NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

MARK MATTHEW GARLINGER, *Appellant*.

No. 1 CA-CR 16-0246
FILED 6-13-2017

Appeal from the Superior Court in Maricopa County
No. CR2014-144736-001
The Honorable Jose S. Padilla, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Jeffrey L. Force
Counsel for Appellant

Mark Matthew Garlinger, Buckeye
Appellant

MEMORANDUM DECISION

Presiding Judge Peter B. Swann delivered the decision of the court, in which Judge Patricia A. Orozco (retired) and Chief Judge Michael J. Brown joined.

S W A N N, Judge:

¶1 Mark Matthew Garlinger appeals, under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297 (1969), from his convictions and sentences for possession of dangerous drugs, a class 4 felony, and possession of drug paraphernalia, a class 6 felony. We have reviewed the record for fundamental error and considered the issues identified in Garlinger's supplemental brief filed in *propria persona*. *See Anders*, 386 U.S. at 744; *see also Smith v. Robbins*, 528 U.S. 259, 277 (2000); *State v. Clark*, 196 Ariz. 530, 538–39, ¶¶ 31–38 (App. 1999).

FACTS[1] AND PROCEDURAL HISTORY

¶2 Garlinger was arrested on September 14, 2014, after he was found in possession of suspected methamphetamine in a plastic baggie. Police responded to a 911 call about a suspicious person — described as a Hispanic male in his 30s — who was entering yards, knocking on doors, and acting strangely. Garlinger, who appeared to match the 911 call description, was found about two blocks away, lying behind a short retaining wall on private residential property.

¶3 After Garlinger identified himself, Officer Goit asked him if he had anything on his person he was not supposed to have, such as guns or drugs. Garlinger responded "yes," and when he reached into his right front pocket, Officer Goit ordered him to stop and put his hands on his head. When Garlinger removed his hand from his pocket, Officer Goit saw the end of a clear plastic baggie sticking out. When Officer Goit removed the baggie, he saw it contained a crystalline substance that appeared to be methamphetamine. The crystalline substance was in the pinched-off corner of a baggie, which itself was in another baggie. Garlinger was then arrested and searched, during which officers found another plastic baggie that contained syringes. Garlinger told police he had a medical condition and

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[1] We view the evidence presented in the light most favorable to sustaining the convictions. *State v. Guerra*, 161 Ariz. 289, 293 (1989).

needed insulin. He did not elaborate on his condition, but said it was not diabetes.

¶4 Garlinger was indicted on one count of possession of dangerous drugs (methamphetamine), a class 4 felony, in violation of A.R.S. § 13-3407(A)(1), (B), and one count of possession of drug paraphernalia (baggie), a class 6 felony, in violation of A.R.S. § 13-3415(A), (F)(2). The jury convicted him on both counts.

¶5 At sentencing, after finding one prior admitted at trial and two additional priors based on fingerprint comparison, the court sentenced Garlinger as a category 3 offender to a mitigated term on the drug-possession count of 6 years in prison, and a concurrent mitigated term on the drug-paraphernalia-possession count of 2.25 years, with 551 days of presentence incarceration credit.

¶6 Garlinger made multiple requests throughout his case to waive counsel and represent himself. The court found he knowingly, intelligently, and voluntarily waived assistance of counsel. During the times he represented himself, Garlinger had an appointed advisory counsel. He also asked for and was appointed counsel at least twice and was represented by counsel periodically, including throughout trial. The court denied his request to represent himself once, after he personally filed a motion for a Rule 11 examination, which was granted. The court later found him competent.

DISCUSSION

¶7 Garlinger raises the following issues in his supplemental brief.

I. RIGHT TO BE PRESENT

¶8 We reject Garlinger's claim that his constitutional right to be present was violated because he was not in the courtroom when his counsel made an oral motion to dismiss.

¶9 A criminal defendant "is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Morehart v. Barton*, 226 Ariz. 510, 513–14, ¶ 13 (2011) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987)). A critical stage, in general, is any proceeding at which the defendant's presence "has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge," but not "purely

procedural hearings." *Id.* at 514, ¶ 14 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105–06 (1934)).

¶10 Garlinger was not present on day 4 of trial, from 11:01 a.m. to 11:14 a.m., while his counsel made an oral motion to reconsider the motion to dismiss based on the prosecutor's examination of a witness on day 3 of trial. Although the record does not reflect the reason Garlinger was not present, Garlinger was in custody and therefore his absence was involuntary. *See State v. Garcia-Contreras*, 191 Ariz. 144, 147, ¶ 14 (1998) ("An incarcerated defendant's ability to control his situation is limited . . . .").

¶11 Because no objection to his absence was raised with the trial court,[2] normally we would review only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005). However, because a presence error can be structural error, *State v. Forte*, 222 Ariz. 389, 394, ¶ 15 (App. 2009), and reversal is mandated if we find such error, *State v. Valverde*, 220 Ariz. 582, 584–85, ¶ 10 (2009), we must determine whether it occurred here.

¶12 A presence error can amount to structural error when it "so undermine[s] the integrity of the trial process that [it] will necessarily fall within that category of cases requiring automatic reversal." *Garcia-Contreras*, 191 Ariz. at 148, ¶ 16 (quoting *Hegler v. Borg*, 50 F.3d 1472, 1476 (9th Cir. 1995)) (second alteration in *Garcia-Contreras*). We must evaluate "the character of the proceeding from which the defendant was excluded . . . to ascertain the impact of the constitutional violation on the overall structure of the criminal proceeding." *Id.* (quoting *Hegler*, 50 F.3d at 1477).

¶13 We find neither prejudice nor structural error. Garlinger's thirteen-minute absence, outside the jury's presence while defense counsel argued the motion to dismiss, did not so undermine the integrity of the trial process such that any error occurred. *Cf. State v. Sainz*, 186 Ariz. 470 (App. 1996) (finding harmless error when court allowed trial to continue and five police witnesses to testify while defendant was involuntarily absent from trial because he had been arrested for and incarcerated on drug charges). In fact, little of substance occurred during Garlinger's absence, as the court

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[2] When the court began proceedings, it noted that Defendant was not present. Defense counsel did not waive his absence or ask that proceedings be continued until he arrived. Only after the court ruled on her motion and asked, "So with that, are we ready?" did defense counsel note that her client was not present.

appears to have believed it had already denied the motion to dismiss the previous day of trial.[3] Garlinger otherwise was present during all portions of the trial that might have had a substantial influence on the verdict, including jury selection, opening arguments, the presentation of evidence, closing arguments, and jury instructions. *State v. Levato*, 186 Ariz. 441, 445 (1996).

II. MOTION TO DISMISS

¶14 We also reject Garlinger's argument that the court erred by denying the motion to dismiss. Defense counsel alleged that Officer Irvin, while testifying, had referred to the baggie of syringes in Garlinger's possession when he was arrested. The court previously granted a defense motion to preclude testimony about the baggie of syringes.[4]

¶15 The portion of Officer Irvin's testimony to which defense counsel objected came at the end of defense counsel's cross-examination:

> Q: So when it was taken out of his pocket, you testified that you saw a baggie within a baggie?
>
> A. Yes.
>
> Q. And you testified that it was tied in a certain way?
>
> A. If you can look at this, you can see this baggie in here is like a corner of a sandwich bag, like it was pulled off.
>
> Q. Okay. So there were . . . two baggies?
>
> A. So this baggie was there, but the baggie that actually contained the crystal-like substance.

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[3] The February 8, 2016, minute entry refers to defense counsel as arguing a "motion to reconsider motion to dismiss." The transcript, however, refers to it as a "motion to dismiss." When the court said it had previously denied her motion to dismiss, defense counsel stated that she had not previously made a motion to dismiss. Even then the court treated the motion as a motion for reconsideration and denied it.

[4] The court had granted two defense motions in limine, one regarding the syringes and one regarding field testing. An earlier trial had resulted in a mistrial when one of the state's witnesses referred to the field testing.

Q. So there was only one baggie then?

A. Yes, but there is a baggie that had their stuff.

In denying the motion to dismiss, the court noted that Officer Irvin had been looking at an exhibit composed of an inner baggie and an outer baggie. The transcript reflects that Officer Irvin had been looking at Exhibit 5, which the exhibit worksheet describes as a "sealed clear plastic bag containing sealed plastic baggie purported to contain meth and one clear plastic tube purported to contain clear plastic bag."

¶16 We will not disturb the court's denial of a motion to dismiss absent an abuse of discretion. *State v. Hansen*, 156 Ariz. 291, 294 (1988). "An 'abuse of discretion' is discretion manifestly unreasonable, or exercised on untenable grounds or for untenable reasons." *State v. Sandoval*, 175 Ariz. 343, 347 (App. 1993).

¶17 We find no abuse of discretion. Officer Irvin did not refer to "syringes," and she was testifying regarding an admitted exhibit that involved multiple baggies and the crystalline substance.

III. IN LIMINE ORDER REGARDING SYRINGES

¶18 The court granted a defense motion to preclude evidence related to the syringes, concluding that it would be speculation that Garlinger used them to inject methamphetamine because others have; it was irrelevant because the state had not charged Garlinger with possessing them as drug paraphernalia; and it would raise Garlinger's claimed medical issue.

¶19 On direct examination, Garlinger testified to finding "medical instruments" in a baggie on the ground. In a bench conference, the state argued the defense opened the door to bringing in evidence of the syringes. Defense counsel advised that Garlinger had been instructed to follow the court's in limine order and asked only that his answer be stricken. The court ruled the state would be allowed to bring in a witness to testify about the syringes. On cross-examination, Garlinger testified the "medical instruments" he spoke of were the syringes. The state presented a rebuttal witness, Officer Villa-Rodriguez, who was present at Garlinger's arrest and testified that Garlinger claimed ownership of the syringes and did not say he either found the syringes on the ground or planned to dispose of them.

¶20 The court did not err by allowing evidence of the syringes. Garlinger opened the door by testifying regarding "medical instruments."

See cf. State v. Mincey, 130 Ariz. 389, 404–05 (1981) (holding that a defendant cannot complain about the admission of "other act" evidence when he himself opens the door by introducing the subject in an opening statement).

IV. OFFICER'S PERSONNEL RECORD

¶21 We interpret Garlinger's argument on this issue to be that he should have been allowed to use the personnel file of Officer Trynosky, who impounded the baggie of crystalline substance, to impeach him regarding the weight of the seized methamphetamine. The court had earlier granted the state's motion to preclude mentioning his personnel file. When defense counsel asked to "go into Trynosky's personnel reprimand" on cross-examination the court denied the request saying that the officer's veracity had not been attacked.

¶22 Although Ariz. R. Evid. 608(B) permits a court to allow evidence of specific instances of conduct of a witness on cross-examination if those instances are probative of the witness's character for truthfulness or untruthfulness, it also permits the discretionary exclusion of such testimony. *State v. Prince*, 160 Ariz. 268, 273 (1989). Officer Trynosky testified that the drugs inside the packaging as seized weighed 2 grams. The state's forensic scientist testified that the drugs, outside of the packaging as seized, weighed 1.0131 grams. As the differences in weights does not raise a question of Officer Trynosky's veracity, the court did not err by denying defense counsel's request.

V. PROSECUTORIAL MISCONDUCT

¶23 First, Garlinger contends that the state engaged in prosecutorial misconduct when it failed to disclose to him a baggie that had contained the syringes. Garlinger had requested specific items of discovery, including photographs of "syringes/paraphernalia including packaging." The state responded that it was "not aware that any photographs exist of the methamphetamine, syringes or packaging involved in this offense. As far as the State is aware, this physical evidence has been impounded at the police department." Garlinger points out that at trial, Officer Villa-Rodriquez, when asked how the syringes were packaged, testified, "I believe they were in a sandwich bag." Garlinger contends that the sandwich bag was missing from the evidence bag and that this resulted in prejudice to him and intentional prosecutorial misconduct.

¶24 Next, Garlinger claims the prosecutor allowed Officer Trynosky to misstate evidence. Officer Trynosky, who impounded the

evidence from Garlinger's arrest, testified that the baggie that contained the methamphetamine "was probably open" when he received it, because he placed it in a vial. During argument in an earlier hearing about the admissibility of field testing, the prosecutor and the court had this exchange:

> [Prosecutor]: . . . But the officer did have to handle the packaging.
>
> The Court: Again, he can testify: I handled the packaging. . . .
>
> [Prosecutor]: He had to open the packaging.

¶25 Garlinger also points to two alleged misstatements of evidence involving Officer Goit, who searched and arrested Garlinger. Garlinger, representing himself, raised both statements at the hearing on one of his motions to suppress:

> Q. [by Garlinger] And you didn't question Defendant having any methamphetamines?
>
> A. [Officer Goit] Did I question you about having meth, specifically?
>
> Q. Yeah.
>
> A. No.
>
> Q. All right. Previously you had an interview with [defense counsel] regarding this matter, correct?
>
> A. Yes.
>
> * * *
>
> Q. And did you state you reviewed the police report previous to the interviews with [defense counsel]?
>
> A. I believe that's what I said, yes.
>
> * * *
>
> Q. And [defense counsel] had asked whether you reviewed the report today, and your response was, "Not today"; correct?

> A. As far as I remember.
>
> Q. Okay. She then asked, "When was the last time you reviewed . . . it?" And your response was, "Three or four weeks ago"--

At trial, when asked whether he questioned Garlinger about the methamphetamine, Officer Goit answered: "I pulled [the baggie] out and held it up and said: Is this what you're talking about? He said 'yes.'"

¶26 Finally, Garlinger alleges the prosecutor engaged in misconduct when she stated in her closing argument that Garlinger "knew" he possessed methamphetamine when Officer Villa-Rodriguez testified that he had not made any statements about the methamphetamine.

¶27 Although Garlinger had, while acting in *propria persona*, filed a motion to dismiss for prosecutorial misconduct on other grounds — a motion the court denied — he raised none of these issues below. We therefore review for fundamental error. *See State v. Dixon*, 226 Ariz. 545, 549, ¶ 7 (2011); *see also Henderson*, 210 Ariz. at 567, ¶ 19.

¶28 We perceive no prosecutorial misconduct. "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, ¶ 26 (1998) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). "Prosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial . . . .'" *State v. Aguilar*, 217 Ariz. 235, 238–39, ¶ 11 (App. 2007) (quoting *Pool v. Superior Court*, 139 Ariz. 98, 108–09 (1984)). Garlinger has not explained how any of these instances constituted misconduct, much less how they denied him due process.

VI. ADMISSION OF PRIOR FELONY CONVICTIONS

¶29 The state alleged, under A.R.S. § 13-703, four prior felony convictions that were multiple offenses not committed on the same occasion. The state later sought to use Garlinger's 2000 conviction for theft of means of transportation only as impeachment if Garlinger testified.

¶30 Under Ariz. R. Evid. 609, the conviction was admissible because Garlinger had been released from confinement for it in 2012, making it less than 10 years old. The court specifically found that the

probative value outweighed any prejudicial effect, as theft is an act of moral turpitude, and allowed use of both the fact and date of the 2000 felony conviction. We find no abuse of discretion. *See Ritchie v. Krasner*, 221 Ariz. 288, 302, ¶ 46 (App. 2009) ("The trial court has wide discretion in deciding whether to exclude evidence of prior convictions because its prejudicial effect is greater than the probativeness on lack of credibility, and the exercise of this discretion should not be disturbed absent a clear showing of abuse." (internal citation and quotation omitted)).

VII. IMPEACHMENT WITH MOTION FOR RULE 11 EXAMINATION

¶31 Early in the prosecution, while Garlinger represented himself, he filed a motion requesting a Rule 11 examination in which he wrote: "Defendant has no memory of any alleged events stated in police report or any other events" on the date he was arrested. The court granted his request for an examination. Based on the examination reports, the court later found him competent.

¶32 The prosecutor asked to impeach Garlinger, if he testified, with this motion. Defense counsel argued that the police reports documented that Garlinger had been drunk and that he was an "unsophisticated party, who does not know the standards for somebody being petitioned into a Rule 11 evaluation." The court granted the prosecutor's motion, saying: "[I]f he takes the stand and says: I remember every detail about this -- and again if it were simply alcohol and he hadn't written that motion, the State could say: Oh, you remember everything, but you were drinking that day. I mean they can impeach him with just that fact, and whether he was drinking or not. And whether that was aggravated, if you will, or exacerbated by the fact that he may have memory lapses."

¶33 At trial, Garlinger testified to specific facts, including that on the day of his arrest, he had found a baggie on the ground while he was walking and put it in his pocket; he did not see any drugs in the baggie, but he did see some "medical instruments"; he had consumed a couple of 20-ounce cans of beer that day and was feeling sick so he found some shade under a tree and vomited; he picked the baggie up because it contained capped syringes and he did not want a child to pick it up and get hurt; he

intended to dispose of the syringes properly but did not have the opportunity to do so.[5]

¶34 On cross-examination, he acknowledged he had previously submitted his Rule 11 motion that stated he did not remember any of the events alleged to have occurred on the day he was arrested.

¶35 The court did not err by admitting the statements contained in Garlinger's Rule 11 motion. Evidence impeaching a witness's credibility must be relevant. *Hernandez v. State*, 203 Ariz. 196, 200, ¶ 15 (2002). Prior inconsistent statements are admissible for impeachment. *See State v. Saenz*, 88 Ariz. 154, 156–57 (1960) (holding that a police officer's notes were relevant as prior and possibly inconsistent statements made and recorded by the witness); *Parkinson v. Farmers Ins. Co.*, 122 Ariz. 343, 345 (App. 1979) (holding that insured's son's prior inconsistent statements impeached his more recent claim that he acted accidentally). "An adverse witness may be impeached by a showing that he has previously made statements inconsistent with his present testimony." *State v. Caldwell*, 117 Ariz. 464, 473 (1977). This includes a defendant who elects to testify in his own defense. *See State v. Jorgenson*, 108 Ariz. 476, 478 (1972) (holding that the trial court must hold a voluntariness hearing when the state seeks to impeach a defendant's trial testimony with prior inconstant statements made to police officers which the defendant claims were made involuntarily). That Garlinger's statement was contained in a motion he personally filed requesting a Rule 11 examination does not make the evidence inadmissible.

VIII. ADMISSIBILITY OF THE 911 CALL

¶36 Garlinger argues that the court erred by granting the state's motion to use the 911 call. Garlinger, acting in *propria persona*, opposed the motion, arguing that the recording was inadmissible because the 911 call was testimonial hearsay. As described by the prosecutor, the 911 caller said the person she was calling about was "really scary, growling, and right next to them in the neighbor's garden."

¶37 Garlinger contends the court erred in admitting the recording, arguing that the caller's statements were testimonial and that he was denied his Sixth Amendment confrontation rights because he did not have the opportunity to cross-examine the caller. *See Crawford v. Washington*, 541

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[5] He did not testify that the syringes belonged to him, as he had previously told police.

U.S. 36, 59–61 (2004) (holding that the Confrontation Clause precludes admission of testimonial out-of-court statements unless the witness is subject to cross-examination at trial or is unavailable and the defendant had a prior opportunity to cross-examine the witness). Although we generally review a court's ruling on the admissibility of evidence for abuse of discretion, we review challenges to admissibility based on the Confrontation Clause de novo. *State v. Armstrong*, 218 Ariz. 451, 458, ¶ 20 (2008).

¶38 The Confrontation Clause only precludes the admission of testimonial statements. *Davis v. Washington*, 547 U.S. 813, 821 (2006). The Supreme Court defines "testimony" as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51. Statements made to the police, including those in 911 calls, are testimonial for purposes of the Confrontation Clause when "there is no . . . ongoing emergency, and . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822, 827. On the other hand, a statement is nontestimonial when the "circumstances objectively indicat[e] that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.*

¶39 Here, the court properly found the statements by the caller were non-testimonial because they were not made for "the purpose of establishing or proving some fact," but rather to request "police assistance."

¶40 Accordingly, there was no violation of Garlinger's confrontation rights in the admission of the recording of the 911 call. *See Williams v. Illinois*, 132 S.Ct. 2221, 2243 (2012) ("In identifying the primary purpose of an out-of-court statement, we apply an objective test. . . . We look for the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances." (citation omitted)).

IX. FAILURE TO POSTPONE EVIDENTIARY HEARING

¶41 Garlinger contends the court erred by failing to continue a November 6, 2015 evidentiary hearing. He contends he did not know that the hearing was to be an evidentiary hearing, and therefore was not able to prove his case effectively; that the hearing was originally scheduled for December 4, 2015 but was moved up without his knowledge; and that the court "admit[ted] that the matter did not get set properly." Garlinger misstates the record.

¶42 Garlinger represented himself, with advisory counsel, at the October 28, 2015 final trial management conference. The court granted Garlinger's motion to continue trial and then, on the record, worked on scheduling the next hearing, stating:

> I'm going to grant the defendant a continuance in this matter. In terms of how long the continuance is going to be, the December 4th evidentiary hearing date is for – I'm going to say is going to be for all motions pending at the time that we give to that hearing date, and I'm going to straighten out which motions we're going to hear beginning then.

¶43 When the prosecutor advised she would not be available on December 4, the court then sought a substitute date. When November 6 was proposed, the court stated "Unfortunately, this didn't get set properly, but I'm told that we actually have a three-hour hearing all that afternoon. So I'm sorry." After further discussion, the court settled on December 18, with trial set for January 19, 2016. After a pause in proceedings, the court returned to advise that it was available November 6 and stated: "We'll vacate the December 18th motions hearings and set all motions presently pending for hearing 1:30 to 4:30, November 6th." The dates were noted in an October 28, 2015 minute entry.

¶44 At the November 6 hearing, Garlinger requested a continuance. He told the judge he did not "really hear anything about this being an evidentiary hearing or else I would have asked to be postponed so I could call witnesses on my behalf." The court questioned Garlinger about what he intended to accomplish and then ruled that the matter could proceed on the record already before the court — noting that it had already held several evidentiary hearings and oral argument.

¶45 We see no fundamental error. Continuances are "within the sound discretion of the trial judge whose decision will not be disturbed unless there is a clear abuse of discretion, and unless denial of the motion is shown to be prejudicial to the defendant." *State v. Jackson*, 112 Ariz. 149, 154 (1975). Based on the record before us, and in the absence of any claim that Garlinger actually was prejudiced by the court's denial of his request to continue the evidentiary hearing, we find no abuse of discretion, much less fundamental error. Garlinger was present during the October 23 hearing when scheduling was discussed and, if he had any questions regarding the matter, had advisory counsel.

X. JURY ISSUES

¶46 Garlinger contends the court erred by reducing the number of peremptory challenges; failing to strike two jurors; and denying his challenge to the prosecutor striking two others.

¶47 To complete jury selection, the court proposed that, once the venire consisted of 20 members, each side give up one peremptory strike so that they would each exercise five strikes, leaving eight jurors and two alternates. When defense counsel objected, the state suggested that it waive one strike and that the jury proceed with one alternate, thus giving the defense its full number of peremptory challenges. Defense counsel did not object to that procedure, which the court adopted. Garlinger received the benefit of all the peremptory strikes the rules allow.

¶48 Garlinger also argues his rights were violated because he had to use two peremptory strikes when the court decided not to strike jurors 43 and 49 for cause. Defense counsel argued that Juror 49 indicated he "would have a difficult time following the law" and "seemed very affected" by a friend's experience as a crime victim. As for Juror 43, defense counsel argued that she "indicated that she would voice her opinion, but she cannot continue her own position if the majority doesn't agree with her." Because that juror also said she was starting to experience pain from recent surgery, defense counsel argued that she should be stricken because, once she went to the doctor, she might be taking narcotics. The court refused to strike either from the venire panel, and neither sat on the jury. We find no error. We will not disturb a court's decision on a motion to strike a juror for cause absent a clear abuse of discretion. *State v. Blackman*, 201 Ariz. 527, 533, ¶ 13 (App. 2002).

¶49 Finally, Garlinger contends that the court erred in denying his challenge pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), to the prosecutor striking Juror 26, who was Black, and Juror 6, who was Hispanic. The defense intimated that the prosecutor did not have a race-neutral reason as evidenced by the fact that she had not sought to strike those jurors for cause.

¶50 We review a court's decision regarding the state's motives for a peremptory strike for clear error. *State v. Murray*, 184 Ariz. 9, 24 (1995). "We give great deference to the trial court's ruling, based, as it is, largely upon an assessment of the prosecutor's credibility." *State v. Canez*, 202 Ariz. 133, 147, ¶ 28 (2002), *abrogated on other grounds by rule,* Ariz. R. Crim. P. 16.2(b), *as recognized in State v. Valenzuela*, 239 Ariz. 299 (2016). In evaluating

the credibility of the state's proffered explanation, the court must consider factors such as "the prosecutor's demeanor . . . how reasonable, or how improbable, the explanations are . . . and . . . whether the proffered rationale has some basis in accepted trial strategy." *State v. Bustamante*, 229 Ariz. 256 (App. 2012) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003)) (omissions in original).

¶51 We find no error. The court found that the prosecutor had a neutral basis for striking the jurors. While the basis for a strike must be more than a mere denial of improper motive, it need not be "persuasive, or even plausible." *Purkett v. Elem*, 514 U.S. 765, 768 (1995). It also need not rise to the level of a challenge for cause. *Batson*, 476 U.S. at 97. The prosecutor said she struck Juror 26 because:

> [S]he initially held up her card saying that she would believe cops less while she ultimately got around to saying she could be fair and impartial. She also told us a story about how she was a witness to something that happened to her husband where police lied. She said he didn't do what police said and that the charges were ultimately dropped.
>
> Her brother-in-law was convicted of narcotic drugs. . . . When asked if she could be fair and impartial, she simply said: I can try my best, and that she would need evidence in addition to cops testimony to believe it.

As for Juror 6, the prosecutor stated she struck him because:

> He went into great detail about what he is studying right now, including psychopharmacology, the validity of witnesses and the law in general. He said, and I wrote down which I thought was a quote, he has a strong bias with live witnesses. Now, again, he said he would definitely try to be fair and impartial. And while he says he would listen to everything, he also simply said that these are things he is studying, he is very involved in them, and that he is critical of it, and he has a strong bias against it.

¶52 Neither of these explanations are premised on attributes ascribed to the panelist because of his or her race. *See State v. Hernandez*, 170 Ariz. 301, 305 (App. 1991) ("It is permissible to rely on a prospective juror's mode of answering questions as a basis for peremptory selections."); *Hernandez v. New York*, 500 U.S. 352, 360–61 (1991) (a panelist's responses and demeanor during voir dire may support neutral, trial-related basis for

removal). "If a discriminatory intent is not inherent in the reason offered, the explanation will be deemed race neutral." *State v. Henry*, 191 Ariz. 283, 286 (App. 1997).

CONCLUSION

¶53 We do not find fundamental error in general nor any error raised by Garlinger's supplemental brief. Sufficient evidence was presented upon which a jury could determine beyond a reasonable doubt that Garlinger possessed dangerous drugs and drug paraphernalia.

¶54 The proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. So far as the record reveals, Garlinger was represented by counsel at all stages of the proceedings, or had waived counsel. Except for the few minutes on day 3 of trial, Garlinger was present at all critical stages of trial, including the verdict. The jury was properly comprised of eight jurors, and the record shows no evidence of jury misconduct. *See* A.R.S. § 21-102(B); Ariz. R. Crim. P. 18.1(a). At sentencing, Garlinger had the opportunity to speak, and did so, and the court stated on the record the evidence and materials it considered and the factors it found in imposing sentence. *See* Ariz. R. Crim. P. 26.9; 26.10. The sentence imposed was within the statutory limits. *See* A.R.S. § 13–703(B), (J).

¶55 We affirm Garlinger's convictions and sentences. Defense counsel's obligations pertaining to this appeal have come to an end. *See State v. Shattuck*, 140 Ariz. 582, 584–85 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review to the Arizona Supreme Court, counsel must only inform Garlinger of the status of this appeal and his future options. *Id.* Garlinger has 30 days from the date of this decision to file a petition for review in *propria persona*. *See* Ariz. R. Crim. P. 31.19(a). Upon the court's own motion, Garlinger has 30 days from the date of this decision in which to file a motion for reconsideration.

AMY M. WOOD • Clerk of the Court
FILED: JT