DIVISION ONE
FILED: 9/19/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 12-0671
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
RONALD MARVIN BYRLEY, JR.,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Yavapai County

Cause No. P1300CR201001104

The Honorable Tina R. Ainley, Judge

AFFIRMED

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

David Goldberg — Fort Collins
Attorney for Appellant

G O U L D, Judge

¶1 Ronald Marvin Byrley, Jr., appeals his convictions for one count of possession of dangerous drugs; one count of sale of dangerous drugs; two counts of possession of drug paraphernalia; and one count of use of a wire device in a drug transaction. Byrley argues that error occurred in the admission of evidence and that the prosecutor improperly vouched for two witnesses. He additionally argues that there was insufficient evidence for two of the five convictions. For reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 We state the facts in the light most favorable to sustaining the convictions. *State v. McCurdy*, 216 Ariz. 567, 570, ¶ 2, 169 P.3d 931, 934 (App. 2007). An informant notified a narcotics detective that she had arranged to purchase methamphetamine from Byrley outside a convenience store. The detective provided the informant with an audio/video recording device and conducted visual surveillance of the transaction from a nearby parking lot.

¶3 On March 9, 2010, Byrley arrived at the agreed location in his truck. A passenger exited the truck and handed the informant a soda cup. In return, the informant gave the passenger forty dollars, which the passenger handed to Byrley. Inside the cup was a small plastic baggie containing .13 grams of methamphetamine.

¶4 The following month, the informant contacted Byrley to arrange a second purchase of methamphetamine. As with the first transaction, on April 21, 2010 the detective wired the informant and conducted visual surveillance of the "buy."

¶5 Byrley told the informant that he did not have any methamphetamine at the time, but stated that if she gave him the money, he would get it for her. When Byrley met with the informant, the informant gave Byrley forty dollars. Byrley left with the money and did not return for over two hours. The detective had other officers follow Byrley while he maintained surveillance on the informant.

¶6 After leaving with the money, Byrley had several telephone conversations with the informant in which he demanded that the informant return a computer she had purchased or pay him additional money. It was eventually agreed that the informant would pay Byrley an additional sixty dollars. When Byrley returned, the informant gave Byrley sixty dollars and Byrley handed the informant a small plastic baggie containing .21 grams of methamphetamine.

¶7 Byrley was arrested six months following the second transaction and charged with two counts of transportation of dangerous drugs for sale, three counts of possession of drug paraphernalia, and one count of use of a wire device in a drug

transaction. One of the three counts of possession of drug paraphernalia was dismissed by the State prior to trial.

¶8 Upon trial to a jury, Byrley was acquitted of the charge of transportation of dangerous drugs for sale in regards to the first transaction but found guilty of the lesser-included offense of possession of dangerous drugs on that count. The jury found Byrley guilty as charged on the four other counts. The trial court sentenced Byrley to concurrent and consecutive prison terms totaling six and one-half years. Byrley timely appealed.

DISCUSSION

A. Hearsay Testimony

¶9 Byrley argues that error occurred in the admission of hearsay testimony from the detective who conducted surveillance of the two transactions. In particular, Byrley claims that the detective, in testifying about the second transaction, made two hearsay statements in violation of the Confrontation Clause of the Sixth Amendment. We hold that no reversible error occurred because the first statement was not hearsay and the trial court sustained the objection to the second statement and ordered the testimony struck.

¶10 The first of the challenged statements was made by the detective in response to being asked what happened after he had

provided the informant with a recording device in preparation of her meeting with Byrley. The detective answered:

> To the best of my recollection, [the informant] met with Mr. Byrley, provided him with the funds, and then Mr. Byrley then left the area to go pick up the methamphetamine. He was followed by P.A.N.T. detectives, and then later returned to the same location and provided the methamphetamine to [the informant].

Byrley objected to this testimony as hearsay and moved to strike, but the trial court overruled the objection.

¶11 The second challenged statement was made after the detective was recalled as a rebuttal witness. During the cross-examination of Byrley, the prosecutor asked Byrley without objection why it was that he was followed on the date of the second transaction to a "known drug house." Byrley denied going to the house. In the State's rebuttal case, the prosecutor elicited testimony from the detective that unidentified P.A.N.T. officers followed Byrley to the home of a subject where officers later executed a search warrant and found drugs. As part of this testimony, the detective referred to the home as a "known drug house." Byrley objected to the detective's testimony about his presence at this house on the grounds of hearsay and lack of personal knowledge and moved to strike after the detective acknowledged on cross-examination that his testimony was based on information derived from other detectives. The trial court

sustained the objection, granted Byrley's motion to strike, and directed the jury to disregard the testimony.

¶12 There was no error by the trial court in overruling Byrley's hearsay objection to the first statement. Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted and is generally inadmissible. Arizona Rule of Evidence 801(c). The Confrontation Clause bars admission of out-of-court testimonial hearsay unless the defendant has had an opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). The first of the two portions of challenged testimony did not involve any out-of-court statement. The record reflects the testimony was based on the detective's first-hand knowledge from watching and listening to what occurred during the second transaction. Because the testimony was not hearsay, its admission did not violate Byrley's Sixth Amendment right of confrontation. *State v. Roque*, 213 Ariz. 193, 214, ¶ 70, 141 P.3d 368, 389 (2006).

¶13 In contrast, the testimony by the detective in the State's rebuttal case that Byrley traveled to a "known drug house" as part of the second transaction was unquestionably hearsay in that it was not based on first-hand information but rather what the detective was told by other detectives. The trial court, however, sustained the objection and further ordered the testimony stricken from the record and directed the

jury not to consider it as requested by Byrley. Consequently, this hearsay testimony was not admitted at trial. Under these circumstances, and in light of the trial court's prompt and curative response, reversal is not required. *See State v. Dann*, 205 Ariz. 557, 571, ¶ 48, 74 P.3d 231, 245 (2003) (holding trial court's curative instruction regarding inadmissible testimony sufficient because jurors are presumed to follow instructions); *State v. Richmond*, 114 Ariz. 186, 193, 560 P.2d 41, 48 (1976) (holding trial court curative order striking improper other act evidence together with instruction to jury to disregard evidence sufficient to overcome any prejudice), *abrogated in part by State v. Salazar*, 173 Ariz. 399, 417, 844 P.2d 566, 584 (1992).

B. Other Act Evidence

¶14 Byrley argues that the trial court erred in admitting evidence that he tested positive for methamphetamine when he was arrested. Byrley asserts that the evidence should have been precluded as inadmissible other act evidence under Arizona Rule of Evidence 404(b) of the Rules of Evidence because it was irrelevant and unfairly prejudicial as it showed him to be a drug user.

¶15 We ordinarily review evidentiary rulings for abuse of discretion. *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1054 (1997). The superior court has discretion to admit other-act evidence offered for a proper purpose under Rule 404(b) if

its relevance under Rule 401 is not substantially outweighed by the potential for unfair prejudice under Rule 403 and if the court gives a limiting instruction if requested under Rule 105. *Id.* At trial, however, Byrley only raised a general objection without any reference to Rule 404(b) or other act evidence. Because Byrley failed to object based on Rule 404(b), this claim of error has been waived. *See State v. Rutledge*, 205 Ariz. 7, 13, ¶¶ 29–30, 66 P.3d 50, 56 (2003) (requiring objection on specific legal ground to preserve issue for appeal). Our review is therefore limited to fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). "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." *Id.* at 567, ¶ 20, 115 P.3d at 607.

¶16 Even if we assume it was error to admit evidence of Byrley's positive drug test, we conclude Byrley has failed to meet his burden of showing that he was prejudiced by the admission of this evidence. Byrley testified to occasionally using drugs in 2010, or around the time of the charged offenses. Thus, evidence of the drug test results was simply cumulative to Byrley's own testimony. *See State v. Moody*, 208 Ariz. 424, 455, ¶ 121, 94 P.3d 1119, 1150 (2004) (holding no fundamental error where challenged evidence is cumulative to other evidence); *State v. Williams*, 133 Ariz. 220, 226, 650 P.2d 1202, 1208

(1982) ("We have held that erroneous admission of evidence which was entirely cumulative constituted harmless error.").

C. Vouching

¶17 Byrley contends the prosecutor engaged in misconduct during rebuttal closing argument by vouching for the testimony of two witnesses. According to Byrley, the claimed vouching consisted of statements by the prosecutor that the witnesses "testified truthfully." Because no objection was raised below to the challenged remarks, our review is again limited to fundamental error. *State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990).

¶18 "[I]t is improper for the prosecution to vouch for the credibility of the state's witnesses." *State v. Salcido*, 140 Ariz. 342, 344, 681 P.2d 925, 927 (App. 1984). "Prosecutorial vouching occurs 'when the prosecutor places the prestige of the government behind its witness,' or 'where the prosecutor suggests that information not presented to the jury supports the witness's testimony.'" *State v. Garza*, 216 Ariz. 56, 64, ¶ 23, 163 P.3d 1006, 1014 (2007) (citation omitted). However, counsel is given "wide latitude" in closing argument and may comment on the evidence and argue all reasonable inferences therefrom. *State v. Zaragoza*, 135 Ariz. 63, 68, 659 P.2d 22, 27 (1983). Thus, a prosecutor's characterization of a witness as truthful that, out of context, appears to place "the prestige of the

government" behind a witness will not be deemed vouching when that characterization is "sufficiently linked to the evidence." *State v. Corona*, 188 Ariz. 85, 91, 932 P.2d 1356, 1362 (App. 1997).

¶19 Here, the challenged remarks, when viewed in context, did not constitute impermissible prosecutorial vouching. The prosecutor's statements were made in response to comments by defense counsel that the State's witnesses had motive to lie. In addressing this argument, the prosecutor tied his rebuttal to the evidence at trial. At no time did the prosecutor place the prestige of the government behind either of the witnesses or suggest that information not presented at trial supports the testimony of the two witnesses. Rather, the prosecutor directed the jurors to evaluate the witnesses' credibility for themselves based on the evidence presented. There was no error, fundamental or otherwise, in the prosecutor's closing argument.

¶20 Moreover, as with the previous claim of error, Byrley is unable to meet his burden of establishing prejudice. The trial court instructed the jurors that what the attorneys say is not evidence and that they were to determine the facts only from the evidence produced in court. As our supreme court has instructed, we presume that jurors follow the court's instructions. *State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006); *see also State v. Bowie*, 119 Ariz. 336,

340, 580 P.2d 1190, 1194 (1978) ("Any possible prejudice from the opening statement was overcome by the court's cautionary instructions that evidence did not come from the attorneys and that the verdict must be determined only by reference to the evidence. . . .").

D. Sufficiency of Evidence

¶21 Finally, Byrley argues that there was insufficient evidence to support his convictions for possession of dangerous drugs and possession of drug paraphernalia in regards to the first transaction. Specifically, Byrley asserts that there was no evidence that he possessed the baggie of methamphetamine purchased by the informant. The "question of sufficiency of evidence is one of law, subject to de novo review on appeal." *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011).

¶22 In considering claims of insufficient evidence, our review is limited to whether substantial evidence exists to support the verdicts. *State v. Scott*, 177 Ariz. 131, 138, 865 P.2d 792, 799 (1993); *see also* Arizona Rule of Criminal Procedure 20(a) (stating trial court shall enter judgment of acquittal "if there is no substantial evidence to warrant a conviction"). "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*,

184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). We will reverse a conviction for insufficient evidence only if "there is a complete absence of probative facts to support [the jury's] conclusion." *State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

¶23 The term "possess" means "knowingly to have physical possession or otherwise to exercise dominion or control over property." A.R.S. § 13-105(34) (West 2013).[1] In the instant case, the informant testified that Byrley was the person she spoke to in arranging the first purchase of methamphetamine. Moreover, though Byrley did not directly transfer the soda cup containing the baggie of methamphetamine to the informant in the first transaction, the passenger who handed the cup to the informant testified that Byrley gave it to her to hand to the informant. Together, this testimony is more than sufficient to permit the jury to find beyond a reasonable doubt that Byrley knowingly possessed the methamphetamine purchased by the informant in the first transaction.

[1] We cite the current versions of statutes unless material changes have been made since the time of the charged offenses.

CONCLUSION

¶24 Based on the foregoing, we affirm Byrley's convictions and sentences.

/S/
ANDREW W. GOULD, Judge

CONCURRING:

/S/
PETER B. SWANN, Presiding Judge

/S/
PATRICIA K. NORRIS, Judge