NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 10/16/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	) 1 CA-CR 11-0083
Appellee,	) DEPARTMENT A
v.	) **MEMORANDUM DECISION**
EDWARD LAMAR CARPENTER,	) (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)
Appellant.	)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-007454-001 DT

The Honorable Janet E. Barton, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Craig W. Soland, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Stephen R. Collins, Deputy Public Defender
Attorneys for Appellant

D O W N I E, Judge

¶1 Edward Lamar Carpenter appeals his convictions and sentences, arguing the trial court erred by: (1) improperly commenting on the evidence; (2) not *sua sponte* ordering a mistrial; and (3) limiting his testimony about a prior conviction. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Carpenter was charged with five counts of fraudulent schemes and artifices and five counts of fraudulent schemes and practices after causing several individuals to participate in a "mortgage-elimination" or "mortgage-abatement" program from which he profited financially. A jury convicted Carpenter of the charged offenses, and he was sentenced to an aggregate term of 12 years' imprisonment. Carpenter timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A), 13-4031 and -4033.

I. Jury Instruction

¶3 Carpenter contends the trial court improperly commented on the evidence in a final jury instruction.[1] A trial court has substantial discretion in determining how to instruct

[1] Carpenter also complains the instruction shifted the burden of proof, but he does not explain how the instruction did so and does not cite any authority to support his claim. A single reference to an issue is insufficient to present that issue for appellate review. *State v. Dean*, 206 Ariz. 158, 161 n.1, ¶ 8, 76 P.3d 429, 432 n.1 (2003).

the jury. *Smyser v. City of Peoria*, 215 Ariz. 428, 439, ¶ 33, 160 P.3d 1186, 1197 (App. 2007) (citation omitted). On review, jury instructions are read as a whole, with an eye toward determining whether the jury was given the proper rules of law to apply in arriving at its decision. *Durnin v. Karber Air Conditioning Co.*, 161 Ariz. 416, 419, 778 P.2d 1312, 1315 (App. 1989). We review *de novo* whether a jury instruction correctly stated the law. *State v. Moody,* 208 Ariz. 424, 466, ¶ 189, 94 P.3d 1119, 1161 (2004) (citation omitted).

A. Background

¶4 During a trial recess, the court referred to earlier discussions about the scope of Carpenter's testimony. Based on its understanding of the defense, the court told Carpenter: "You cannot interpret the law to this jury. It's the Court's job to instruct the jury on the law." The court advised Carpenter he could not testify that what he did was authorized by law and could not testify about lenders' rights and obligations. The court further stated that if Carpenter testified that he relied on his understanding of the law, it would instruct the jury that the law did not in fact authorize Carpenter's actions. Carpenter stated he understood that as long as his testimony was couched in terms of what he relied on, he could testify about the law. The court responded, "Yes, but you are also buying that instruction." The court told

Carpenter: "The issue here is not whether your process was legal or illegal; it's whether you knew." Carpenter's counsel responded, "Judge, I think we understand the parameters. Thank you very much."

¶5 Carpenter thereafter repeatedly testified about the law. He explained to the jury his understanding of the Constitution, the UCC, the Bankruptcy Code, "The Patriot Act," and the common law. He repeatedly testified about what he believed the law permitted and why he could discharge debt by tendering or filing documents. Carpenter testified "the financial system" itself violates the Constitution, and he understood the Bankruptcy Code and the UCC permitted the discharge of debt through his process. Carpenter even testified that the UCC "said you could" and that mortgages are illegal.

¶6 Based on Carpenter's testimony, the trial court advised that it would instruct the jury as previously indicated. Carpenter did not object. During final instructions, the court advised the jury:

> The issue in this case is not whether the mortgage abatement and/or elimination program Mr. Carpenter offered to homeowners was legal. The Uniform Commercial Code, law of Arizona, bankruptcy laws, the Constitution of Arizona, and the United States of America didn't and do not allow or authorize this program either before or after the passage of the Patriot Act. Mortgages are not illegal under the U.S. or Arizona Constitution, bankruptcy laws or Uniform Commercial Code.

> Similarly, there is no requirement under the Uniform Commercial Code, Arizona law, bankruptcy laws, or the Constitution of Arizona or the United States of America that a person or entity respond to a document that is, on its face, null and void.
>
> To use Mr. Carpenter's example, if you receive a document issued by your neighbor, which purports to require you to report to jury duty, even if it looks official, no action will be taken against you by the State of Arizona or Maricopa County if you fail to respond to that document and/or show up for jury service on the date reflected on the document.
>
> The issues in this case, ladies and gentlemen, are twofold.
>
> . . . .
>
> First, it's whether, in connection with each of the five transactions at issue in this lawsuit, the State has proven beyond a reasonable doubt that Mr. Carpenter knowingly participated in a scheme or artifice to defraud; and if he did, whether in connection therewith, he obtained any benefit by means of false or fraudulent pretences, representations, promises, or material omissions.
>
> The second issue is whether, in connection with each of the five transactions at issue in this lawsuit, the State has proven beyond a reasonable doubt that in any matter related to the business conducted by any department or agency of this state or any political subdivision, Mr. Carpenter knowingly falsified, concealed, or covered up a material fact by any trick, scheme or device, or made or used any false writing or document knowing such writing or document contained any false, fictitious, or fraudulent statement or entry.

Carpenter again voiced no objection.

B. Discussion

¶7 Trial courts may not comment on the evidence. *State v. Wolter*, 197 Ariz. 190, 193, ¶ 14, 3 P.3d 1110, 1113 (App. 2000) (citation omitted). "A trial court 'comments on the evidence' when it expresses its opinion to the jury as to what the evidence shows, or when it misinforms the jury that a fact has been proven when the fact remains a subject of dispute." *Id.* This does not mean, though, that a court may not refer to the evidence. *State v. Hopkins*, 108 Ariz. 210, 211, 495 P.2d 440, 441 (1972) (citation omitted). To constitute an improper comment, the court's action must be a "comment upon the evidence that would interfere with the jury's independent evaluation of that evidence." *State v. Rodriguez*, 192 Ariz. 58, 63, ¶ 29, 961 P.2d 1006, 1011 (1998).

¶8 "The failure to object to an instruction either before or at the time it is given waives any error, absent fundamental error." *State v. Schrock*, 149 Ariz. 433, 440, 719 P.2d 1049, 1056 (1986). "To establish fundamental error, [a defendant] must show that the error complained of goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 568, ¶ 24, 115 P.3d 601, 608 (2005). Even if fundamental error exists, a defendant

must nevertheless demonstrate that the error was prejudicial. *Id.* at ¶ 26.

¶9 We find no error, fundamental or otherwise. The instruction did not address any matter in dispute, let alone misinform the jury that a matter in dispute had been proven, and it did not interfere with the jury's independent evaluation of the evidence. Carpenter told the jury he believed the Constitution and other laws authorized his process and, at one point, went so far as to inform the jury that the UCC "said you could."

¶10 To ensure that the jury was not misled by Carpenter's testimony about the law, it was reasonable for the court to instruct jurors that the law did not in fact authorize his actions. The instruction served to clarify both the applicable law and the issues properly before the jury. *See State v. Noriega*, 187 Ariz. 282, 284, 928 P.2d 706, 708 (App. 1996) (the purpose of jury instructions is to advise of the applicable law and give the jury an understanding of the issues). The court was not required to ignore the very real potential for jury confusion, especially when it had repeatedly warned Carpenter about the consequences of his testimony. The trial court did not err by giving the challenged instruction.

II. Mistrial

¶11 During cross-examination, the prosecutor asked Carpenter: "This isn't the first time that you filed fraudulent documents, right?" The court immediately called a bench conference. The prosecutor explained that her question related to Carpenter's earlier testimony that he attempted to use the same process to eliminate his own debt, not to his prior conviction. The court struck the question and instructed the jury to disregard it. The State then went on to prove a sanitized version of Carpenter's prior conviction. Carpenter did not object or request a mistrial. He now contends the court committed fundamental error by not *sua sponte* declaring a mistrial based on the prosecutor's question. We disagree.

¶12 The trial court is in the best position to determine whether a particular incident calls for a mistrial because it is aware of the atmosphere of the trial, the circumstances surrounding the incident, the manner in which any objectionable statement is made, and its possible effect on the jury. *See State v. Koch*, 138 Ariz. 99, 101, 673 P.2d 297, 299 (1983); *State v. Brown*, 195 Ariz. 206, 209, ¶ 12, 986 P.2d 239, 242 (App. 1999). A mistrial is the most dramatic remedy for trial error and "should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Adamson*, 136 Ariz. 250, 263, 665 P.2d 972,

985 (1983); see *also State v. Lamar*, 205 Ariz. 431, 439, ¶ 40, 72 P.3d 831, 839 (2003).

¶13 We find no error, fundamental or otherwise. Nothing in the record suggests the question was anything other than a reference to Carpenter's earlier testimony that he unsuccessfully used the same process to eliminate debt owed on his own home. The question did not suggest the existence of a prior conviction. Moreover, the court struck the question and instructed the jury to disregard it. "Juries are presumed to follow their instructions." *State v. Dunlap*, 187 Ariz. 441, 461, 930 P.2d 518, 538 (App. 1996).

III. Carpenter's Testimony

¶14 Carpenter has a prior felony conviction for presenting a false instrument for filing, a class six felony. *See* A.R.S. § 39-161. The State sought to use a sanitized version of this prior conviction for impeachment purposes should Carpenter testify.

¶15 Carpenter wanted to testify that the felony could have been designated a misdemeanor if he had paid a $30,000 fine, which he did not, in addition to successfully completing probation, which he did. The State objected to evidence about details of the conviction. It argued that if Carpenter went beyond the sanitized version of the conviction, it should be allowed to introduce information about the prior offense. After

significant discussion, the court ultimately agreed with the State, ruling that if Carpenter offered details about his conviction, the State could introduce evidence regarding the underlying offense. Following additional dialogue, Carpenter stated: "Judge, I will go back to sanitizing the prior." When the court explained what evidence of the prior it would admit, Carpenter's counsel responded, "Judge, I think that's fine."

¶16 "The trial court has considerable discretion in determining the relevance and admissibility of evidence, and we will not disturb its ruling absent a clear abuse of that discretion." *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990). We find no abuse of discretion. Carpenter initially wanted to explain why he pled guilty and why his offense was not designated a misdemeanor. After the court ruled such testimony would open the door to additional evidence regarding the conviction, Carpenter agreed to use only the

sanitized version of his conviction.

CONCLUSION

¶17 For the reasons stated, we affirm Carpenter's convictions and sentences.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
ANN A. SCOTT TIMMER, Presiding Judge

/s/
JOHN C. GEMMILL, Judge