DIVISION ONE
FILED: 6/27/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 12-0640
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
JUAN CARLOS PEREZ-CONTRERAS,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Mohave County

Cause No. S8015CR201101264

The Honorable Derek C. Carlisle, Judge *Pro Tempore*

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Aaron J. Moskowitz, Assistant Attorney General
Attorneys for Appellee

David Goldberg, Attorney at Law — Fort Collins, CO
By David Goldberg
Attorney for Appellant

B R O W N, Judge

¶1 Juan Carlos Perez-Contreras appeals his convictions and sentences for possession of dangerous drugs for sale,

possession of drug paraphernalia, and resisting arrest. For the reasons set forth below, we affirm.

BACKGROUND[1]

¶2 In November 2011, a Bullhead City Police officer (Holdway) received a phone call from a narcotics detective in Nevada indicating that an inmate there wanted to speak with Holdway. Upon arriving at the police station in Laughlin, Holdway learned that the inmate was Bob Garcia, who Holdway knew from previous investigations. Garcia told Holdway he could "help [him] out" and offered to call a friend of his named Carlos to order methamphetamine ("meth"). Holdway asked Garcia if he had ever purchased narcotics from Carlos, and Garcia stated that he had and that he usually purchased four ounces of meth at a time. Holdway then asked Garcia to call Carlos and order the meth, but Garcia said he usually only communicated with Carlos by text message. Garcia then sent Carlos a text message asking, "Can you bring me 4 to my place?" Carlos replied by asking "what time" he should bring the narcotics and Garcia replied "Bring me 4 at 5 at my place."

¶3 After Garcia received the text message from Carlos, Holdway and Garcia discussed how Carlos would usually deliver

[1] We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against Defendant. *State v. Vendever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

the meth. While Holdway and Garcia were speaking, Garcia's phone rang. Garcia answered and Holdway overheard the brief conversation between Garcia and an unidentified male with a Hispanic accent. Holdway heard the unidentified male ask Garcia what time he needed to be at Garcia's house. After the call, Garcia gave Holdway a physical description of Carlos, indicating that he was "going to be short and skinny, that he was a Hispanic male, and that he had a dark complexion." Garcia also told Holdway that when Carlos arrived at his house to deliver the narcotics, he would be driving "an older, junky, white minivan." At that point, Holdway ended his conversation with Garcia and returned to Bullhead City to begin the investigation.

¶4 Holdway and another officer (Harris) proceeded to Garcia's home. At approximately 5:00 p.m., Holdway observed a white minivan park across the street from Garcia's house. A hispanic male exited the vehicle, and Holdway immediately recognized Carlos ("Defendant") based on previous police contact Holdway had with him. Holdway saw Defendant approach Garcia's house and noticed that he had a "tennis ball or racquetball size white object in his right hand." Holdway then exited his vehicle and attempted to apprehend Defendant but Defendant fled on foot. Holdway maintained visual contact with Defendant except for a brief period when Holdway encountered a pit bull dog in one of the yards. After crossing through several yards

and climbing over fences, Holdway eventually caught Defendant. An initial search revealed that Defendant was no longer carrying the object that Holdway had observed prior to the chase. After searching the area that evening, no drugs were discovered. However, the following morning a different officer discovered two packages containing approximately four ounces of methamphetamine on the roof of a house near the area where Holdway said he momentarily lost sight of Defendant during the chase.

¶5 A grand jury indicted Defendant on (Count 1) possession of dangerous drugs for sale, (Count 2) possession of drug paraphernalia, (Count 3) burglary in the third degree, (Count 4) resisting arrest, and (Count 5) aggravated assault. A jury found Defendant guilty on Counts 1, 2, and 4, but the court granted his motion for acquittal on Count 3 and the jury found him not guilty on Count 5. The trial court sentenced Defendant to a term of 8 years' imprisonment for Count 1, and a concurrent term of 6 months' imprisonment for Count 2. The court also sentenced Defendant to a term of 6 months' imprisonment on Count 4 to be served consecutively to the sentence for Count 1. Defendant timely appealed and we have jurisdiction pursuant to

Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (2013).[2]

DISCUSSION

¶6 Defendant argues that because Garcia did not testify at trial, his conviction and sentence for possession of a dangerous drug for sale must be vacated because the only evidence supporting that conviction was inadmissible hearsay that violated his rights under the Confrontation Clause. He concedes, however, that he did not object[3] to the admission of Garcia's statements through Holdway and thus we review this issue for fundamental error only.[4] *See State v. Henderson*, 210

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[2] Absent material revisions after the relevant date, we cite the current statute.

[3] During Holdway's testimony, Defendant's trial counsel made a single objection on hearsay grounds. After that objection was sustained, however, counsel failed to object to any more of Holdway's testimony related to his conversation with Garcia.

[4] In his opening brief, Defendant initially argues that admission of Garcia's statements constitutes fundamental error. In discussing prejudice, Defendant asserts that violations of the Confrontation Clause are reviewed under a harmless error standard. In his reply, however, Defendant acknowledges that the proper standard of review in this case is fundamental error. Additionally, the record is clear that Defendant did not object at trial to any of Garcia's statements based on his inability to cross-examine him. Thus, Defendant never made an objection on Confrontation Clause grounds. *Cf. State v. King*, 212 Ariz. 372, 375, ¶ 14, 132 P.3d 311, 314 (App. 2006) (finding Confrontation Clause objection preserved because defendant objected to testimonial hearsay on the basis that he would not be able to cross-examine, although he failed to expressly invoke the Confrontation Clause). The fact that Defendant raised the issue in his motion for new trial was also insufficient to preserve

Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) ("Fundamental error review . . . applies when a defendant fails to object to alleged trial error."); *State v. Boggs*, 218 Ariz. 325, 333, ¶ 31, 185 P.3d 111, 119 (2008) (finding that where a defendant fails to raise a Confrontation Clause objection below, we review for fundamental error). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607. Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id*. at ¶ 19 (internal quotations omitted).

¶7 "The Confrontation Clause prohibits the admission of testimonial hearsay unless (1) the declarant is unavailable and (2) the defendant had a prior opportunity to cross-examine the declarant." *State v. Armstrong*, 218 Ariz. 451, 460, ¶ 32, 189 P.3d 378, 387 (2008) (internal citation and quotation omitted). In this case, even assuming that the admission of Holdway's testimony regarding statements made by Garcia constitutes

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the issue for appeal. *See State v. Davis*, 226 Ariz. 97, 100, ¶ 12, 244 P.3d 101, 104 (App. 2010).

fundamental error, we conclude reversal is not warranted because Defendant has failed to demonstrate prejudice.

¶8 To establish prejudice, Defendant bears the burden of demonstrating that absent the error, a reasonable jury could have reached a different result. *Henderson*, 210 Ariz. at 569, ¶ 27, 115 P.3d at 609. Whether a defendant can make a sufficient showing of prejudice "depends upon the facts of his particular case." *Id*. at ¶ 28.

¶9 In arguing he was prejudiced by the admission of Garcia's statements, Defendant does not acknowledge the remaining admissible evidence the State presented supporting his conviction. For example, to support the possession element of Defendant's conviction, the State presented evidence that when Holdway and Harris first observed Defendant walking towards Garcia's home, they saw that he was carrying what appeared to be either golf-ball or tennis-ball size white objects in his hands. And when the officers approached Defendant, he immediately fled from the area and led them on a lengthy pursuit. The jury was free to consider Defendant's flight as evidence of guilt. *See State v. Cota*, 229 Ariz. 136, 142, ¶ 11, 272 P.3d 1027, 1033 (2012) ("Evidence of flight is admissible to show consciousness of guilt when the defendant flees in a manner which obviously invites suspicion or announces guilt." (internal citation and quotation omitted)). And, the two packages containing meth were

discovered on top of a roof along the route that Defendant followed while fleeing. *See State v. Butler*, 230 Ariz. 465, 472, ¶ 24, 286 P.3d 1074, 1081 (App. 2012) (declining to find prejudice where there was "substantial circumstantial evidence" demonstrating the defendant's guilt).

¶10 To support the "with intent to sell or transfer" element of Defendant's conviction, the State presented evidence that the packaging that Holdway observed in Defendant's hand was "consistent with how methamphetamine would be packaged for sale." Holdway testified that the amount of methamphetamine recovered, approximately four ounces, was "a very large quantity" that he "could only assume . . . would be for resale." Holdway further stated that four ounces of methamphetamine was equivalent to approximately 1,090 individual uses.

¶11 On appeal, Defendant addresses none of the admissible evidence the State presented relating to the "sale or transfer" element but instead simply argues that absent Garcia's statements, there was insufficient evidence to support his conviction. Vague assertions of prejudice are insufficient to meet the threshold required under *Henderson*. Moreover, Defendant concedes that the State would have been permitted to present testimony related "to the fact that police met with an informant who had arranged a buy at the location they went to stake out." In light of the significant admissible evidence

supporting Defendant's conviction, we conclude that Defendant has failed to meet his burden of showing that absent Garcia's statement, a reasonable jury could have reached a different result. *See Henderson*, 210 Ariz. at 569, ¶ 27, 115 P.3d at 609.

CONCLUSION

¶12 For the foregoing reasons, we conclude that even if the admission of Garcia's statements violated Defendant's rights under the Confrontation Clause, Defendant has failed to demonstrate that the error was prejudicial. We therefore affirm Defendant's convictions and sentences.

_____/s/_____
MICHAEL J. BROWN, Judge

CONCURRING:

_____/s/_____
JON W. THOMPSON, Presiding Judge

_____/s/_____
KENT E. CATTANI, Judge