IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 12/16/10
RUTH WILLINGHAM, ACTING CLERK
BY: DLL

STATE OF ARIZONA, Appellee,	)	1 CA-CR 08-0672
	)	DEPARTMENT D
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
MICHAEL RAY FUQUA, Appellant.	)	Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Navajo County

Cause No. S-0900-CR-2005-0569

The Honorable Thomas L. Wing, Judge

REVERSED AND REMANDED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Michael T. O'Toole, Assistant Attorney General
Attorneys for Appellee

Criss E. Candelaria, P.C. — Pinetop
By Criss E. Candelaria
Attorneys for Appellant

I R V I N E, Judge

¶1 Michael Ray Fuqua appeals his conviction for conspiracy to commit first-degree murder. We hold that the

trial court erred in precluding admission of Fuqua's contemporaneous statements to other jail inmates that he was only pretending to go along with the murder plot and had no intention of following through, and that the error was not harmless under the circumstances. We accordingly reverse and remand for a new trial.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 While Fuqua was in jail awaiting trial on drugs and weapon charges, his former attorney gave him documents produced by the State in discovery that revealed the identity of the confidential informant in that case. Fuqua's cellmate, G.H., testified that Fuqua was "pretty upset" at discovering the identity of the informant and told G.H. that he wanted the informant dead. Fuqua asked G.H. to shoot the informant, and Fuqua gave him the informant's telephone numbers, drew a map to the informant's house and workplace, and told him the name and telephone number of a person from whom he should obtain the rifle.

¶3 G.H. contacted his attorney about the plot and met with police. In exchange for dismissal of charges then pending against him, he agreed to return to his cell with a hidden recorder to discuss the murder plot with Fuqua. As recorded,

[1] We view the evidence in the light most favorable to upholding the jury's verdict. *State v. Moody*, 208 Ariz. 424, 435, n.1, ¶ 2, 94 P.3d 1119, 1130 n.1 (2004).

Fuqua discussed plans to have G.H., who was expecting to be released from jail soon for other reasons, kill the informant. Fuqua also discussed plans to make sure he had an alibi if G.H. were successful in obtaining Fuqua's release from jail before G.H. shot the informant.

¶4 Fuqua testified at trial that he never intended for Gary H. to kill the informant, but was going along with the plot because he wanted G.H. to obtain his release from jail. He testified that G.H. came up with the plan to kill the informant in exchange for Fuqua killing someone who had stolen money from G.H.

¶5 The jury convicted Fuqua of the charged crime of conspiracy to commit first-degree murder. Fuqua was sentenced to life with the possibility of parole after twenty-five years, a term to be served concurrently with the 19.75 year prison sentence for his drugs and weapon convictions in the underlying case. Fuqua timely appealed.

1. Exclusion of Fuqua's Statements

¶6 We address first Fuqua's argument that the trial court abused its discretion in refusing to admit Fuqua's statements to two other jail inmates that he was only pretending to go along with Gary H.'s plot and had no intention of following through. We review a trial court's ruling on the admissibility of evidence over hearsay objections for an abuse of discretion.

State v. Tucker, 205 Ariz. 157, 165, ¶ 41, 68 P.3d 110, 118 (2003).

¶7 Fuqua initially sought to have the statements admitted under Arizona Rule of Evidence ("Rule") 803(3), the state of mind exception to the rule precluding hearsay. Based on the State's cross-examination of Fuqua, he also sought admission of the statements under Rule 801(d)(1)(B), as prior consistent statements to rebut an implied charge of recent fabrication. Fuqua's counsel offered as proof testimony from two inmates, P.C. and M.V., that Fuqua told them he had no intention of going through with the plan to murder the informant, and that he was just going along with it so G.H. would bond him out. He also offered as proof the letters that the inmates sent to Fuqua's former attorney several months after G.H. taped the incriminating conversation with Fuqua.

¶8 In one letter, P.C. wrote that Fuqua told him G.H. came up with a plan to post Fuqua's bond on the condition that G.H. kill Fuqua's confidential informant, but Fuqua "explained that he really had no intention whatsoever of committing any criminal acts once he was out," and that he "had no intention of ever letting such a plan come to pass." In testimony at the suppression hearing, P.C. confirmed that Fuqua told him this, and indicated this discussion took place before G.H. returned to Fuqua's cell with the hidden recorder. In another letter, M.V.

wrote: “Fuqua mentioned that [G.H.] had a brilliant idea that can help the both of them out and he is only going along with [that] idea . . . and that it can only help his situation to go home with no harm done in it.” He also stated this conversation occurred before G.H. wore the wire.

¶9 Citing *State v. Barger*, 167 Ariz. 563, 810 P.2d 191 (App. 1990), the trial court ruled that the statements Fuqua made to the inmates were not admissible under Rule 803(3) because they were not circumstantial evidence of Fuqua’s state of mind, but were instead direct assertions of his existing state of mind. The trial court also ruled the statements were not admissible under Rule 801(d)(1)(B) because the prosecutor’s cross-examination had not presented any charge of recent fabrication to which these statements would respond. We agree with the trial court.

¶10 Fuqua’s statements to the inmates were hearsay because they were made out-of-court and offered to prove the truth of the assertion that he lacked the requisite intent to complete the crime charged. Ariz.R.Evid. 801(c). *See Barger*, 167 Ariz. at 194, 810 P.2d at 566. Rule 803(3), however, excludes from the rule precluding hearsay statements of a declarant’s “then existing state of mind . . . (such as intent, plan, motive . . .), but not . . . a statement of memory or belief to prove the fact remembered or believed." Ariz.R.Evid. 803(3). Fuqua’s

statements were admissible under this Rule because they showed Fuqua's intent at the time he allegedly entered into the conspiracy.

¶11 Moreover, Fuqua's statements not only showed his intent in past conversations with G.H., but they also reflect his state of mind during any future conversations with G.H. about obtaining his release. *Compare Barger,* 167 Ariz. at 566, 810 P.2d at 194 (holding that statements defendant made to police the day after the incident necessarily concerned his past mental condition, and accordingly were not admissible under this exception) *with State v. Fulminante*, 193 Ariz. 485, 495, ¶ 32, 975 P.2d 75, 85 (1999) (holding that "the statement must describe declarant's present feeling or future intention rather than look backward, describing declarant's past memory or belief about another's conduct."). Both inmates indicated at the suppression hearing that Fuqua made these statements to them before Gary H. returned to the cell with a wire. On this record, the trial court abused its discretion in ruling that the hearsay exception under Rule 803(3) did not apply.

¶12 Additionally, we cannot agree with the State that the trial court's preclusion of these statements was harmless error under the circumstances. To show harmless error, the State must prove beyond a reasonable doubt that the error "did not contribute to or affect the verdict or sentence." *State v.*

Henderson, 210 Ariz. 561, 567, ¶ 18, 115 P.3d 601, 607 (2005) (citation omitted). Fuqua defended entirely on the basis of lack of intent, and testified he was only pretending to go along with G.H.'s plot. His inability to present two witnesses to corroborate this claim went to the heart of his case. We cannot say this testimony would not have affected the verdict. Therefore, we vacate his conviction on this ground.

¶13 Because many of the other issues raised by Fuqua will come up again on remand, however, we address them as well.

2. Sixth Amendment Right to Counsel

¶14 Fuqua argues the incriminating statements made to G.H. after he was wired by police were obtained in violation of his Sixth Amendment right to counsel that attached following his arrest on the drug charges. We disagree.

¶15 At the suppression hearing, Fuqua's former attorney testified he was appointed on September 23 to represent Fuqua on the drugs and weapon charges, and revealed the identity of the informant in that case to Fuqua several days later. He testified he withdrew from representation on September 29, the same afternoon he learned that another attorney in the same legal defender's office represented G.H., and that G.H. and his attorney planned to meet with police to investigate Fuqua's alleged plot to murder the informant. G.H. and his attorney met with police on September 30, and police wired G.H. and returned

him to his cell to engage Fuqua in further conversation regarding the murder plot.

¶16 The trial court denied Fuqua's motion to suppress the incriminating statements, ruling Fuqua had no reason to believe that G.H. was a government informant and that police were investigating a crime for which Fuqua had not yet been charged. We review the denial of a motion to suppress evidence for an abuse of discretion, but review constitutional and legal issues de novo. *State v. Gay*, 214 Ariz. 214, 217, ¶ 4, 150 P.3d 787, 790 (App. 2007).

¶17 "Under the Sixth Amendment, the right to counsel attaches when a defendant is formally charged with a crime." *State v. Hitch,* 160 Ariz. 297, 299, 772 P.2d 1150, 1152 (App. 1989). Once the Sixth Amendment right to counsel has attached to a particular crime, the government may not introduce statements made by a criminal defendant to an undercover informant regarding that crime in his trial on those charges. *See United States v. Henry*, 447 U.S. 264, 265-74 (1980) (holding the government violated defendant's Sixth Amendment right to counsel by intentionally creating a situation likely to induce him to make incriminating statements to a fellow inmate without the assistance of counsel); *Massiah v. United States*, 377 U.S. 201, 204-06 (1964) (holding the government violated defendant's Sixth Amendment right to counsel by using as evidence against him

incriminating statements a defendant made to a cooperating codefendant after their indictment on narcotics charges, and heard by a government agent over a radio transmitter planted in codefendant's car).

¶18 The Sixth Amendment does not prohibit, however, evidence obtained by an undercover informant in an investigation for a crime not yet charged at a trial on those charges, notwithstanding that the right to counsel may have attached on other charges. *See Illinois v. Perkins*, 496 U.S. 292, 299 (1990) (noting that use of undercover agent to interrogate suspect on a subject on which the suspect has not been charged does not violate suspect's Sixth Amendment right to counsel); *Maine v. Moulton,* 474 U.S. 159, 180 n.16 (1985) ("Incriminating statements pertaining to other crimes as to which the Sixth Amendment has not attached, are, of course, admissible at a trial of those offenses."); *Moran v. Burbine*, 475 U.S. 412, 431 (1986) ("[T]he Sixth Amendment right to counsel does not attach until after the initiation of formal charges.").

¶19 Here, the incriminating statements about the murder plot were elicited by G.H. on behalf of police before Fuqua was charged with conspiracy to commit murder. Therefore, they were admissible notwithstanding that Fuqua's right to counsel had attached in the underlying drugs and weapon charges. Fuqua's

incriminating statements were thus properly admitted.[2]

3. Conduct of Former Counsel

¶20 Fuqua further argues his right to due process was violated because his former attorney (1) unnecessarily broke client confidentiality and (2) withdrew from representation without first confronting Fuqua or warning him that "the gig was up," while the attorney representing Hall did not withdraw. We agree that the attorney-client privilege prevented his former attorney from testifying that he revealed to Fuqua the informant's identity, but we discern no misconduct with regard to his withdrawal.

¶21 Before trial, Fuqua moved to preclude his former attorney and G.H.'s attorney from testifying at trial, arguing admission of their testimony would be fundamentally unfair and a

[2] Fuqua additionally argues that the admission of the recorded conversation violated the invocation of his right to counsel, which he claims occurred at the time of his arrest on the drug charges when he said, "I guess I need an attorney." For this argument, Fuqua relies on a police report, presumably from the prior drugs and weapon investigation, which was not admitted into evidence in the suppression hearing or at trial in this case, and is not part of the record on appeal. Because Fuqua raises this claim with supporting legal authority for the first time in his Reply Brief, we do not address it. *See State v. Moody*, 208 Ariz. 424, 452 n.9, ¶ 101, 94 P.3d 1119, 1147 (2004) ("Merely mentioning an argument is not enough: 'In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issue raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim.'") (citation omitted). *See also State v. Larson,* 222 Ariz. 341, 346, ¶ 23, 214 P.3d 429, 434 (App. 2009) (argument waived if raised for first time in reply brief).

violation of due process under *State v. Melendez*, 172 Ariz. 68, 834 P.2d 154 (1992). At the suppression hearing, G.H.'s attorney testified that shortly after G.H. called her to report Fuqua's plan to murder the informant, she learned that another attorney in the same legal defender's office represented Fuqua on the other charges. The two determined that G.H.'s attorney would continue to represent him, but that Fuqua's former counsel would immediately seek to withdraw from representation. That afternoon, Fuqua's former counsel met with the trial court, which granted his motion to withdraw.

¶22 The following morning, Fuqua's former attorney called the commander of the major crimes apprehension task force to cancel the previously scheduled interviews in the underlying drugs and weapon case. The commander did not believe Fuqua knew the identity of the informant because Fuqua had called the informant and asked her to bail him out of jail. Concerned that the confidential informant was in serious physical danger, Fuqua's former counsel told the commander that he had revealed to Fuqua the identity of the informant.

¶23 The trial court denied the suppression motion in its entirety without specifically addressing his request to preclude the attorneys from testifying. At trial, without further objection, Fuqua's former attorney testified only that he had represented Fuqua on the drug charges; that he had furnished him

a copy of the police reports containing Fuqua's picture and the signature of the informant; and shortly thereafter, he withdrew as attorney for Fuqua. G.H.'s attorney testified only that she had represented G.H.; that he had contacted her from jail, from which they had anticipated he would be released shortly; that she had arranged a meeting between him, the task force, and the prosecutor in his case; and that G.H. agreed to wear the recording device in exchange for dismissal of the charges pending against him (which she identified along with the potential sentences).

¶24 To the extent Fuqua challenges the trial court's denial of his request to preclude his former attorney's testimony at trial, we hold that one portion of the testimony revealed a confidential communication, in violation of the attorney-client privilege. As an initial matter, *Melendez*, 172 Ariz. 68, 834 P.2d 154, the only case on which Fuqua relies, is distinguishable.

¶25 In *Melendez*, our supreme court held that it would be fundamentally unfair and a violation of due process under the Arizona constitution to allow a formal inmate representative to testify as to communications made to him by a defendant during the representation. *Id.* at 73, 834 P.2d at 159. In reaching its decision, it declined to determine whether department regulations governing such representations brought the

communications under the attorney-client privilege. *Id.* at 71 n.5, 834 P.2d at 157 n.5.

¶26 In this case, unlike *Melendez*, the statutorily defined attorney-client privilege does govern the determination of whether Fuqua's former attorney could testify as to any confidential communications made during the course of their relationship. The statutory attorney-client privilege precludes an attorney from testifying without the consent of his client "as to any communication made by the client to the attorney, or the attorney's advice given in the course of professional employment." A.R.S. § 13-4062(2) (2010).[3] The attorney-client privilege accordingly protects communications between the lawyer and his or her client. *State ex rel. McDougall v. Corcoran*, 153 Ariz. 157, 161, 735 P.2d 767, 771 (1987).

¶27 The portion of Fuqua's former attorney's testimony that he provided Fuqua with police reports revealing the identity of the informant violated the attorney-client privilege. That testimony revealed a "communication" made by attorney to client just as if the attorney had testified that he told Fuqua the identity of the informant. Therefore, it was not similar to "the fact that the client has consulted an attorney, the dates and places of his visits, [or] the [i]dentity of the

[3] We cite to the current version of the applicable statutes when no revisions material to this decision have since occurred.

client," which are considered outside the coverage of the privilege. *See State v. Alexander*, 108 Ariz. 556, 568, 503 P.2d 777, 789 (1972). Because this testimony violated the attorney client privilege, the motion to suppress it should have been granted.

¶28 Fuqua's claim fails to the extent he claims he was deprived the right to counsel because his former counsel allegedly violated ethical rules and withdrew during "a critical phase" of this case. The Sixth Amendment guarantees a criminal defendant the right to the aid of counsel during critical stages of trial. *United States v. Cronic,* 466 U.S. 648, 659 (1984). The Supreme Court has also held that the failure to appoint counsel for capital defendants during the critical phase "from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important" was a violation of due process. *Powell v. Alabama*, 287 U.S. 45, 59-60 (1932).

¶29 The record does not demonstrate that Fuqua was completely deprived of the aid of counsel in preparing a defense against the conspiracy charges at issue, or denied representation at any critical stage of this prosecution. He claims only that his former attorney for the drugs and weapon charges should have warned him that he was being investigated for conspiracy to murder, a warning that might have dissuaded

him from further discussing the murder plot with his cellmate and obviated the resulting charge.

¶30 To the extent Fuqua argues his former attorney breached professional standards by not warning him of the investigation of the crime not charged, he raises an ineffective assistance of counsel claim that is not cognizable on direct appeal. *State v. Spreitz,* 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002) ("Any such claims improvidently raised in a direct appeal . . . will not be addressed by appellate courts regardless of merit.") Rather, such claims must be brought in a Rule 32 petition for post-conviction relief. *Id.*

4. Denial of Solicitation Instruction

¶31 Fuqua also argues that the trial court fundamentally erred because it did not sua sponte instruct the jury that solicitation is a lesser-included offense of the charged crime of conspiracy to commit murder. We find no merit in this argument. A lesser-included offense is an offense "composed solely of some but not all of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one." *State v. Celaya*, 135 Ariz. 248, 251, 660 P.2d 849, 852 (1983).

¶32 A person commits conspiracy "if, with the intent to promote or aid the commission of an offense, such person agrees with one more persons that at least one of them or another

person will engage in conduct constituting the offense." A.R.S. § 13-1003(A) (2010). A person commits the crime of solicitation "if, with the intent to promote or facilitate the commission of a felony . . . such person commands, encourages, requests or solicits another person to engage in specific conduct which would constitute the felony." A.R.S. § 13-1002(A) (2010). One can commit conspiracy without committing solicitation simply by reaching an agreement to commit a felony without commanding, encouraging, requesting or soliciting another person to engage in the conduct. Because solicitation is not necessarily a lesser-included offense of conspiracy, we discern no error.

¶33 Because we reverse and remand on the evidentiary issue, Fuqua's final claim that the failure of the trial court to have a state-certified court reporter prepare the record is moot.

CONCLUSION

¶34 For the foregoing reasons, we reverse Fuqua's conviction and remand for proceedings consistent with this decision.

/s/
PATRICK IRVINE, Judge

CONCURRING:

/s/
LAWRENCE F. WINTHROP, Presiding Judge

/s/
PATRICIA K. NORRIS, Judge