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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>AMOS BEVERETT,<br><br>Appellant. | ) | 2 CA-CR 2010-0397<br>DEPARTMENT B<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091782001

Honorable Charles S. Sabalos, Judge

AFFIRMED

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E S P I N O S A, Judge.

**¶1** After a jury trial, appellant Amos Beverett was convicted of three counts of sale and/or transfer of a narcotic drug and sentenced to concurrent, presumptive prison terms of 15.75 years. On appeal, Beverett argues the trial court erred in admitting the testimony of two police officers, the prosecutor committed misconduct, and the jury instruction on accomplice liability was improper. For the following reasons, we affirm.

**¶2** We view the facts in the light most favorable to sustaining the verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). The evidence showed that, on three occasions in January 2009, Beverett led undercover Tucson Police Officer Gilbert Martinez into an apartment complex in a "high-crime area" where crack cocaine sales reportedly had been taking place. On each occasion, Edward Byrd was waiting inside the apartment; Martinez gave money to Beverett, who returned with cocaine; and either Byrd handed Martinez a portion of the cocaine or, as was the case during the last sale, Beverett himself "ripped the bag [of crack cocaine] open on the kitchen counter" with Byrd nearby. At the conclusion of the first sale, Martinez asked Beverett if he could call him again, and Beverett said yes. During the last sale, when Martinez questioned the weight of the cocaine, Beverett responded that he would "call his guy," after which he made a telephone call.

**¶3** Based on evidence that Beverett directed Martinez to the point of sale, took money from him in exchange for cocaine,[1] and discussed quantity and future sales with

[1]Based on the evidence in the record, we are not persuaded by Beverett's suggestion that the state failed to prove its case because the marked money used to purchase the cocaine was never retrieved. *See* A.R.S. § 13-3401(32) ("'Sale' or 'sell' means an exchange for anything of value or advantage, present or prospective.").

him, a jury reasonably could infer Beverett was employed by or associated in some way with Byrd and that he intended to bring Martinez to Byrd so the sale of cocaine could occur, thus satisfying the elements of sale of a narcotic drug as an accomplice. *See* A.R.S. §§ 13-3408(A)(7) ("person shall not knowingly . . . sell . . . or offer to sell . . . a narcotic drug"); 13-301(2) ("'accomplice' means a person . . . who with the intent to promote or facilitate the commission of an offense . . . [a]ids, counsels, agrees to aid or attempts to aid another person in planning or committing an offense"); 13-303(A)(1), (3) ("person is made accountable for such conduct by the statute defining the offense" and that person "is an accomplice of such other person in the commission of an offense including any offense that is a natural and probable or reasonably foreseeable consequence of the offense for which the person was an accomplice").

**¶4** We note at the outset that Beverett apparently does not challenge the fact that he participated in the three drug sales, a conclusion supported by the undisputed evidence. Rather, he asserts as he did below that Byrd was "running the show," that he did not obtain any benefit from the sales, and that he was merely a "pawn" in those transactions.

**¶5** On appeal, Beverett argues that the testimony by Martinez and another investigating officer that they routinely investigate "drug trafficking organizations" in "high narcotic areas," and that they have a high success rate catching individuals involved in illegal drug activities, was improper because it implied Beverett had committed "prior bad acts of drug dealing." *See* Ariz. R. Evid. 404(b) ("Except as

provided in Rule 404(c)[, Ariz. R. Evid.,] evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."); *State v. Johnson*, 94 Ariz. 303, 306, 383 P.2d 862, 863 (1963) (prior bad acts generally not admissible so jury will not conclude defendant is "bad man" and convict him on less evidence than necessary to support conviction).

**¶6** In a closely related argument, Beverett asserts that the prosecutor's references to the officers' testimony in her opening statement and closing argument, and her assertions to the jury that Beverett ran an illegal drug business, were improper and resulted in fundamental, prejudicial error. He also contends that, by asserting Byrd was not the "kingpin," and suggesting there was evidence to support that conclusion, the prosecutor engaged in improper vouching. "Two forms of impermissible prosecutorial vouching exist: (1) when the prosecutor places the prestige of the government behind its witness, and (2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony." *State v. Dumaine*, 162 Ariz. 392, 401, 783 P.2d 1184, 1193 (1989), *disapproved on other grounds by State v. King*, 225 Ariz. 87, 235 P.3d 240 (2010).

**¶7** Prosecutorial misconduct is defined as conduct that "is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial." *Pool v. Superior Court*, 139 Ariz. 98, 108, 677 P.2d 261, 271 (1984) (footnote omitted). "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to

make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998), *quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

**¶8** To preserve an argument for review, the defendant must sufficiently argue an issue to allow the trial court to rule on it. *State v. Fulminante*, 193 Ariz. 485, ¶ 64, 975 P.2d 75, 93 (1999). As Beverett apparently concedes, he did not raise in the trial court any of the arguments he raises on appeal. Therefore, he has forfeited the right to seek relief for all but fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005); *see also State v. Rutledge*, 205 Ariz. 7, ¶¶ 29-30, 66 P.3d 50, 56 (2003) (objection to state's "'shifting the burden' did not adequately raise [or preserve] the claim of prosecutorial misconduct in the trial court"). Fundamental error is "'error going 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.'" *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). In order to prevail under fundamental error review, "a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

**¶9** Contrary to Beverett's assertion that he "played a minor role in obtaining the drugs, and that the operation was truly Byrd's," the undisputed evidence showed that Beverett escorted Martinez to the apartment, delivered the cocaine that Martinez purchased, accepted money for the purchase from Martinez, and addressed questions regarding future purchases and the quantity of cocaine delivered. Similarly, the record

belies Beverett's assertion that the evidence "was not overwhelming as to whether [he] was only a pawn or gofer with no criminal intent or benefit in the sales." Based on the undisputed evidence, a reasonable jury could have, and did, conclude otherwise.

**¶10** Further, as the state correctly argues, the officers' testimony did not imply Beverett had been involved in prior drug sales. Instead, that evidence provided background information regarding the officers' assignments and duties and did not suggest they were investigating Beverett as a repeat offender. *See State v. Gamez*, 144 Ariz. 178, 180, 696 P.2d 1327, 1329 (1985) (officers can testify about assignments and duties "if such testimony does not suggest that defendant committed a crime"). And, the prosecutor's references to Beverett as a businessman fit within the context of the three sales of which he was convicted. Additionally, the prosecutor's statement that Byrd was not the "kingpin" was made in response to comments defense counsel had made in his opening statement and closing argument that Byrd was, in fact, the kingpin. Even assuming, arguendo, the prosecutor's comment on rebuttal was improper, it would not constitute improper vouching that deprived Beverett of a fair trial because it neither invited the jury to consider matters not properly before it nor placed the prestige of the government behind a witness. *See State v. Duzan*, 176 Ariz. 463, 467, 862 P.2d 223, 227 (App. 1993).

**¶11** And, unlike in *State v. McGann*, 132 Ariz. 296, 299, 645 P.2d 811, 814 (1982), a forgery case where our supreme court found inadmissible as evidence of prior crimes fifty-seven credit card receipts, there is no reason to believe the jury here was unable to "sift out" the purportedly improper evidence from the evidence that was

properly before it. Furthermore, the officers' reference here to the "Counter Narcotics Alliance" did not suggest Beverett had committed prior bad acts as did officers' reference to a "major offenders unit" in *Gamez*, 144 Ariz. 178, 179-80, 696 P.2d at 1328-29. Accordingly, because Beverett has failed to establish the purported errors were either fundamental or prejudicial, we reject his claims that the trial court erroneously admitted the officers' testimony or that the prosecutor conducted herself improperly.

**¶12** Without objection, the trial court provided the jury with the state's requested accomplice liability instruction. The court stated:

> A defendant is criminally accountable for the conduct of another person if the Defendant is an accomplice of the other person in the commission of the offense.
>
> An accomplice is a person who with the intent to promote or facilitate the commission of an offense, solicits or commands another person to commit the offense; or aids, counsels, agrees to aid or attempts to aid another person in planning or committing the offense; or provides means or opportunity to another person to commit the offense.
>
> The liability of an accomplice extends to the reasonably foreseeable consequences of the acts he intentionally or knowingly aids or encourages.

**¶13** Beverett asserts the trial court erred in giving the instruction because it contradicted his defense that he was a "mere gofer who did not benefit from the sale," and that he was not "legally involved in the sale." Because Beverett did not object to the instruction in the trial court, we again review only for fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. And again, Beverett bears the burden of showing both fundamental error and prejudice. *Id.* ¶ 20. "With regard to jury

instructions, fundamental error occurs 'when the trial judge fails to instruct upon matters vital to a proper consideration of the evidence.'" *State v. Edmisten*, 220 Ariz. 517, ¶ 11, 207 P.3d 770, 775 (App. 2009), *quoting State v. Laughter*, 128 Ariz. 264, 267, 625 P.2d 327, 330 (App. 1980).

**¶14** Beverett specifically challenges the foreseeability language in the final paragraph of the instruction, arguing it permitted the jury to find him guilty without finding he had the required mental state to aid in the commission of the charged drug offense. He further asserts the instruction permitted the jury to convict him,"finding he intended to aid the commission of any reasonably foreseeable crime instead." In support of his argument, Beverett cites *State v. Phillips*, 202 Ariz. 427, 46 P.3d 1048 (2002), asserting that in that case the supreme court "rejected the notion that accomplice liability extends to reasonably foreseeable consequences of the acts an accomplice intentionally or knowingly aids or encourages. Instead, the accomplice must intend to promote the crime charged, as is set forth in the accomplice statute itself." In *Phillips*, the defendant's accomplice chased two fleeing customers during the last of three armed robberies, shooting one of them in the back. *Id.* ¶¶ 1, 9. Our supreme court held Phillips could not be convicted of premeditated murder because the evidence did not show he had "intended to facilitate or aid in committing a murder." *Id.* ¶ 41.

**¶15** Unlike in *Phillips*, where the state did not argue Phillips had intended to kill the victim, *id.* ¶ 34, the state here argued that Beverett intended to sell narcotic drugs. Also unlike *Phillips*, at the time of the offenses here, § 13-303(A)(3) included the

foreseeability language Beverett now challenges.[2] The jury instruction given here essentially tracked the language of the accomplice liability statutes. *See* §§ 13-301, 13-303(A)(3). The trial court instructed the jury that a person could be held "criminally accountable for the conduct of another person if the [person] is an accomplice of the other person in the commission of the offense." The instructions required the jury to find Beverett had the intent "to cause [the] result or to engage in . . . conduct" to "knowingly sell[] and/or transfer[] a narcotic drug to another." The court also instructed the jury that "'[s]ale' or 'sell' means an exchange of anything of value or advantage, present or prospective."

**¶16** Notably, evidence was presented at trial from which the jury could conclude Beverett had intended to promote or facilitate Byrd's selling narcotic drugs and that he helped him do so. A jury instruction should be given only if it correctly states the law, *see State v. Barr*, 183 Ariz. 434, 443 n.3, 904 P.2d 1258, 1267 n.3 (App. 1995), and is supported by the evidence. *See State v. Shumway*, 137 Ariz. 585, 588, 672 P.2d 929, 932 (1983). Beverett fails to explain how, given the facts of this case, a reasonable jury would have found he "was not participating in the sale and had no mental state required for accomplice liability," as he suggests. Despite his defense that he "had no control over [Byrd's actions] or intent to further" the sale of drugs, the undisputed facts plainly

[2]Section 13-303(A)(3) previously read, "A person is criminally accountable for the conduct of another if . . . [t]he person is an accomplice of such other person in the commission of an offense," while the current version states, "A person is criminally accountable for the conduct of another if . . . [t]he person is an accomplice of such other person in the commission of an offense including any offense that is a natural and probable or reasonably foreseeable consequence of the offense for which the person was an accomplice." *See* 2008 Ariz. Sess. Laws, ch. 296, § 2.

support the jury's findings of guilt. *See* § 13-3408(A)(7). And, there was abundant evidence that Beverett and Byrd were accomplices. *See* §§ 13-301(2), 13-303(A)(3). Thus, even if the trial court somehow erred in giving this instruction, such error was not detrimental to Beverett's defense and does not constitute fundamental error.

**¶17** For the foregoing reasons, Beverett's convictions and sentences are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge