr. Dancil discussed the Property. (R.T. of Aug. 16, 2010, at 113–14; R.T. of Aug. 18, 2010, at 363–64, 396–97.) On May 17 and 24, and June 11 and 14, 2009, Mr. Dancil and others inspected the Property and found numerous zoning and building code violations. (*Id.* at 112–13.) As a result, on May 7, 2010, the Phoenix City Prosecutor’s Office filed a Complaint charging Defendant with 67 zoning and building code violations. (Complaint, signed May 7, 2010.)

The trial court held a trial in this matter lasting 5 days. (R.T. of Aug. 16, 17, 18, 19, and 30, 2010.) After reviewing the evidence presented and considering the arguments of the parties, the trial court found the State had proved all 67 charges beyond a reasonable doubt. (R.T. of Aug 30, 2010, at 45–46.) The trial court further found the State had proved beyond a reasonable doubt that Defendant was the person responsible for the violations. (*Id.* at 46.) The trial court further stated this case was not about trying to prevent anyone from worshiping anything they would like; it was instead about whether Defendant had violated those code provisions that were enacted for the purpose of public safety. (*Id.*) The trial court suspended the imposition of sentence and placed Defendant on probation for 3 years. (R.T. of Sept. 27, 2010, at 142.) It further ordered that Defendant serve 60 days in jail, pay \$2,000 in jail fees, and pay fines totaling \$10,000. On September 29, 2010, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

A. Was Defendant the person in control of the Property.

In his Opening Brief, Defendant contends he was not the person in control of the Property. The City of Phoenix building and zoning codes apply to anyone using, occupying, or controlling property. (R.T. of Aug. 17, 2010, at 242–44, 275, 280, 310, 311; R.T. of Aug. 18, 2010, at 353, 355.) At oral argument, Defendant acknowledged he was the person using, occupying, and controlling the Property. Defendant’s contention is therefore without merit.

B. Did the evidence show Defendant’s activities violated the applicable codes.

Defendant contends the evidence presented did not support the charges, that is, did not show Defendant’s activities violated the applicable codes. In addressing the issue of the sufficiency of the evidence, the Arizona Supreme Court has said the following:

We review a sufficiency of the evidence claim by determining “whether substantial evidence supports the jury’s finding, viewing the facts in the light most favorable to sustaining the jury verdict.” Substantial evidence is proof that “reasonable persons could

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000033-001 DT

06/02/2011

accept as adequate . . . to support a conclusion of defendant's guilt beyond a reasonable doubt." We resolve any conflicting evidence "in favor of sustaining the verdict."

State v. Bearup, 221 Ariz. 163, 211 P.3d 684, ¶ 16 (2009) (citations omitted). That court has further stated that, when considering whether a verdict is contrary to the evidence, this court does not consider whether it would reach the same conclusion as the finder of fact, but whether there is a complete absence of probative facts to support that conclusion. *State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988). This Court has reviewed the evidence presented, and concludes the evidence was sufficient to support beyond a reasonable doubt each of the 67 counts charged in the Complaint.

C. Did the State present sufficient evidence to support the finding that Defendant was engaged in public or church activities.

Defendant contends the trial court precluded him from "challeng[ing] the ordinance" by showing "the ordinance" was meant for public and commercial use and not for private use. Seven of Defendant's convictions were for zoning violations, and those apply to public or church use. (R.T. of Aug. 18, 2010, at 438, 443-44.) For the remaining 60 convictions, they were for building code and fire code violations, and those apply based on the size of the structure and thus the occupancy load of the structure, and not on the use of the property. (R.T. of Aug. 16, 2010, at 121, 151-52; R.T. of Aug. 17, 2010, at 177, 194, 196, 201, 235-36, 251, 258, 284-87; R.T. of Aug. 18, 2010, at 355.) Thus, for those 60 convictions, it was irrelevant whether Defendant was using the Property for a public or private purpose.

For the seven counts involving zoning violations, the questions then is whether the State presented sufficient evidence that Defendant was using the Property for a public or religious purpose. Robin Hurt, Frank Dancil, Ray Martinez, Alex Singbush, and Dwayne Grierson gave testimony indicating Defendant had the Property open to the public for religious purposes. (R.T. of Aug. 16, 2010, at 52, 55-58, 63, 66, 111, 121-22, 125, 144-45, 152, 164; R.T. of Aug. 17, 2010, at 176, 188, 212, 235-39, 251, 258, 281-89, 296-97, 305, 314; R.T. of Aug. 18, 2010, at 348, 371, 378, 399-400, 403-05, 411-12, 431-32, 433-35, 437-39, 443-44, 450-53, 455-58, 471-72.) Cary Cartter, Orlando Sanchez, Frank Salman, and Suzanne Salman gave testimony indicating Defendant kept the Property private. (R.T. of Aug. 16, 2010, at 74, 78, 84, 88, 98, 99, 101-02; R.T. of Aug. 18, 2010, at 475, 480, 499, 504, 506-07; R.T. of Aug. 19, 2010, at 527, 533.) The trial court thus had to resolve this conflicting testimony, and resolved the conflict by finding the State had presented sufficient testimony to prove Defendant had violated the applicable zoning ordinances. In addressing the role of an appellate court in reviewing conflicting evidence and testimony, the Arizona Supreme Court has said the following:

Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and who can better assess the impact of what occurs before him. [citation] Where a deci-

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000033-001 DT

06/02/2011

sion is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess. Where, however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to “look over the shoulder” of the trial judge and, if appropriate, substitute our judgment for his or hers.

State v. Chapple, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983) (citation omitted). Because this issue involves “an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge” rather than a “question . . . of law or logic,” it is not appropriate for this Court to “substitute [its] judgment for that of the trial judge.”

Defendant further contends the trial court in its rulings prevented him from presenting a defense. To the extent Defendant is contending the trial court precluded him from presenting evidence, Rule 103(a)(2) of the Arizona Rules of Evidence provides that, if the trial court’s ruling is one excluding evidence, the party must make an offer of proof of what the proposed evidence would have been. In the present case, Defendant made no offers of proof, thus he did not establish a claim for relief on appeal. And to the extent Defendant is contending the trial court precluded him from making legal arguments, the record shows the trial court did allow him to make legal arguments. To the extent Defendant is contending the trial court precluded him from presenting hypotheticals, Rule 611(a) of the Arizona Rules of Evidence gives the trial court the authority to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence (1) to make the interrogation and presentation effective for the ascertainment of the truth, (2) to avoid needless consumption of time, and (3) to protect witnesses from harassment or undue embarrassment. This Court has reviewed the trial court’s rulings, and concludes the trial court did not abuse its discretion in limiting Defendant’s hypotheticals.

D. Do Defendant’s convictions violate his Constitutional right to religious freedom.

Defendant makes several arguments that the convictions in the present case violate his Constitutional right to religious freedom. Defendant first contends he is exempt under A.R.S. § 41–1492.07. That statute provides Article 8 of Chapter 9 of Title 41 (A.R.S. §§ 41–1492 to –1492.12) does not apply to religious organizations or entities controlled by religious organizations, including places of worship. Defendant was not, however, charged with any violation of Article 8 of Chapter 9 of Title 41, thus A.R.S. § 41–1492.07 does not apply to Defendant’s convictions.

Defendant next contends his convictions violate A.R.S. § 41–1493.01. Absent fundamental error, failure to raise an issue at trial waives the right to raise the issue on appeal. *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991); *State v. Gatliff*, 209 Ariz. 362, 102 P.3d 981, ¶ 9 (Ct. App. 2004). Fundamental error is limited to those rare cases that involve error going to the foundation of the defendant’s case, error that takes from the defendant a right essential to

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000033-001 DT

06/02/2011

the defendant's defense, and error of such magnitude that the defendant could not possibly have received a fair trial, and places the burden on the defendant to show both that error existed and that the defendant was prejudiced by the error. *State v. Soliz*, 223 Ariz. 116, 219 P.3d 1045, ¶ 11 (2009). In the present case, Defendant did not raise any defense bases on A.R.S. § 41-1493.01 prior to trial, thus this Court may review for fundamental error only. And as noted above, Defendant must show prejudice in order to obtain relief on appeal.

This Court concludes Defendant has failed to establish prejudice. In *State v. Hardesty*, 222 Ariz. 363, 214 P.3d 1004 (2009), the court stated:

A party who raises a religious exercise claim or defense under [A.R.S. § 41-1493 to -1493.03] must establish three elements: (1) that an action or refusal to act is motivated by a religious belief, (2) that the religious belief is sincerely held, and (3) that the governmental action substantially burdens the exercise of religious beliefs.

Hardesty at ¶ 10. Defendant has made no showing that his refusal to comply with the applicable building, fire, safety, and zoning codes was motivated by any religious belief. Further, Defendant has failed to establish that the applicable building, fire, safety, and zoning codes substantially burdens the exercise of religious beliefs. Those building, fire, safety, and zoning codes apply to every other religious organization in the City of Phoenix, and those other religious organizations appear to be able both to comply with those codes and conduct their religious activities. Finally, the state has a compelling interest in securing the safety of its citizens, and had imposed the least restrictive means of furthering that compelling interest. Defendant thus has failed to establish prejudice.

III. CONCLUSION.

Based on the foregoing, this Court concludes the evidence showed (1) Defendant was the person in control of the Property, (2) Defendant's activities violated the applicable codes, (3) Defendant was engaged in public or church activities, and further that Defendant's convictions did not violate his Constitutional right to religious freedom.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Phoenix Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Phoenix Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

060220111640