DIVISION ONE
FILED: 04/29/10
PHILIP G. URRY, CLERK
BY: JT

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. NUNO MIGUEL ROCHA, Appellant.	)	No. 1 CA-CR 09-0425 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Yavapai County

Cause No. CR2008-0034

The Honorable Ralph Matthew Hess, Judge *Pro Tempore*

AFFIRMED

Terry Goddard, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
And Aaron J. Moskowitz, Assistant Attorney General
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

David Goldberg, Esq. — Fort Collins, CO
Attorney for Appellant

B R O W N, Judge

¶1 Nuno Miguel Rocha appeals his conviction and sentence for possession of marijuana. For the reasons that follow, we find no reversible error and therefore affirm.

BACKGROUND

¶2 A grand jury indicted Rocha for possession of marijuana for sale, a class 4 felony, in violation of Arizona Revised Statutes ("A.R.S.") section 13-3405(A) (2010), possession of marijuana, a class 6 felony, in violation of A.R.S. § 13-3405(A) and possession of drug paraphernalia, a class 6 felony, in violation of A.R.S. § 13-3415(A) (2010) after a deputy sheriff arrested him on an outstanding warrant and found four small baggies containing a usable amount of marijuana in the center console of his van. The court dismissed the charge of possession for sale before trial at the request of the State on grounds of insufficiency of the evidence. The jury acquitted Rocha of possession of drug paraphernalia, but convicted him of possession of marijuana. The court suspended his sentence and imposed a one-year term of unsupervised probation and 294 days in jail, with credit for 294 days served. Rocha timely appealed.

DISCUSSION

¶3 Rocha argues that the trial court abused its discretion in denying a mistrial after the court incorrectly advised the jury at the start of trial that Rocha had been charged with possession of marijuana for sale. The error arose when the court clerk read the original indictment to the jury at the start of trial, instead of the indictment reflecting the dismissal of the charge for possession of marijuana for sale. Immediately following the error, defense counsel approached the bench and moved for a mistrial. Following a bench conference at which possible curative instructions were discussed, the court advised the jury that defendant had been charged with only two offenses, not three, as follows:

> Ladies and gentlemen, the indictment that was read to you included three counts. Only two counts are actually being tried in this case.
>
> So Count One, which was read by the clerk, has been dismissed upon motion of the State because the State determined that there was no basis to proceed with that count. And, therefore, Count One was dismissed.
>
> The only two counts that are being presented to you for determination are Count Two and Count Three as have been read by the clerk.

The court then re-read the two counts presented for the jury's consideration, and reiterated that "[t]hese are the two counts with which the State is now charging Mr. Rocha. Mr. Rocha has

pled not guilty to both of those charges." The following day, defense counsel conceded that "the curative instruction was curative" and she did not "think at this point that we need to consider a mistrial." The court then reaffirmed its denial of the mistrial, reasoning that defense counsel had "brought the misreading to the court's attention immediately," the court had corrected the misreading immediately, and the curative instruction "eliminated any possible chance of prejudice," considering that the only evidence presented at trial would relate to the two remaining charges.

¶4 A declaration of mistrial is "the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Dann,* 205 Ariz. 557, 570, ¶ 43, 74 P.3d 231, 244 (2003) (citation omitted). In determining whether to grant a mistrial, the trial judge should consider: (1) whether the testimony called the jurors' attention to matters that they would not be justified in considering in reaching a verdict; and (2) the probability, under the circumstances, that the testimony influenced the jurors. *State v. Bailey*, 160 Ariz. 277, 279, 772 P.2d 1130, 1132 (1989) (citing *State v. Hallman,* 137 Ariz. 31, 37, 668 P.2d 874, 880 (1983)).

¶5 Here, because Rocha withdrew his request for a mistrial after determining that the curative instruction was

sufficient, we review his objection on appeal for fundamental error only. *See State v. Henderson,* 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (noting that fundamental error review applies when a defendant fails to object to the alleged error at trial). Rocha thus bears the burden of establishing that the trial court erred, that the error was fundamental, and that the error caused him prejudice. *Id.* at 568, ¶ 22, 115 P.3d at 608. Error is fundamental only when it reaches the foundation of a defendant's case, takes from him a right essential to his defense, and is error of such magnitude that he could not possibly have received a fair trial. *Id.* at 567, ¶ 19, 115 P.3d at 607. We review a trial court's denial of a motion for mistrial for abuse of discretion. *State v. Jones,* 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000). "The trial judge's discretion is broad . . . because he is in the best position to determine whether the evidence will actually affect the outcome of the trial." *Id.* (citations omitted).

¶6 We find no abuse of discretion, much less fundamental error, in the trial court's failure to declare a mistrial. The court told the jury immediately after the clerk misread the indictment that the possession of marijuana for sale count had been dimissed because "the State determined there was no basis to proceed with that count." The court then re-read to the jury the "only two counts that are being presented to you for

determination." The court further instructed the jury, both in its preliminary instructions and in its final instructions, that Rocha was presumed by law to be innocent, and "[y]ou must decide the facts only from the evidence presented in court . . . A charge is not evidence[.] You must not think that Mr. Rocha is guilty just because of a charge." We presume the jurors followed the court's instructions. *See State v. LeBlanc,* 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). We cannot say that the court abused its discretion in denying a mistrial in light of the curative instruction, as well as the other instructions that provided that a conviction must be based on evidence, and the charges were not evidence. *Cf. State v. Cornell*, 179 Ariz. 314, 320, 878 P.2d 1352, 1358 (1994) (holding that instruction that "indictment was not evidence against the accused and raised no inference of guilt or innocence" was sufficient to avoid any prejudice from reading of surplus words from indictment); *State v. Amaya-Ruiz*, 166 Ariz. 152, 174, 800 P.2d 1260, 1282 (1990) (holding that, in light of similar cautionary instruction, reading of surplus words from indictment was not error). Defense counsel in fact agreed the following day that the immediate corrective instruction was sufficiently curative, and a mistrial was not warranted.

¶7 The cases cited by Rocha on appeal for the proposition that a mistrial was required are inapposite, as the trial court

in those cases did not instruct the jury to disregard the charges not before them. *See Hurst v. United States*, 337 F.2d 678, 680-81 (5th Cir. 1964) (holding that the judge reversibly erred in allowing admission of evidence of prior indictments of defendant, several of which had been dismissed, ostensibly to impeach witness's testimony on his knowledge of defendant's criminal history); *Sides v. State,* 99 S.E.2d 884, 886-87 (Ga. 1957) (holding that it was reversible error for the court to have arraigned defendant in front of jury on charges not before this jury, on record that showed the judge failed to instruct jury to disregard the other indictments); *Thrash v. State*, 283 S.E.2d 611, 612 (Ga. Ct. App. 1981) (reversing conviction for criminal damage on the basis that the jurors had learned from outside sources that defendant had previously been indicted for arson, and they mistakenly believed that he had been convicted of that crime). We find no abuse of discretion in this case in which the trial court appropriately advised the jury that the charge of possession of marijuana for sale had previously been dismissed.

¶8 Moreover, Rocha has failed to demonstrate that any error was either fundamental or prejudicial, as required for reversal on fundamental error review. Rocha's only defense at trial was that the State had failed to demonstrate beyond a reasonable doubt that he knew that there was marijuana in the

vehicle, and accordingly failed to prove that he knowingly possessed it. On this record, the erroneous reading of a charge of possession of marijuana for sale, immediately corrected, was not fundamental error because it did not reach the foundation of defendant's case, take from him a right essential to his defense, or constitute an error of such magnitude that he could not possibly have received a fair trial. *See Henderson,* 210 Ariz. at 567, ¶ 19, 115 P.3d at 607.

¶9 Nor has Rocha established the necessary prejudice. He offers only speculation that the jury was more likely to convict him of possession of marijuana after hearing he had originally also been charged with possession of marijuana for sale, as evidenced by its acquittal of him on the charge of possession of drug paraphernalia. Speculation is an insufficient basis to establish prejudice on fundamental error review. *See State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006) (finding that speculation is insufficient to establish prejudice and that the burden of proving prejudice is on the defendant).

CONCLUSION

¶10 For the foregoing reasons, we affirm Rocha's conviction and sentence.

/s/
_____
MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
PATRICK IRVINE, Presiding Judge

/s/
_____
DONN KESSLER, Judge