IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

FREDERICK LAMAR NEAL,
Appellant.

No. 2 CA-CR 2023-0145
Filed April 25, 2024

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pinal County
No. CR202101851
The Honorable Jason R. Holmberg, Judge

AFFIRMED

COUNSEL

Kristin K. Mayes, Arizona Attorney General
Alice M. Jones, Deputy Solicitor General/Section Chief of Criminal Appeals
By Eliza C. Ybarra, Assistant Attorney General, Phoenix
Counsel for Appellee

Kate Milewswki, Pinal County Public Defender
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Counsel for Appellant

MEMORANDUM DECISION

Judge Kelly authored the decision of the Court, in which Judge Eckerstrom and Judge Eppich concurred.

K E L L Y, Judge:

¶1 Frederick Neal appeals from his convictions and sentences for possession of a dangerous drug, possession of drug paraphernalia, and tampering with physical evidence. For the following reasons, we affirm.

Factual and Procedural Background

¶2 "We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining" Neal's convictions. *State v. Allen*, 235 Ariz. 72, ¶ 2 (App. 2014). In September 2021, a uniformed police officer investigated a residential backyard pursuant to a 9-1-1 call. There, he encountered Neal standing about six feet away behind a chain-link fence in an adjoining backyard. Neal reached into his pockets, prompting the officer to respond by "request[ing] and then demand[ing]" that Neal remove his hands from his pockets. Neal removed a glass pipe from his pocket, brought it to his lips, lit it with a lighter, inhaled, and then exhaled "a large plume of white smoke." The officer climbed over the fence, and Neal threw down the pipe and stepped on it, breaking its bulbous end but leaving its cylinder intact. Neal was arrested, and in a subsequent search, the officer discovered a clear plastic bag in Neal's back pocket containing methamphetamine. There was also methamphetamine residue on Neal's broken glass pipe.

¶3 Neal was charged with possession of a dangerous drug, possession of drug paraphernalia, and tampering with physical evidence. A jury found him guilty of these charges and found as aggravating circumstances that he was on probation at the time of the offenses and had a prior felony conviction within the ten years immediately preceding the date of the offenses.

¶4 The trial court sentenced Neal to presumptive, concurrent terms of ten years for possession of a dangerous drug and 3.75 years each for possession of drug paraphernalia and tampering with evidence. This

appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶5 On appeal, Neal argues that his conviction for tampering with physical evidence "rest[ed] upon a non-existent theory of criminal liability" and was not supported by sufficient evidence. He further asserts that his trial by an eight-person jury violated the Sixth Amendment.

Tampering with Physical Evidence

¶6 Neal acknowledges that he did not raise this issue before the trial court, and he must therefore demonstrate fundamental, prejudicial error. *See State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018). "Fundamental error occurs only when the defendant can show trial error exists, that the error went to the foundation of the case, took from him a right essential to his defense, or was so egregious that he could not have possibly received a fair trial." *State v. Jones*, 248 Ariz. 499, ¶ 7 (App. 2020). "If the error is such that it goes to the foundation of the case or takes away an essential right, the defendant must additionally show such error was prejudicial." *Id.* If the error is sufficiently egregious "that the defendant could not have possibly received a fair trial, prejudice is presumed." *Id.* Under this analysis, the defendant's failure to carry his burden of persuasion as to any element of fundamental error results in the failure of his claim. *Id.* Accordingly, this court must first determine if error occurred at all. *See id.*

¶7 "[I]t is fundamental, prejudicial error to convict a defendant of a crime with insufficient evidence." *State v. Clark*, 249 Ariz. 528, ¶ 20 (App. 2020). "Sufficiency of the evidence is a question of law, which we review de novo." *State v. Chandler*, 244 Ariz. 336, ¶ 3 (App. 2017). The relevant inquiry "is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Watson*, 248 Ariz. 208, ¶ 11 (App. 2020) (quoting *State v. West*, 226 Ariz. 559, ¶ 16 (2011)). "Substantial evidence is 'evidence that reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.'" *Clark*, 249 Ariz. 528, ¶ 21 (quoting *State v. Fimbres*, 222 Ariz. 293, ¶ 4 (App. 2009)). Both direct and circumstantial evidence are evaluated in considering whether substantial evidence supports a conviction. *Watson*, 248 Ariz. 208, ¶ 11. Furthermore, "[t]o set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis . . . is

there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316 (1987).

¶8 The crime of tampering with physical evidence occurs when a person, "with intent that it be used, introduced, rejected or unavailable in an official proceeding which is then pending or which such person knows is about to be instituted . . . [d]estroys, mutilates, alters, conceals or removes physical evidence with the intent to impair its verity or availability." A.R.S. § 13-2809(A)(1). An official proceeding is "a proceeding heard before any legislative, judicial, administrative or other governmental agency or official authorized to hear evidence under oath." A.R.S. § 13-2801(2).

¶9 Neal concedes that he broke the methamphetamine pipe, but maintains that no evidence presented at trial established that an "official proceeding" was either pending or known by Neal to be "about to be instituted" when he did so. Thus, Neal asserts that the record "is void of substantial evidence" supporting his tampering with evidence conviction and that the conviction and sentence must therefore be vacated. Neal argues the evidence may have established that a "criminal investigation" was about to be initiated at the time the pipe was broken, but he asserts that the Arizona Legislature omitted the word "investigation" from § 13-2809 when it adopted a modified version of the Model Penal Code's (MPC) tampering with physical evidence statute.[1] Therefore, he contends, the statute does not permit a conviction for "destroying evidence during a criminal investigation."

¶10 However, a criminal prosecution, wholly distinct from an investigation, undoubtedly qualifies as an "official proceeding" under § 13-2801(2) because it is a proceeding heard before a judicial agency. And a jury may infer a defendant's mental state "from his behaviors and other circumstances surrounding the event." *State v. Noriega*, 187 Ariz. 282, 286 (App. 1996). It is therefore reasonable to infer that Neal, having just smoked methamphetamine in front of a uniformed police officer who immediately thereafter climbed over a chain-link fence in order to apprehend him, believed that not only an arrest and investigation, but also a criminal prosecution, was "about to be instituted" against him. § 13-2809(A).

[1]The MPC's statute criminalizes tampering with evidence where an individual believes "an official proceeding or investigation is pending or about to be instituted," and "alters" evidence "with purpose to impair its verity or availability in such proceeding or investigation." Model Penal Code § 241.7 (Am. L. Inst., 2022).

Accordingly, there was sufficient evidence presented at trial, both direct and circumstantial, for the jury to conclude that Neal's conduct in throwing the pipe to the ground and breaking it were done "with the intent to impair its verity or availability" in an impending criminal prosecution. § 13-2809(A)(1); *see also Watson*, 248 Ariz. 208, ¶ 11.

¶11 Neal also contends that that the methamphetamine pipe "was not destroyed, mutilated, altered or concealed" in accordance with the requirements of § 13-2809 because the arresting officer was still able to collect it and place it into evidence and the prosecution was still able to admit it as an exhibit at trial and show it to the jury. However, nothing in § 13-2809 requires an individual to succeed in rendering physical evidence unavailable, only that it be mutilated or altered with "the *intent* to impair its verity or availability." § 13-2809(A)(1) (emphasis added). It was reasonable for the jury to conclude that Neal intended the pipe to shatter upon impact, rather than breaking into two pieces. *See Watson*, 248 Ariz. 208, ¶ 11. The evidence is sufficient to support the jury's conclusion that Neal threw down and stepped on the pipe in an attempt to impair its use as evidence against him in an impending criminal prosecution, § 13-2809(A)(1), and Neal has therefore failed to establish that any error, let alone fundamental error, occurred. *See Clark*, 249 Ariz. 528, ¶ 26.

Eight-Person Jury

¶12 Neal next asserts that his trial by an eight-person jury violated the Sixth Amendment and should therefore be reversed. Because Neal did not preserve this issue below, he must demonstrate fundamental, prejudicial error. *See Escalante*, 245 Ariz. 135, ¶ 12. Neal concedes that his eight-person jury complied with article II, § 23 of the Arizona Constitution and the United States Supreme Court's holding in *Williams v. Florida*, 399 U.S. 78 (1970). However, he contends that an eight-person jury conflicts with the Sixth Amendment and its "centuries-long consensus" that a jury be composed of twelve members.

¶13 In *Williams*, the United States Supreme Court held that a twelve-member jury "is not a necessary ingredient of" a jury trial. 399 U.S. at 86. There, the "refusal to impanel more than the six members . . . did not violate petitioner's Sixth Amendment rights as applied to the States through the Fourteenth." *Id.* Decisions of the United States Supreme Court are binding on this court with regard to the interpretation of the federal constitution. *Pool v. Superior Court*, 139 Ariz. 98, 108 (1984). Arizona law requires a twelve-person jury only when the potential sentence is death or imprisonment for thirty years or more, § 21-102(A); eight-person juries are

required for "any other criminal case," § 21-102(B). *See State v. Soliz*, 233 Ariz. 116, ¶¶ 6-7 (2009) (recognizing *Williams* and noting Arizona law has "reserved the twelve-person jury only for the most serious offenses"). The maximum potential term of imprisonment Neal faced under these charges was less than thirty years, and his jury therefore properly consisted of eight persons. *See id.*; § 21-102(B); *see also* A.R.S. § 13-703(J) (sentencing stipulations for category three offenders). Accordingly, Neal has failed to establish error, let alone fundamental, prejudicial error. *See Escalante*, 245 Ariz. 135, ¶ 12.

Disposition

¶14 We affirm Neal's convictions and sentences.