FILED BY CLERK
OCT 19 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ROLANDO PARRADO-HERRERA, Appellant.	)	2 CA-CR 2011-0263 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20102378001

Honorable Michael O. Miller, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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K E L L Y, Judge.

¶1 After a jury trial, appellant Rolando Parrado-Herrera was convicted of solicitation to commit possession of cocaine for sale. He was placed on a four-year term

of probation, which included as a condition that he serve one year in the Pima County Jail. On appeal, he argues the trial court erred in making several evidentiary rulings, denying his motion for mistrial, and instructing the jury on solicitation as a lesser-included offense of conspiracy to commit possession of cocaine for sale. For the reasons that follow, we affirm.

Background

¶2 We view the facts in the light most favorable to sustaining the verdict. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). Parrado-Herrera and his brother Juan met several times with a police informant to discuss purchasing multiple kilograms of cocaine from him. Following the final meeting, law enforcement officers stopped the brothers' vehicle as it was leaving the meeting place and found a small quantity of cocaine in the vehicle. Both brothers were charged with conspiracy to commit possession of cocaine for sale and, after a jury trial in which they were tried together, Rolando Parrado-Herrera was convicted of solicitation to commit possession of cocaine for sale as a lesser-included offense. This appeal followed his sentencing.

Discussion

Evidentiary rulings

¶3 Parrado-Herrera argues the trial court erred in "permitting testimony that [he] was in jail" at the time he first discussed purchasing cocaine with the informant because this information was unfairly prejudicial and therefore inadmissible under Rule 403, Ariz. R. Evid. We review the trial court's evidentiary ruling for an abuse of

discretion. *State v. Davolt*, 207 Ariz. 191, ¶ 60, 84 P.3d 456, 473 (2004). During trial, Parrado-Herrera moved to preclude any testimony that he had been in jail at the time he first spoke with the informant, on the basis it would be unduly prejudicial. The court denied the motion, finding no "danger of unfair prejudice" and that any potential prejudice "applie[d] equally" to the informant.

¶4 To be admissible, evidence first must be relevant to an issue in the case. *State v. Chapple*, 135 Ariz. 281, 288, 660 P.2d 1208, 1215 (1983). "The trial court must then consider the probative value of the [evidence] and determine whether" it is substantially outweighed by the danger of unfair prejudice. *Id.*; *see also* Ariz. R. Evid. 403. Evidence is unfairly prejudicial if it "has an undue tendency to suggest [a] decision on an improper basis, such as emotion, sympathy, or horror." *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997).

¶5 Although Parrado-Herrera argued below the evidence wholly lacked probative value, the location of the conversation about purchasing cocaine was probative of the likelihood it had occurred as the informant claimed. The informant testified that while he was in jail on drug sales and money laundering charges, he had been housed in the same cell as Parrado-Herrera and had told him why he was in jail.[1] If Parrado-Herrera knew the informant was in jail for drug and money laundering charges, he would have been more likely to believe the informant was involved in the drug trade with access

[1]Parrado-Herrera testified he had met the informant while in jail and they had "formed a friendship." But, he denied discussing drugs with the informant in jail or during subsequent meetings and instead claimed the informant had "surprised" him by unexpectedly bringing a kilogram of cocaine to his house.

to large quantities of cocaine; therefore, this information made it more probable that Parrado-Herrera would have discussed purchasing cocaine from the informant. *See* Ariz. R. Evid. 401.

¶6 Parrado-Herrera also asserts the evidence was unduly prejudicial because it led the jury to believe "he is a bad person" and increased the risk that he would be convicted on an improper basis. But as the trial court concluded, even assuming the evidence was prejudicial, Parrado-Herrera has not established that it was unfairly so. "[N]ot all harmful evidence is unfairly prejudicial," *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993), and Parrado-Herrera has not explained how the conversation taking place in the jail suggested the jury made its "decision on an improper basis, such as emotion, sympathy, or horror." *Mott*, 187 Ariz. at 545, 931 P.2d at 1055. We therefore cannot say the court abused its broad discretion in concluding that the probative value of the evidence was not "substantially outweighed by a danger of . . . unfair prejudice."[2] *See* Ariz. R. Evid. 403; *see also State v. Connor*, 215 Ariz. 553, ¶ 39, 161 P.3d 596, 607 (App. 2007) ("Because '[t]he trial court is in the best position to balance the probative value of challenged evidence against its potential for unfair prejudice,' [it] has broad discretion in this decision."), *quoting State v. Harrison*, 195 Ariz. 28, ¶ 21, 985 P.2d 513, 518 (App. 1998) (alteration in *Connor*).

[2]Parrado-Herrera also appears to argue the trial court erred in allowing the testimony because it was impermissible other act evidence. *See* Ariz. R. Evid. 404(b). Parrado-Herrera did not raise this argument below and has not alleged fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). And, in any case, he has not explained how his presence in jail constituted an other act pursuant to Rule 404(b). Therefore, we do not address this argument.

¶7 Parrado-Herrera next argues the trial court erred in allowing the state to present evidence that when he was arrested, officers discovered a small amount of cocaine in the air conditioning ventilation duct of his vehicle. Parrado-Herrera moved to exclude the evidence, under Rule 403, on the basis it was irrelevant and unfairly prejudicial. The court denied the motion.

¶8 On appeal, Parrado-Herrera argues the trial court abused its discretion in concluding the evidence was admissible. Parrado-Herrera concedes the evidence had probative value, but he claims the court erred in weighing the probative value of the evidence against the danger of unfair prejudice. He asserts the cocaine's evidentiary value was low because it "was not consistent with either the packaging or amount" of cocaine the brothers had taken with them from their meetings with the informant.[3] And, he contends the danger of prejudice was great because cocaine "usage is viewed . . . as a problem in our society and therefore laden with emotion." But again he has not shown that the evidence was *unfairly* prejudicial, much less that the danger of unfair prejudice substantially outweighed the probative value of the evidence. *See* Ariz. R. Evid. 403; *Schurz*, 176 Ariz. at 52, 859 P.2d at 162. The court, therefore, did not abuse its discretion in admitting the evidence. *See Connor*, 215 Ariz. 553, ¶ 39, 161 P.3d at 607.

[3]The informant testified that during a meeting, the Parrado-Herreras had taken "a little bit" of the cocaine and placed it in "a small Zip-Lock bag," which they took with them to "test." At a subsequent meeting, the Parrado-Herreras again took approximately one gram of cocaine to test. Roughly half a gram of cocaine, wrapped in a dollar bill, was found in the vehicle.

Motion for Mistrial

¶9 Parrado-Herrera also claims the trial court erred in denying his motion for a mistrial. During cross-examination, counsel for Juan asked the informant "Did you ever think that maybe the Parrados were stringing you along?" The informant responded "No, because I had knowledge that they did that sort of work." Neither Juan nor Parrado-Herrera objected to the statement, but at the end of Juan's cross-examination of the informant, Parrado-Herrera moved for a mistrial, which the court denied.

¶10 "'A declaration of a 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. Herrera*, 203 Ariz. 131, ¶ 4, 51 P.3d 353, 356 (App. 2002), *quoting State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983). In deciding whether to grant a motion for mistrial on the basis of a witness's testimony, a trial court must examine "whether the testimony called to the jurors' attention matters that they would not be justified in considering in reaching their verdict and[, if so,] . . . the probability under the circumstances of the case that the testimony influenced the jurors." *State v. Lamar*, 205 Ariz. 431, ¶ 40, 72 P.3d 831, 839 (2003). We give great deference to a trial court's decision because it "is in the best position to determine whether the [testimony] will actually affect the outcome of the trial." *State v. Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d 345, 359 (2000). Therefore, a denial of a motion for mistrial will not be disturbed absent an abuse of discretion. *State v. Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d 231, 244 (2003).

¶11 Parrado-Herrera argues the informant's statement was improper under Rules 403 and 404 because it referred to "prior cocaine dealings." But, even assuming the statement was improper, Parrado-Herrera has not demonstrated there was a reasonable probability it affected the outcome of the trial. *See Lamar*, 205 Ariz. 431, ¶ 40, 72 P.3d at 839; *State v. Gilfillan*, 196 Ariz. 396, ¶¶ 35, 38, 998 P.2d 1069, 1078-79 (App. 2000). He claims the statement was prejudicial because his trial counsel observed the jury taking notes after it was made. But, the jury already had heard evidence that Parrado-Herrera was engaged in another cocaine deal. The informant had testified earlier that, in addition to attempting to purchase cocaine from him, the Parrado-Herreras were "working on [another] deal" in which they intended to purchase a large amount of cocaine from a separate supplier. *Cf. State v. Bailey*, 160 Ariz. 277, 279-80, 772 P.2d 1130, 1132-33 (1989) (mistrial not required after codefendant suggested defendant previously imprisoned; statement vague and jury had other evidence of defendant's prior convictions). Additionally, over the course of the nine-day trial the state presented strong evidence of Parrado-Herrera's guilt. *See State v. Hoskins*, 199 Ariz. 127, ¶ 58, 14 P.3d 997, 1013 (2000) (affirming denial of mistrial motion based on "strong circumstantial evidence of defendant's guilt"). Accordingly, in the context of the trial as a whole, there is no reasonable probability that the statement influenced the jurors. *See State v. Newell*, 212 Ariz. 389, ¶ 70, 132 P.3d 833, 847-48 (2006). Thus, even if improper, we cannot say

the statement warranted "the most dramatic remedy for trial error."[4] *Herrera*, 203 Ariz. 131, ¶ 4, 51 P.3d at 356.

Jury instruction

¶12 Parrado-Herrera claims the trial court erred in instructing the jury on solicitation to commit possession of a narcotic drug for sale. He argues the instruction was improper because the indictment charged him only with conspiracy and "solicitation is not a lesser included offense of conspiracy."

¶13 Juan initially had submitted a jury instruction on solicitation, and the trial court's proposed final instructions contained this instruction as to both defendants. When the court asked whether there were any objections to the proposed final instructions, Parrado-Herrera stated he had none. Juan, however, argued that insufficient evidence had been presented to support the solicitation instruction as to him and asked that it be removed. After the state argued that the evidence supported giving the solicitation instruction as to both defendants, Parrado-Herrera told the court it was permissible to

[4]Had Parrado-Herrera objected to the statement at the time it was made, the trial court could have provided a less severe remedy, such as striking the testimony and instructing the jury not to consider it. *See State v. Moody*, 208 Ariz. 424, ¶ 124, 94 P.3d 1119, 1151 (2004) (failure to lodge "contemporaneous objection" deprives court of "opportunity to correct any error that may have occurred with an immediate curative instruction").

instruct the jury on a lesser offense as to one defendant only. The court ultimately instructed the jury on solicitation as to Parrado-Herrera only.[5]

¶14 Based on this record, we conclude that any potential error was invited by Parrado-Herrera. Under the doctrine of invited error, "'one who deliberately leads the court to take certain action may not upon appeal assign that action as error.'" *In re MH2009-002120*, 225 Ariz. 284, ¶ 8, 237 P.3d 637, 640 (App. 2010), *quoting Schlecht v. Schiel*, 76 Ariz. 214, 220, 262 P.2d 252, 256 (1953). In that way, courts prevent a party from "'inject[ing] error in the record and then profit[ing] from it on appeal.'" *State v. Logan*, 200 Ariz. 564, ¶ 11, 30 P.3d 631, 633 (2001), *quoting State v. Tassler*, 159 Ariz. 183, 185, 765 P.2d 1007, 1009 (App. 1988). The invited error doctrine applies whenever a party affirmatively contributes to the error challenged on appeal. *See State v. Islas*, 132 Ariz. 590, 592, 647 P.2d 1188, 1190 (App. 1982) ("Generally, a party who participates in or contributes to an error cannot complain of it."); *State v. Mead*, 120 Ariz. 108, 111, 584 P.2d 572, 575 (App. 1978) ("[A party will not] be permitted to take advantage of an error which was a natural consequence of his own actions.").

¶15 Citing *State v. Lucero*, 223 Ariz. 129, 220 P.3d 249 (App. 2009), Parrado-Herrera contends the invited error doctrine is inapplicable here because he did not initiate the alleged error but instead "merely acquiesced" to an instruction that Juan had requested. In *Lucero*, this court held that the invited error doctrine may be applied only

[5]A jury instruction on the lesser-included offense of facilitation to commit possession of cocaine for sale was given as to Juan and the jury convicted him of this offense.

when the party challenging the error on appeal "affirmatively and independently initiated the error," and not when the party "merely acquiesced in the error proposed by another." 223 Ariz. 129, ¶ 31, 220 P.3d at 258. To the extent Parrado-Herrera claims he cannot have initiated the error because he did not originally offer the instruction, we disagree.[6] The invited error doctrine does not require a defendant to have offered the instruction in the first instance; it is enough that he approved the instruction and affirmatively contributed to the error. *See State v. Pandeli*, 215 Ariz. 514, ¶ 50, 161 P.3d 557, 571 (2007) (applying invited error doctrine when defense counsel did not object to offered testimony and argued it was admissible).

¶16 As the state points out, Parrado-Herrera went beyond acquiescence and instead led the trial court to believe he thought the instruction was appropriate. Indeed, the court stated it was giving the instruction "in light of th[e] discussion" with counsel. *See In re MH2009-002120*, 225 Ariz. 284, ¶ 8, 237 P.3d at 640 ("one who deliberately leads the court to take certain action" invites error). During that discussion, Parrado-Hererra told the court it could apply the instruction to him only, and stated he took "no position on it" and "d[id]n't care." And, after the court explained that it would give the instruction as to Parrado-Herrera only, Parrado-Herrera stated that this was "fine" with him. Parrado-Herrera thus made a tactical decision to accept the instruction, indicated to the court that the instruction was permissible and, in so doing, foreclosed the possibility

[6]As stated in the special concurring opinion in *Lucero*, our supreme court has not set forth an explicit test for determining invited error. *See* 223 Ariz. 129, ¶ 41, 220 P.3d at 258 (Hall, J., concurring) ("it is unclear as to what degree a defendant must contribute to a ruling . . . before the invited error doctrine" applies).

that the court further consider whether the instruction should be given.[7] Parrado-Herrera ultimately approved the instruction and affirmatively contributed to the alleged error he now challenges on appeal. His claim is therefore rejected as invited error. *See Pandeli*, 215 Ariz. 514, ¶ 50, 161 P.3d at 571; *Islas*, 132 Ariz. at 592, 647 P.2d at 1190; *Mead*, 120 Ariz. at 111, 584 P.2d at 575.

Disposition

¶17 Parrado-Herrera's conviction and sentence are affirmed.

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

CONCURRING:

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

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

[7]The decision to accept an instruction on a lesser-included offense can be tactical. *See State v. Mercer*, 13 Ariz. App. 1, 2, 473 P.2d 803, 804 (1970) (defendant's decision to accept instruction may be "tactical or strategical"); *see also State v. Gipson*, 229 Ariz. 484, ¶¶ 7, 9, 15, 277 P.3d 189, 190-92 (2012) (defendant may request lesser-included instruction if he believes it to be beneficial, or may decline to request and instead present "all or nothing" defense). We agree with the concurrence in *Lucero* that for equitable reasons a "defendant should not be permitted to take one position before the trial court and then ambush the state and the trial court on appeal by asserting an inconsistent position." 223 Ariz. 129, ¶ 45, 220 P.3d at 262 (Hall, J., concurring).