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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	No. 1 CA-CR 12-0527
v.	DEPARTMENT E
CHRISTOPHER STUART MULLER, Appellant.	**MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-007633-001

The Honorable Dawn M. Bergin, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals/Capital Litigation Section
William Scott Simon, Assistant Attorney General
Attorneys for Appellee

Curry Pearson & Wooten PLC — Phoenix
By Kristen M. Curry
Attorneys for Appellant

D O W N I E, Judge

¶1 Christopher Stuart Muller appeals his conviction and life sentence for conspiracy to commit first-degree murder. The conviction stems from an alleged plan by Muller to kill a former business associate and the associate's brother. The plot failed when the person Muller spoke to about arranging the murders notified the authorities. On appeal, Muller argues that error occurred in the admission of evidence. For reasons that follow, we affirm.

DISCUSSION

I. Admission of Testimony Regarding Threat

¶2 Muller contends the trial court erred in admitting testimony regarding a threat made by one of the brothers. We review a ruling on the admissibility of evidence for an abuse of discretion. *State v. Amaya–Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990) (citation omitted).

¶3 The State's theory was that Muller wanted to kill M.S. and his brother because they were threatening his businesses -– including a crating business and a marijuana growing enterprise for use by medical dispensaries in California. At trial, M.S. testified about a telephone call his brother made to Muller. During the call, the brother "warned [Muller] that often times if you overload a grow house, a marijuana grow house, and overload the power system they have the ability to catch fire." M.S. testified that his brother's statement "almost sounded threatening." Muller argues this testimony should have been excluded because it was hearsay.

¶4 Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible. Ariz. R. Evid. 801(c), 802. The rule excluding hearsay, however, is inapplicable when the statement is offered for some valid purpose other than proving the truth of the matter asserted in the statement. *State v. Rivera*, 139 Ariz. 409, 413-14, 678 P.2d 1373, 1377-78 (1984).

¶5 Here, testimony regarding the brother's "warning" was not offered to prove that overloading the power system on a grow house will cause a fire, but rather to show the effect of the statement on Muller vis-à-vis his motive for wanting the brothers killed. Hence, the testimony was properly admissible for a non-hearsay purpose. *See State v. Hernandez*, 170 Ariz. 301, 306, 823 P.2d 1309, 1314 (App. 1991) (words offered for effect on listener not hearsay because not offered to prove truth of matter asserted).

II. Admission of Opinion Testimony

¶6 As part of its proof of motive for the murder plot, the State presented evidence that Muller was angry because he believed M.S. had contacted Muller's crating business customers to inform them about Muller's prior felony conviction. Although M.S. denied contacting Muller's customers, the trial court permitted him to testify that if customers of the crating business learned of Muller's felony conviction, it would adversely affect the business. Muller contends the court should not have allowed this testimony because M.S. is not an expert and is unqualified to offer such an opinion.

¶7 A witness not testifying as an expert is permitted to give an opinion that is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Ariz. R. Evid. 701. The Arizona Rules of Evidence further provide, in pertinent part: "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony." Ariz. R. Evid. 602.

¶8 Muller argues M.S.'s experience in the trucking business was too remote and limited to permit him to opine about the effect of a felony conviction on the crating business. Specifically, Muller notes that M.S. had not worked in the trucking business since about 2001 and that he had worked for Muller's crating business for only six months in 2003 or 2004 as a dispatcher. At trial, though, M.S. testified it is "well known through the industry and documented through contracts that they sign with these customers that a vendor can't have felons work for them or in the factory places" and further explained that he became familiar with this restriction on owners and employees during his work at Muller's business, which included reviewing contracts with the no-felony requirement.

¶9 Given M.S.'s testimony about his background in the industry and his review of contracts with the no-felony requirement, the trial court could reasonably conclude he was sufficiently qualified to offer the opinion because it was based on his own experience in the industry. Muller's argument that M.S.'s knowledge and experience is "too remote or limited" goes to the weight of the evidence, not its admissibility. *See State v. Davolt*, 207 Ariz. 191, 210, ¶ 70, 84 P.3d 456, 475 (2004) ("The degree of qualification goes to the weight given the testimony, not its admissibility."). The court did not abuse its discretion in admitting the testimony.

¶10 Furthermore, even if M.S.'s testimony were erroneously admitted, reversal would not be required. Two other witnesses, including Muller himself, testified that customers' knowledge of Muller's felony conviction would adversely affect his business. Thus, any error in admitting M.S.'s testimony would be harmless because it was cumulative of other testimony. *See State v. Williams*, 133 Ariz. 220, 226, 650 P.2d 1202, 1208 (1982) (citations omitted).

III. Admission of Other Act Evidence

¶11 Finally, Muller argues that admitting evidence of his involvement in illegally transporting marijuana was fundamental error. He claims this evidence should have been precluded as other act evidence under Rule 404(b). We decline to review this assertion because any error was invited by Muller.

¶12 Before trial, the court ruled that evidence of Muller's involvement in the illegal transportation of marijuana would not be admissible unless Muller "opened the door" on this subject. In his opening statement, defense counsel informed the jury of Muller's involvement with another witness in illegally transporting marijuana. When the prosecutor sought clarification from the court regarding whether counsel had "opened the door" on this subject, defense counsel confirmed his intent to do so. Consistent with the decision to place evidence on this subject before the jury, defense counsel later elicited testimony from Muller regarding his involvement in the illegal transportation of marijuana.

¶13 A defendant who invites error at trial may not then claim the same as error on appeal. *State v. Moody*, 208 Ariz. 424, 453, ¶ 111, 94 P.3d 1119, 1148 (2004) (citation omitted); *see also State v. Lucero*, 223 Ariz. 129, 138, ¶ 31, 220 P.3d 249, 258 (App. 2009) ("[I]f the party complaining on appeal affirmatively and independently initiated the error, he [is] barred from raising the error on appeal.”). Because he affirmatively contributed to the admission of the evidence he now challenges on appeal, Muller’s claim is rejected as invited error. *See State v. Logan*, 200 Ariz. 564, 565–66, ¶ 9, 30 P.3d 631, 632–33 (2001) (“If an error is invited, we do not consider whether the alleged error is fundamental . . . .”). We further reject Muller’s claim that the trial court committed fundamental error by failing to *sua sponte* give a limiting instruction on the proper use of other act evidence. *See State v. Roscoe*, 184 Ariz. 484, 491, 910 P.2d 635, 642 (1996) (“[T]he trial court's failure to *sua sponte* give a limiting instruction is not fundamental error.”).

CONCLUSION

¶14 For the reasons stated, we affirm Muller’s conviction and sentence.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
LAWRENCE F. WINTHROP, Presiding Judge

/s/
JON W. THOMPSON, Judge