DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 10-0384
	)	DEPARTMENT A
v.	)	**MEMORANDUM DECISION**
MICHAEL DELGADO MAYO, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Mohave County

Cause No. CR2008-0366

The Honorable Steven F. Conn, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Jeffrey L. Sparks, Assistant Attorney General
Attorneys for Appellee

The Brewer Law Office — Show Low
By Benjamin M. Brewer
Attorneys for Appellant

T I M M E R, Judge

¶1 Michael Delgado Mayo appeals his convictions and resulting sentences imposed for conspiracy to sell dangerous drugs (methamphetamine), a class two felony, illegal use of a

wire or electronic communication, a class four felony, and illegally conducting an enterprise, a class four felony. For the reasons that follow, we find no reversible error and affirm.

DISCUSSION[1]

¶2 In early 2008, a multi-agency narcotics task force obtained wiretaps on the phones of Jose Juan Ochoa, Reynaldo Magana ("Reynaldo"), Consuelo Magana ("Consuelo"), and Terrance Roberts. During seven weeks of wiretapping, officers recorded hundreds of telephone calls evidencing the existence of a major methamphetamine trafficking organization led by Ochoa in Kingman, Arizona.

¶3 The wiretaps intercepted a number of calls between Mayo and Ochoa relating to drug trafficking as well as calls between Ochoa and Reynaldo concerning delivery of drugs to Mayo for re-sale. After one series of such calls, police observed Reynaldo making a brief in-and-out stop at Mayo's residence; shortly thereafter, another person left in a truck. Officers conducted a traffic stop on this person and found 1.22 grams of methamphetamine on the passenger seat of his truck.

¶4 The police arrested Mayo on March 30, 2008. A grand jury indicted him on the previously described charges, *see supra*

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

¶ 1, along with possession of dangerous drugs for sale (methamphetamine), a class two felony. The indictment alleged Mayo, along with seventeen other defendants, committed the *o*ffenses between February 19 and March 31, 2008. The jury acquitted Mayo of possession of dangerous drugs for sale (methamphetamine) but convicted him of the other charges. The court found the existence of an historical prior felony conviction and sentenced Mayo to mitigated concurrent prison terms, the longest of which was seven years. Mayo filed a timely notice of appeal.

DISCUSSION

I. Severance

¶5 Mayo argues the trial court committed reversible error by denying motions to sever his trial from that of his co-defendants. We review the court's rulings for an abuse of discretion, which exists if Mayo demonstrates that at the time he moved for severance, he would be prejudiced by being tried with the co-defendants. *State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995).

¶6 The court may try co-defendants together "when each defendant is charged with each offense . . . or when the several offenses are part of a common conspiracy." Ariz. R. Crim. P. ("Rule") 13.3(b). The court must sever the trial of co-defendants, however, when it "is necessary to promote a fair

determination of the guilt or innocence of any defendant of any offense." Rule 13.4(a). The court should grant severance when it detects features of the case that might prejudice the defendant when:

> (1) evidence admitted against one defendant is facially incriminating to the other defendant; (2) evidence admitted against one defendant has a harmful rub-off effect on the other defendant; (3) there is significant disparity in the amount of evidence introduced against the defendants, or (4) co-defendants present antagonistic, mutually exclusive defenses or a defense that is harmful to the co-defendant.

Murray, 184 Ariz. at 25, 906 P.2d at 558. Any doubt about the propriety of severance should be resolved in favor of the defendant. *State v. Roper*, 140 Ariz. 459, 462, 682 P.2d 464, 467 (App. 1984).[2] With these principles in mind, we review the court's rulings.

Motion #1

¶7 In April 2009, Mayo moved for severance based on anticipated "rub-off" and "spill-over" effects from evidence that would be introduced against ten co-defendants. The court

[2] We disagree with Mayo that this language from *Roper* supports a holding that severance was required because none of the issues injected by his co-defendants would have arisen in a trial of Mayo alone, making a fair trial more likely in that circumstance. If we read *Roper* that broadly, the court would likely never permit joinder. But as stated by our supreme court, "in the interest of judicial economy, joint trials are the rule rather than the exception." *Murray*, 184 Ariz. at 25, 906 P.2d at 558.

denied the motion, noting in part that a *Bruton*[3] issue did not exist. Mayo argues the court improperly relied only on the absence of any *Bruton* issue in denying his initial severance motion. But the court did not deny the initial motion based solely on the lack of a *Bruton* issue; the court reasoned there was no indication another defendant would have an antagonistic defense and pointed out that a jury instruction would minimize the risk the jury would be unable to keep the evidence against each defendant separate. We reject Mayo's argument as based on its faulty factual premise.

Motion #2

¶8 Approximately six months after the initial motion, Mayo renewed his motion, arguing severance was necessary to ensure his speedy trial rights, which were then hampered by continuances granted at his co-defendants' requests. The court denied the motion without comment. In determining the time period required to protect a defendant's speedy trial rights, the trial court is required to exclude "[d]elays resulting from joinder for trial with another defendant as to whom the time limits have not run when there is good cause for denying severance." Rule 8.4(f). We cannot say on this record that the

[3] *Bruton v. United States*, 391 U.S. 123, 135-37 (1968) (holding a defendant is deprived of the Sixth Amendment cross-examination right when co-defendant's confession incriminates defendant and is admitted at trial).

court abused its discretion in finding good cause for denying severance under the circumstances and excluding the delays resulting from the joinder.

Motions #3 and #4

¶9 On the second day of trial, Mayo orally moved for severance, arguing a "circus atmosphere" existed due to trying five defendants together.[4] The court denied the motion without comment. The court also denied Mayo's motion to sever filed the third week of trial on the ground that counsel for co-defendant Sean Blackwell was acting as a "second prosecutor" by emphasizing that although indicia of drug trafficking existed in the case, it did not implicate his client, who claimed to be only a customer. Because this evidence suggested Mayo was engaged in selling drugs, he argued that Blackwell's strategy was "damaging in the extreme." The court denied the motion, reasoning none of his co-defendants' defenses were mutually antagonistic, and there were no unusual circumstances warranting severance.

¶10 To require severance on the basis of antagonistic defenses, the "defenses must be irreconcilable; they must be antagonistic to the point of being mutually exclusive," such that a jury could not find both defendants innocent based on

[4] Between the time Mayo filed his first motion for severance and trial, six defendants entered guilty pleas pursuant to plea agreements with the State.

their respective theories. *State v. Cruz*, 137 Ariz. 541, 544-45, 672 P.2d 470, 473-74 (1983). The jury could have acquitted both Blackwell and Mayo based on their respective theories; in other words, to acquit Blackwell based on his assertion he was not a dealer did not require the jury to find Mayo guilty. *See id.*

¶11 Mayo also argues the court erred by failing to sever following Blackwell's argument in closing that he was the "only one who got up on this stand, as scary as it was, and looked you straight in the eye and said I'm a user." Because Mayo failed to object or otherwise raise the issue with the court, we review only for fundamental error.[5] *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Under this standard of review, Mayo bears the burden of showing error, that the error was fundamental, and that he was prejudiced thereby. *Id.* at 567-68, ¶¶ 20-22, 115 P.3d at 607-08.

¶12 Even assuming error, we do not detect fundamental error or prejudice. The closing argument comments focused on the fact Blackwell testified rather than the fact his co-defendants refrained from doing so. Also, the court instructed the jury that a defendant was not required to testify, that it

[5] Co-defendant Xavier Milea objected to Blackwell's closing argument, and the court ruled that rather than comment on the statement, it would instruct the jury it could not consider a defendant's failure to testify as evidence of guilt.

"must not conclude that any defendant is likely to be guilty because he does not testify," and must not "let it affect your deliberations in any way." The court also instructed the jury that what the lawyers said in closing arguments was not evidence. Finally, the court instructed the jury that it must consider the evidence against each defendant separately. We presume the jury followed those instructions. *See State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). On this record, we are not persuaded the court abused its discretion, much less fundamentally erred, in failing to sua sponte sever Mayo's case after Blackwell's closing argument.

¶13 Mayo argues for the first time on appeal that the conduct of co-defendant Xavier Milea's counsel during voir dire prejudiced him to such an extent severance was required. We review only for fundamental error, *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607, which we do not detect. As explained hereafter, *see infra* ¶ 17, we find no merit in Mayo's argument that the jury panel was tainted. Nor do we find any merit in Mayo's argument that Milea's cross-examination of witnesses so clarified and emphasized the evidence against Mayo that severance was required. We have reviewed the cited testimony and find nothing in it that the State had not already elicited or was so unusual that severance was in order. *Cf. Cruz*, 137 Ariz. at 545-46, 672 P.2d at 474-75 (holding that co-defendant's

examination eliciting testimony that appellant had previously hired people to commit murder required severance because the prosecutor would not have been allowed to elicit this testimony in a separate trial, and it caused prejudice from which the trial court did not protect appellant).

¶14 In sum, the trial court did not commit reversible error by refusing to sever Mayo's trial from those of his co-defendants.

II. Refusal to strike jury panel

¶15 Mayo next argues the trial court abused its discretion by denying his motion to strike the entire jury panel for taint based on (1) comments made by one prospective juror that she had read that this case had involved the most extensive search warrant and one of the "largest busts" ever in Mohave County, and involved a husband and wife who ran a drug ring with "several known associates;" (2) comments by another prospective juror that methamphetamine had killed a friend; and (3) comments by a third prospective juror that different relatives high on drugs had killed a man for two dollars, killed a four-month-old baby by throwing him out a window, and attempted suicide. Mayo joined in a motion to strike the entire jury panel on the ground that the "horror stories" from prospective jurors on their experiences with drugs had "poisoned" the panel. The court denied the motion, reasoning in part:

> We had dozens of people that were excused because they said that they would be unable to be fair and impartial. We had people who asked to be excused today, for things that were cumulative, that had happened during the course of the jury selection process; and I believe that any juror who felt, based upon things that they had heard, that they would have been unable to be fair and impartial, certainly would have understood that they had the option and the opportunity of telling us that.

¶16 We review a trial court's ruling on a motion to strike a jury panel for an abuse of discretion. *See State v. Glassel*, 211 Ariz. 33, 45, ¶ 36, 116 P.3d 1193, 1205 (2005). As the party challenging the panel, Mayo had the burden of showing "the jurors could not be fair and impartial." *State v. Davis*, 137 Ariz. 551, 558, 672 P.2d 480, 487 (App. 1983). In reviewing Mayo's claim, we do not presume the jury panel was tainted by information shared during voir dire. *See State v. Doerr*, 193 Ariz. 56, 61-62, ¶ 18, 969 P.2d 1168, 1173-74 (1998). "Unless the record affirmatively shows that a fair and impartial jury was not secured, the trial court must be affirmed." *State v. Greenawalt*, 128 Ariz. 150, 167, 624 P.2d 828, 845 (1981).

¶17 We find no abuse of discretion. Mayo fails to meet his burden to show that the jurors could not be fair and impartial, and the record fails to affirmatively show that a fair and impartial jury was not secured. During voir dire, the prosecutor and the court repeatedly advised prospective jurors

that this was not a trial on whether conspiring to sell methamphetamine should be a crime, but rather whether any of the defendants did conspire to sell methamphetamine. After most of the contested comments occurred, the court appropriately excluded anyone who expressed concerns about remaining impartial due to negative feelings regarding illegal drugs. Finally, none of the comments about the harmful consequences of drug use was so shocking they necessarily rendered prospective jurors unable to remain impartial. We decline to reverse on this basis.

III. Jury instructions

¶18 Mayo next argues the trial court abused its discretion in refusing to give two proposed jury instructions. We review the trial court's ruling denying a jury instruction for an abuse of discretion. *State v. Wall*, 212 Ariz. 1, 3, ¶ 12, 126 P.3d 148, 150 (2006). In reviewing the court's exercise of its discretion, we defer to the court's assessment of evidence. *Id.* at 5, ¶ 23, 126 P.3d at 152. A court "[d]oes not err in refusing to give a jury instruction that is an incorrect statement of the law, does not fit the facts of the particular case, or is adequately covered by the other instructions." *State v. Hussain*, 189 Ariz. 336, 337, 942 P.2d 1168, 1169 (App. 1997).

Conspiracy Instruction

¶19 Although Mayo does not challenge the trial court's jury instruction regarding conspiracy, he argues the court erred by refusing to give the following supplemental instruction, which is based on a doctrine of law known as Wharton's Rule:[6]

> If there is an agreement to commit a crime which can only be committed by the action of 2 persons to the agreement, such agreement does not amount to a conspiracy. This would include an agreement to buy or sell methamphetamine, under which circumstances the agreement to buy or sell methamphetamine would merge in the completed act. In other words, no Defendant in this case can be convicted of Conspiracy to Sell Dangerous Drugs (Methamphetamine) based solely on his having agreed to buy Methamphetamine from another person.

¶20 The trial court did not err by refusing to give this instruction because the court's other instructions adequately covered the issue. *Hussain*, 189 Ariz. at 337, 942 P.2d at 1169. The court instructed the jury that a person commits the offense of conspiracy to sell dangerous drugs if (1) with the intent to promote or aid the sale of dangerous drugs (methamphetamine); (2) he agrees with one or more persons that at least one of them or another person will sell dangerous drugs; and (3) one of the

[6] Wharton's Rule provides that when an agreement between two people to commit an offense can only be committed by the actions of those persons, the agreement merges with the completed act, and a court may not convict the participants of conspiracy. *State v. Barragan-Sierra*, 219 Ariz. 276, 284, ¶ 23, 196 P.3d 879, 887 (App. 2008).

parties commits an overt act in furtherance of the offense. *See* Ariz. Rev. Stat. ("A.R.S.") §§ 13-1003(A), -3407(A)(7), -401(6)(b)(xvii) (West 2012).[7] The court also instructed the jury in pertinent part that a person "may become a member of a conspiracy without full knowledge of all the details of the conspiracy," but that "a person who has no knowledge of a conspiracy but happens to act in a way which furthers some object of the conspiracy does not thereby become a conspirator." It also instructed the jury in part that the State must prove that the person "knowingly participated in the unlawful plan with the intent to promote or assist the carrying out of the conspiracy." Thus, the jury was adequately instructed that it could not convict Mayo for conspiracy if he merely purchased methamphetamine from another party; he must have agreed that he or the other party to the agreement would sell dangerous drugs to members of the public. The court did not err by refusing to give the Wharton Rule instruction.

Other act

¶21 The police arrested Mayo after conducting a traffic stop on March 30, 2008. A subsequent inventory search turned up 0.51 grams of methamphetamine. Ochoa offered to put up money for Mayo's bail and suggested he claim either that the

[7] Absent material revision after the date of the alleged offense, we cite a statute's current version.

methamphetamine found in his vehicle was for personal use or deny ownership altogether.

¶22 Although the State did not charge Mayo with any offenses arising from possession of the methamphetamine found in his vehicle, the State introduced evidence of these events to show Mayo's relationship with Ochoa and his involvement in drug trafficking. The trial court gave a limiting instruction to the jury concerning use of this other-act evidence, but declined Mayo's request to explicitly instruct the jury that Mayo "may not be found guilty of any offense potentially arising from" possession of the 0.51 grams of methamphetamine. Mayo argues the court committed reversible error by refusing to give the instruction. We disagree.

¶23 The court's other-act instruction was adequate to inform the jury of the limited use it could make of the other-act evidence, making the additional language proposed by Mayo unnecessary. *Hussain*, 189 Ariz. at 337, 942 P.2d at 1169. After describing the evidence of the traffic stop and methamphetamine discovery, the court instructed the jury as follows:

> Such evidence was not presented and may not be considered by you to prove that the Defendant Mayo is a bad person or that he has a disposition to engage in criminal behavior. Such evidence was presented and may be considered only to the extent that you find it relevant as to the relationship

> between the Defendant Mayo and Jose Ochoa or that you find it relevant as to the mental state required for the commission of the other crimes with which he is charged.
>
> Whether you find that evidence of the March 30, 2008, incident is relevant for the above purposes is entirely up to you to decide after considering all of the circumstances in this case.
>
> Even if you believe that the Defendant Mayo engaged in criminal conduct on March 30, 2008, you cannot find him guilty unless you are convinced beyond a reasonable doubt that he committed the crimes charged in this case.

This instruction explicitly limited the use which the jury could make of the other-act evidence and directly told the jury that even if it believed Mayo engaged in criminal conduct on March 30, 2008, it could not find Mayo guilty unless the State proved the crimes charged in this case. Telling the jury it could not find him guilty of any offense arising from the March 30, 2008 event would have been repetitive and potentially confusing. The court did not err.

IV. Response to jury question

¶24 Mayo argues the court abused its discretion by failing to respond appropriately to the following jury question posed during deliberations:

> Person A buys drugs from person B, knowing B is a drug dealer. Person A does not sell drugs, but uses; is A part of conspiracy to sell drugs?

Although Mayo argued the court should answer "no," the court declined to answer the question, reasoning any answer would be a comment on the evidence and noting the question omitted other factors bearing on a conspiracy charge. The court then referred the jury to its instructions.

¶25 Mayo argues the trial court erred by failing to answer the jury's question, but he fails to develop this argument with any analysis or citations to authority. He has therefore waived this argument, and we do not address it further. *See* Rule 31.13(c)(1)(vi); *State v. Dann*, 205 Ariz. 557, 570, ¶ 46 n.8, 74 P.3d 231, 244 n.8 (2003) (holding failure to develop argument waives argument on appeal).

V. Voice identification by police detective

¶26 Mayo finally argues the court abused its discretion by allowing a detective to identify Mayo's voice on an audio-recording after hearing his voice for one minute, in the absence of any foundation that the detective was an expert on voice identification. We review the trial court's ruling that evidence has an adequate foundation for abuse of discretion. *State v. McCray*, 218 Ariz. 252, 256, ¶ 8, 183 P.3d 503, 507 (2008).

¶27 Over Mayo's objection, the trial court allowed Detective Benjamin Quezeda to testify that after hearing Mayo speak during a post-arrest interview, he had identified Mayo as

the other party in several telephone conversations recorded by the wiretap. In overruling Mayo's objection, the court stated in the jury's presence, "Again, it will be up to the jury to decide whether they believe that the speaker on this call, or any other call, is who the state asserts it to be."

¶28 The court may admit evidence of recordings and transcripts when properly authenticated. *State v. Miller*, 226 Ariz. 202, 206, ¶ 8, 245 P.3d 887, 891 (App. 2010). Authentication is established by "evidence sufficient to support a finding that the item is what its proponent claims it is." Ariz. R. Evid. 901(a). Arizona Rule of Evidence 901(b)(5) expressly provides that a person may authenticate a voice on a recording "based on hearing the voice at any time under circumstances that connect it with the alleged speaker."

¶29 Detective Quezada testified he had talked to Mayo briefly after his arrest, which enabled the detective to identify Mayo as one of the speakers on various recorded conversations. The detective's personal knowledge of Mayo's voice was sufficient foundation to authenticate Mayo's voice on the recordings, and the State was not required to show Detective Quezada was an expert in voice identification. *Id.*; Ariz. R. Evid. 701 (permitting lay opinion testimony "rationally based on the witness's perception"). Our supreme court has held that lay opinion on voice identification is permissible under similar

circumstances. *See State v. Gortarez*, 141 Ariz. 254, 262, 686 P.2d 1224, 1232 (1984). In so holding, the court cited with approval a federal case that held that the requisite foundation was supplied despite the police officer's "minimal exposure" to defendant's voice. *Id.* (citing *United States v. Rizzo*, 492 F.2d 443, 448 (2d Cir. 1974)). On this record, we decide the court did not err by finding that Detective Quezeda possessed sufficient familiarity with Mayo's voice to offer his lay opinion. The weight of this testimony in light of the detective's limited exposure to Mayo's voice was properly left to the jury.

CONCLUSION

¶30 For the foregoing reasons, we find no reversible error and therefore affirm Mayo's convictions and sentences.

/s/
Ann A. Scott Timmer, Judge

CONCURRING:

/s/
Maurice Portley, Presiding Judge

/s/
Andrew W. Gould, Judge