DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 09-0657
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	
MARK ANTHONY MENDOZA,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-181384-001 DT

The Honorable Lisa M. Roberts, Judge *Pro Tempore*

AFFIRMED

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

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

J O H N S E N, Judge

¶1 Mark Anthony Mendoza appeals his conviction of one count of possession or use of marijuana and the imposition of

probation. He argues the superior court abused its discretion by denying his motion for a mistrial after a prosecution witness provided testimony on a precluded issue and that the court erred by allowing the witness to make statements that were outside his personal knowledge and irrelevant. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Mendoza was driving a car that mistakenly had been reported stolen. Police stopped the car and ordered Mendoza out at gunpoint. One to three minutes later, they ordered Mendoza's passenger, M.J., out of the car. Officers then searched the vehicle and found 1.4 grams of marijuana on the front driver's side floorboard. Mendoza was charged with one count of unlawful use of means of transportation, a Class 5 felony, and possession or use of marijuana, a Class 6 felony. The former charge was dismissed prior to trial.

¶3 Mendoza moved *in limine* prior to trial on the marijuana charge to preclude "[a]ny reference to the car as 'stolen.'" The court did not explicitly rule on the motion prior to trial. During oral argument, however, the court suggested the parties stipulate "very simply that this involved a lawful traffic stop," and the parties agreed. Accordingly, the court instructed the jury that the parties had stipulated

that "police lawfully stopped the Cadillac [Mendoza] was driving."[1]

¶4 At trial, the State called M.J., who testified he vaguely recalled being stopped by police on the night in question. Asked if he told officers why he was in the car, M.J. responded:

> I think I said my name is [M.J.]. Here's my driver's license. I'm a drug addict. I go to Gatehouse Academy. This gentleman was going to take me to get drugs. *I did not steal a car*. I -- I -- please check-out [sic] my story because I have no idea of what they were -- the police officers were originally talking about.

(Emphasis added.) Mendoza did not object to or move to strike M.J.'s testimony at the time. Testifying later in his own defense, Mendoza told the jury the car belonged to a friend who had lent it to him. Mendoza later moved for a mistrial, arguing M.J.'s testimony violated what he described as an order by the court precluding mention of "the notion that the car was stolen." The court denied Mendoza's motion.

¶5 The jury convicted Mendoza of the marijuana charge and the court suspended imposition of sentence and imposed a three-year term of probation. We have jurisdiction of Mendoza's

[1] When the issue came up again late in the trial, the court stated outside the presence of the jury that it had ruled prior to trial that "there will be no testimony about the car being stolen or reported stolen that's not relevant to a charge of possession of marijuana."

appeal pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") section 12-120.21(A)(1) (2003).

DISCUSSION

A. The Superior Court Did Not Abuse Its Discretion by Denying Mendoza's Motion for a Mistrial.

¶6 Mendoza argues M.J.'s statement that he told police he did not steal a car was unfairly prejudicial and required a mistrial.

¶7 We review the superior court's denial of a motion for mistrial for a clear abuse of discretion. *State v. Hoskins*, 199 Ariz. 127, 142, ¶ 57, 14 P.3d 997, 1012 (2000). "We will not reverse a conviction based on the erroneous admission of evidence without a 'reasonable probability' that the verdict would have been different had the evidence not been admitted." *Id.* at 142-43, ¶ 57, 14 P.3d at 1012-13 (citation omitted). In deciding whether to grant a mistrial based on admission of prejudicial evidence, the superior court should consider "[w]hether the [evidence] called to the attention of the jurors matters that they would not be justified in considering in determining their verdict, and . . . the probability that the jurors, under the circumstances of the particular case, were influenced by the remarks." *State v. Bailey*, 160 Ariz. 277, 279, 772 P.2d 1130, 1132 (1989).

¶8 The first prong of *Bailey* asks whether the testimony called the attention of the jury to a matter it should not consider. *Id.* at 279, 772 P.2d at 1132. Although M.J.'s testimony might have implied a car had been stolen, he was recounting what he told the officers about himself, not recounting any alleged statement by or about Mendoza. Nor did M.J. say the car Mendoza was driving was stolen. In short, his statement was so brief and so imprecise that it reasonably could not be heard to implicate Mendoza, much less justify a mistrial. *See State v. Stuard,* 176 Ariz. 589, 601, 863 P.2d 881, 893 (1993) (the inadmissible testimony was brief and the defense counsel's objection was made at a bench conference; thus, attention to the precluded evidence was minimized and it did not warrant mistrial).[2]

¶9 Even assuming without deciding that M.J.'s testimony alerted the jury to the issue of the stolen car and that the jury likely inferred Mendoza somehow was involved with a stolen vehicle, we are unable to conclude there is a reasonable probability the statement influenced the jury sufficiently to affect the outcome of the case. *See Hoskins*, 199 Ariz. at 143,

[2] Mendoza's objection and motion for a mistrial were made outside the presence of the jury, which minimized the attention the jury might have given the comment. *See Stuard*, 176 Ariz. at 601, 863 P.2d at 893.

¶ 57, 14 P.3d at 1013; *Bailey,* 160 Ariz. at 279, 772 P.2d at 1132.

¶10 In denying the motion for mistrial, the superior court cited Mendoza's own testimony that he had borrowed the car from a friend. We agree this testimony likely cured any prejudice M.J.'s statement may have created. *See State v. Adamson*, 136 Ariz. 250, 260, 665 P.2d 972, 982 (1983) ("Any error the trial court may have committed in denying the defendant's motion for mistrial was cured by the later testimony of [the witness] in defendant's case in chief.").

¶11 Moreover, in denying the motion, the superior court offered to instruct the jury "that there is no allegation that the car was stolen and that that's not a charge." Mendoza's denial of the court's offer supports the conclusion that the court did not err by denying the motion for mistrial. As noted, the State and Mendoza stipulated that the stop of the car was lawful. The court also instructed the jury not to consider "ownership or lack of ownership" when reaching a verdict. We must assume the jury followed these instructions. *State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006).

¶12 Finally, just prior to his "stolen car" reference, M.J. had told the jury he was a drug addict, he was enrolled in a drug rehabilitation program and he was on his way to obtain drugs when police stopped the car. On this record, we cannot

conclude the jury focused on M.J.'s "stolen car" comment, coming as it did just after the witness's rather unusual admissions to the police. The superior court is in a much better position to determine the effect testimony actually has on the jury, and its discretion is broad. *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000).

B. The Court Did Not Commit Fundamental Error in Admitting M.J.'s Other Testimony.

1. Standard of review.

¶13 At trial, Mendoza objected when the State asked M.J. whether he introduced himself to Mendoza or whether Mendoza introduced himself to M.J. Over the objection, M.J. responded that he did not "recall but [he] would assume [he] probably . . . approached [Mendoza]." Then, without objection from Mendoza, the State asked M.J. why M.J. "might have approached" Mendoza. In response, M.J. testified, "I probably thought [Mendoza] was looking shady . . . and he probably looked like somebody that could get me drugs."

¶14 On appeal, Mendoza challenges the second answer recounted above, in which M.J. stated he probably approached Mendoza because he thought Mendoza could get him some drugs. Because Mendoza failed to object to the question at issue, fundamental error review applies to our consideration of his contention that the court erred in allowing M.J.'s testimony.

See State v. Henderson, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Error is fundamental when it goes "to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *Id.* (citations omitted). The burden to demonstrate fundamental error is on the defendant, who "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.

2. No fundamental error occurred in admitting M.J.'s testimony despite his foggy memory of the events at issue.

¶15 Citing Arizona Rule of Evidence 602, Mendoza argues M.J.'s testimony should have been excluded because he lacked personal knowledge of events, he was under the influence of drugs and as a result, his memory was foggy.

¶16 Rule 602 provides:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony.

Ariz. R. Evid. 602.

¶17 Contrary to Mendoza's contention, Rule 602 permits use of evidence other than a witness's own testimony to prove the witness has personal knowledge of the matter. Mendoza

challenges M.J.'s account that he assumed that he approached Mendoza, not the other way around. But during his own testimony, Mendoza suggested M.J. was the one who initiated contact. This evidence is sufficient to support a finding that M.J. had personal knowledge of his meeting with Mendoza, despite his hazy memory. *See Zimmer v. Peters*, 176 Ariz. 426, 429-30, 861 P.2d 1188, 1191-92 (App. 1993) (allowing plaintiff to testify despite head injury, even though testimony was "replete with instances where she could not remember details about her life and family"; "discretion should be exercised in favor of allowing the witness to testify"); *see also United States v. Lyon*, 567 F.2d 777, 783-84 (8th Cir. 1977) ("[The witness's] lack of independent recollection did not violate [Federal Rule of Evidence] 602. That Rule excludes testimony concerning matter[s] the witness did not observe or had no opportunity to observe.").

¶18 Accordingly, the superior court did not err, let alone commit fundamental error, by allowing M.J. to testify despite his hazy memory of events. Because no fundamental error occurred in the court's admission of M.J.'s testimony, we also reject Mendoza's contention that the testimony violated his due process rights. *See State v. Williams*, 220 Ariz. 331, 334, ¶ 8, 206 P.3d 780, 783 (App. 2008) (court reviews for fundamental

error when appellant failed to raise constitutional argument in the superior court).

3. No fundamental error occurred in failing to exclude M.J.'s testimony for lack of relevance.

¶19 Mendoza also contends M.J.'s statement that he approached Mendoza because he thought Mendoza could get him drugs should have been excluded because it was irrelevant. Even assuming Mendoza is correct that the testimony should have been excluded if a proper objection had been made, Mendoza's contention fails because he has failed to show that this error was fundamental. *See Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607.

¶20 M.J.'s testimony went to his own drug habit; he did not testify that Mendoza used drugs, that Mendoza had drugs, that he asked Mendoza for drugs, that Mendoza offered to provide him with drugs or that Mendoza did provide him with drugs. Moreover, the jury had ample reason to discredit anything M.J. said. M.J. admitted he was a drug addict and even testified on cross examination that he might have obtained marijuana before he met Mendoza on the night in question. He also admitted he lied to emergency room doctors to obtain prescription drugs. Given the host of credibility issues M.J.'s testimony presented, we cannot conclude that Mendoza has proved that admission of the

statement at issue was fundamental error that deprived him of his right to a fair trial.

CONCLUSION

¶21 For the reasons stated above, we affirm Mendoza's conviction and the resulting imposition of probation.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Judge

/s/
JOHN C. GEMMILL, Judge