DIVISION ONE
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PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0146
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	
STEPHANIE SCOTT RAY-SALVATORE,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-156787-001 DT

The Honorable Warren J. Granville, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Melissa M. Swearingen, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Louise Stark, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 Stephanie Scott Ray-Salvatore (Appellant) appeals her convictions for possession or use of dangerous drugs, possession or use of marijuana and possession of drug paraphernalia. The sole issue on appeal is whether the trial court erred when it allowed the State to impeach Appellant with a written statement she prepared as part of her admission to a drug diversion/deferred prosecution program. For the reasons that follow, we affirm Appellant's convictions and sentences.

FACTS AND PROCEDURAL BACKGROUND

¶2 "We construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998). We do not weigh the evidence, however; that is the function of the jury. *See State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

¶3 On the date of the incident, Appellant's husband contacted police and asked them to remove items he had discovered in his and Appellant's home. When the officer arrived, Appellant's husband invited the officer inside and provided him a cigarette pack. The cigarette pack contained useable quantities of methamphetamine and marijuana, as well as a pipe commonly used to smoke methamphetamine.

¶4 Appellant waived her *Miranda*[1] rights and agreed to be interviewed by the officer. During that interview, Appellant admitted the methamphetamine, marijuana and pipe belonged to her.[2] The officer did not arrest Appellant, however, because he believed it would be more beneficial for Appellant to attend a treatment program than for her to be taken to jail. The officer did inform Appellant, however, that he would begin the process to file charges against her.

¶5 After charges were filed, Appellant appeared for what would ordinarily have been her preliminary hearing. At that time, she waived her preliminary hearing and agreed to participate in a TASC drug diversion/deferred prosecution program (TASC Program).[3] As part of her entry into that treatment program, Appellant signed a statement in which she acknowledged that the methamphetamine, marijuana and pipe were

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[1] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] At a subsequent voluntariness hearing, the trial court found Appellant's statements were made voluntarily after a valid waiver of her constitutional rights. Appellant raises no issue on appeal regarding the voluntariness of her statements to the officer.

[3] "The TASC Drug Diversion Program is a 'special supervision program in which the county attorney or a participating county may divert or defer, before a guilty plea or a trial, the prosecution of a person accused of committing a crime.'" *In re Connelly*, 203 Ariz. 413, 415 n.1, ¶ 5, 55 P.3d 756, 758 (2002) (quoting Ariz. Rev. Stat. (A.R.S.) § 11-361 (2001)). "TASC" stands for "Treatment Assessment Screening Center." *State v. Olea*, 182 Ariz. 485, 487, 897 P.2d 1371, 1373 (App. 1995).

found in her possession. Appellant's prosecution was then suspended for two years to permit her time to complete the TASC program and, if she successfully completed the program, the charges would be dismissed. *See* Ariz. R. Crim. P. 38.3.b. When Appellant failed to successfully complete the TASC program, her prosecution was reinstated and the matter proceeded to trial.

¶6 At trial, Appellant denied the methamphetamine, marijuana or pipe belonged to her. She further denied she ever told the officer those items belonged to her. The State then impeached Appellant with the written statement she prepared as part of her admission to the TASC program. Defendant knew before she testified that the State would be allowed to impeach her with the statement.

¶7 Appellant was found guilty on all counts and placed on concurrent terms of three years' probation for each count. Appellant timely appealed. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21.A.1 (2003), 13-4031 and -4033.A.1 (2010).[4]

DISCUSSION

¶8 Appellant argues the trial court erred when it allowed the State to impeach her trial testimony with the written statement she signed in order to enter the TASC program.

[4] Unless otherwise specified, we cite to the current versions of the applicable statutes because no revisions material to this decision have since occurred.

Appellant argues the statement was inadmissible because it was involuntary and coerced. Appellant further argues the statement was given as part of a negotiated disposition of the case in exchange for "dismissal" of the charges and was, therefore, inadmissible pursuant to Arizona Rule of Evidence 410 and Arizona Rule of Criminal Procedure 17.4.f.[5]

¶9 Ordinarily, we review a trial court's evidentiary rulings for an abuse of discretion. *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990). Appellant concedes, however, that she did not raise these issues below.[6] Therefore, we review only for fundamental error. *See State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991) (the failure to raise an issue at trial waives all but fundamental error review). "To establish fundamental error, [a defendant] must show that the error complained of goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *State*

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[5] The TASC documents were identified as Exhibit 7 but were not admitted into evidence and are not otherwise contained in the record on appeal. "When matters are not included in the record on appeal, the missing portion of the record is presumed to support the decision of the trial court." *State v. Mendoza*, 181 Ariz. 472, 474, 891 P.2d 939, 941 (App. 1995).

[6] While Appellant objected to the admission of the TASC documents and/or any statements within the documents based on allegedly untimely disclosure, Appellant's counsel candidly admitted to the trial court that based on her research, the evidence "would probably be admissible."

v. Henderson, 210 Ariz. 561, 568, ¶ 24, 115 P.3d 601, 608 (2005). Even once fundamental error has been established, however, a defendant must still demonstrate the error was prejudicial. *See id*. at ¶ 26.

¶10 We find no error. When Appellant signed the statement in order to enter the TASC program, she signed a waiver which read, "I have made this statement without coercion and of my own free will. I fully understand what I have written here may be used against me in a court of law should I fail to satisfactorily complete the TASC program."[7] Absent an "affirmative indication" that the agreement was entered into unknowingly or involuntarily, an agreement to waive provisions providing for the exclusion of inculpatory statements made during negotiations or other discussions with prosecutors or law enforcement entities is valid and enforceable. *United States v. Mezzanatto*, 513 U.S. 196, 210-11 (1995); *State v. Campoy*, 220 Ariz. 539, 550, ¶¶ 32-34, 207 P.3d 792, 803 (App. 2009). Such agreements waive the right to seek exclusion pursuant to Arizona Rule of Evidence 410 and Arizona Rule of Criminal Procedure 17.4.f, both of which provide for the exclusion of statements made in connection with pleas, offers of pleas or otherwise made during plea negotiations. *Campoy*, 220 Ariz. at 550, ¶ 34, 207

[7] While the TASC documents are not contained in the record, the documents were provided to the trial court, which reviewed the documents and read the waiver language into the record.

P.3d at 803; *see also Mezzanatto*, 513 U.S. at 197, 210 (agreement waived the right to seek exclusion of statements pursuant to Federal Rule of Evidence 410 or Federal Rule of Criminal Procedure 11(e)(6)).

¶11 Even absent waiver, Rule 17.4.f and Arizona Rule of Evidence 410 would have no application in this matter. Again, both of these rules provide for the exclusion of statements made in connection with pleas, offers of pleas or otherwise made during plea negotiations. Appellant's statement was not made in any of these contexts. In addition, Rule 17 is inapplicable because the deferment of Appellant's prosecution and her entry into the TASC program were governed by Rule 38, not Rule 17. *See* Ariz. R. Crim. P. 38.1-38.3. Because Rule 17 is inapplicable, Appellant was no more entitled to have the trial court review her rights pursuant to Rule 17.3 (acceptance of pleas of guilty or no contest) when she entered the deferment program than she was when she waived her rights and agreed to speak with police.

¶12 Regarding Appellant's argument that the statement was unknowing and/or involuntary and that she did not know she was waiving her rights when she signed the waiver, there is no "affirmative indication" in the record that Appellant entered into this agreement unknowingly or involuntarily. *See Mezzanatto*, 513 U.S. at 210-11. Before placing Appellant in the

TASC program and deferring her prosecution, the presiding commissioner asked Appellant, "By signing the waiver form are you indicating to me that you've read it, that you've discussed it with your attorney, and that you understand the terms of the waiver?" Appellant responded, "That's correct." At trial, Appellant acknowledged she signed the waiver with the advice of her counsel. While Appellant did testify that she did not realize she was waiving her rights when she signed the waiver, she never claimed that she did not know her rights or was otherwise unaware of her rights at the time she signed the waiver. Regardless, the remainder of Appellant's testimony indicates she knew she was waiving her rights when she agreed to enter the TASC program. Appellant testified that to enter the TASC program she knew "[y]ou waive your rights." She later testified, "That's how they put it to you in the office. You are waiving your right." When asked why she would have lied in her written statement, Appellant responded, "I didn't consider it a lie. I considered it waiving my rights." When Appellant explained the process of completing the TASC forms, she stated, "It is given to you as a waiving [of] your rights . . . ."

¶13 Regarding voluntariness, the determination of whether a defendant's statement was voluntary is based on "whether, under the totality of the circumstances, the statement was the product of coercive police tactics." *State v. Lee*, 189 Ariz.

590, 601, 944 P.2d 1204, 1215 (1997). Coercion is a "necessary predicate" to finding a defendant's statements are not voluntary for purposes of due process. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

¶14 There is nothing in the record to suggest Appellant's statement or her wavier were the result of coercive tactics on the part of the State. Appellant testified she entered the program because she "thought that was the best way to keep my record good, and I figured this is what I should do." Appellant further testified she signed the statement "so I could do the program and my life circumstance called for it." Appellant explained, "I believed that was best with my mother and my father being sick from brain problems. He was in the hospital and she's blind, and I needed to take care of her. . . . It was just easiest to be tested every now and then, show I was clean." Finally, Appellant testified she wanted to get into the program, "Because I thought it was best, with everything going on in my life, than to have a big trial and all this stuff. It was very traumatic for my dad to be in the hospital. My mother needed my help. My daughter -- I was really spread thin with my time." Appellant's family circumstances and her desire to keep her "record good" have nothing to do with any action on the part of the State. To offer Appellant the choice of deferring her

prosecution through entry into the TASC program or proceeding with the prosecution was not a coercive tactic.

CONCLUSION

¶15 Because we find no error, we affirm Appellant's convictions and sentences.

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PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

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MAURICE PORTLEY, Presiding Judge

/S/

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MARGARET H. DOWNIE, Judge