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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 7/11/2013  
RUTH A. WILLINGHAM,  
CLERK  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 09-0375  
)  
Appellee, ) DEPARTMENT C  
)  
v. ) **AMENDED**  
) **MEMORANDUM DECISION**  
ANURAG PATHAK, ) (Not for Publication -  
) Rule 111, Rules of the  
Appellant. ) Arizona Supreme Court)  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-165670-001 DT

The Honorable Christopher T. Whitten, Judge

**AFFIRMED**

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Terry Goddard, Arizona Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel  
William S. Simon, Assistant Attorney General  
Criminal Appeals/Capital Litigation Section  
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix  
By Paul J. Prato, Deputy Public Defender  
Attorneys for Appellant

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**D O W N I E**, Judge

¶1 Anurag Pathak ("defendant") appeals his criminal conviction. For the following reasons, we affirm.

## FACTS AND PROCEDURAL HISTORY<sup>1</sup>

¶2 On October 20, 2008, Detective G.M., a member of the Crimes Against Children Unit, learned of a Child Protective Services (CPS) referral alleging that a young girl had been sexually abused by defendant. The girl and her mother were brought to the Child Help children's center,<sup>2</sup> where Detective G.M. conducted forensic interviews.

¶3 Defendant was indicted for sexual abuse, a class 3 felony and dangerous crime against children, pursuant to Arizona Revised Statute ("A.R.S.") section 13-1404 (2010).<sup>3</sup> The indictment alleged that defendant intentionally or knowingly engaged in direct or indirect touching, fondling or manipulating of any part of the female breast of a minor under fifteen years of age.

¶4 A four-day jury trial was held. During the State's case-in-chief, Detective G.M. testified about his interviews, and his videotaped interview of the victim was played.

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<sup>1</sup> We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against the defendant. *State v. Vandever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

<sup>2</sup> Child Help is a national non-profit organization that provides services for children who are victims of abuse or neglect, including forensic interviews. The Crimes Against Children Unit and a CPS unit are also located there.

<sup>3</sup> We cite to the current version of statutes when no revisions material to this decision have occurred.

During that interview, the detective told the victim several times that he planned to talk to defendant about what happened. The State ended its direct examination of Detective G.M. with the following colloquy:

Q. Now, after you interviewed [the victim] and had spoken to [her mother], what did you do after that?

A. We coordinated a little bit with CPS as far as their safety plan goes, and then I made contact or had Mr. Pathak brought down for an interview with me.

Q. And did he talk to you?

A. No.

Defense counsel did not object to this testimony.

¶15 Additionally, the victim, her mother, a CPS caseworker, and a forensic interviewer testified for the State. The defense called defendant and two character witnesses to testify. The jury found defendant guilty, and the court sentenced him to lifetime probation, with terms including sex offender registration and jail time.<sup>4</sup>

¶16 Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010) and -4033 (2010).

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<sup>4</sup> Defendant was ordered to serve 191 days, but received 191 days' presentence incarceration credit.

## DISCUSSION

¶7 Defendant raises one argument on appeal: that the State violated his due process rights by asking Detective G.M. whether defendant had talked to him. Because defendant did not object to this evidence at trial, we review only for fundamental error. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (failure to object at trial waives issue absent fundamental error) (citations omitted). "Fundamental error" is error that 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. *State v. Ruggiero*, 211 Ariz. 262, 268, ¶ 25, 120 P.3d 690, 696 (App. 2005) (citations omitted). To obtain relief, defendant must demonstrate both that fundamental error occurred and that it caused him prejudice. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607 (citations omitted).

¶8 Using a defendant's post-*Miranda* silence for impeachment purposes at trial violates the due process clause of the Fourteenth Amendment. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976); *State v. Keeley*, 178 Ariz. 233, 235, 871 P.2d 1169, 1171 (App. 1994). This prohibition "rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him [via *Miranda* warnings] and then

using his silence to impeach an explanation subsequently offered at trial." *Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993) (internal quotations and citations omitted). Comment on a defendant's post-*Miranda* silence constitutes fundamental error. *State v. Sorrell*, 132 Ariz. 328, 329, 645 P.2d 1242, 1243 (1982).

¶19 There is, however, no constitutional impediment to using a defendant's silence prior to arrest, or after arrest if no *Miranda* warnings are given, for impeachment purposes. *Brecht*, 507 U.S. at 628. As defendant acknowledges, the record here does not establish when or if he was given *Miranda* warnings. According to defendant, Detective G.M.'s testimony that he was "brought [down] for an interview" implies he received *Miranda* warnings. We disagree that such an inference is implicit from that statement. Contrary to defendant's claim, Detective G.M. did not testify that defendant was brought down to the "station" for an interview. The detective testified the interviews were conducted in Child Help's "neutral" interview rooms located just outside a large play room. Detective G.M. had previously described the process to the jury as one requiring "independent interview[s] of all parties separately."<sup>5</sup>

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<sup>5</sup> Defendant's opening brief includes excerpts from the victim's videotaped interview. Defendant asserts the jury "heard several times that the detective was going to *question*" the defendant. (Emphasis added.) However, in each of the quoted

**CONCLUSION**

¶10 Because the record does not establish any improper comment about post-*Miranda* silence, we find no error, let alone fundamental error.<sup>6</sup> Defendant's conviction and sentence are affirmed.

\_\_\_\_\_  
/s/  
MARGARET H. DOWNIE,  
Presiding Judge

CONCURRING:

\_\_\_\_\_  
/s/  
DONN KESSLER, Judge

\_\_\_\_\_  
/s/  
PETER B. SWANN, Judge

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excerpts, Detective G.M. merely stated he was going to "talk to" defendant.

<sup>6</sup> We need not address defendant's contention that the testimony "falls within the class of 'deliberate and not inadvertent' error that requires reversal." Even if the prosecutor deliberately elicited the challenged testimony, it was not improper on this record. Were we to reach the issue of prejudice, we would find it lacking as well. See, e.g., *State v. Bowie*, 119 Ariz. 336, 341, 580 P.2d 1190, 1195 (1978) (finding no prejudice from admittedly improper prosecution question about defendant's *post-arrest* silence, in part because it "was the only time appellant's *post-arrest* silence was mentioned").