NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	No. 1 CA-CR 11-0494
v.	DEPARTMENT A
ALFREDO GONZALEZ, Appellant.	**MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Yavapai County

Cause No. P1300CR201000867

The Honorable Tina R. Ainley, Judge

AFFIRMED

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

David Goldberg — Fort Collins, CO
Attorney for Appellant

G O U L D, Judge

¶1 This is the memorandum decision, filed separately pursuant to Arizona Rule of Civil Appellate Procedure 28(g), which is referenced in our opinion of June 12, 2012. In

addition to the drug courier profile evidence addressed in the opinion, Gonzalez challenges the admission of improper opinion testimony, the sufficiency of the evidence supporting his conviction for transportation of dangerous drugs for sale, and the jury instructions regarding the elements of the offense. We address these claims below. In doing so, we incorporate the factual statement set forth in the opinion as if set forth herein. Finding no reversible error, we affirm.

I. Improper Opinion Testimony

¶2 Gonzalez asserts the court erred in admitting Kasun and Audsley's testimony about his veracity. It is well-established that a witness may not comment on the veracity of another witness. *See State v. Schroeder*, 167 Ariz. 47, 50-51, 804 P.2d 776, 779-80 (App. 1990). Nor may a witness testify as to whether a defendant is innocent or guilty. *Fuenning v. Superior Court*, 139 Ariz. 590, 605, 680 P.2d 121, 136 (1983). However, a police officer may, under certain circumstances, testify as to why he does not believe a defendant's story. *See State v. Doerr*, 193 Ariz. 56, 63, ¶¶ 25-28, 969 P.2d 1168, 1175 (1998) (holding that officer's testimony defendant was not being truthful during post-arrest questioning was admissible as a lay opinion given the fact defendant opened the door to such testimony by implying through cross-examination that police had

improperly failed to look for another assailant other than defendant).

A. Kasun's Testimony

¶3 During Kasun's cross-examination, the following exchange occurred between defense counsel and Kasun:

> Q: And Mr. Gonzalez adamantly denied that he had any knowledge of the drugs; correct?
>
> A: Yes, he did.
>
> Q: Did he say anything that made you believe differently?
>
> A: I believed differently from the start.
>
> Q: Did he say anything specifically, in words that made you believe he had knowledge of those drugs?

In response to this last question, Kasun testified he did not believe Gonzalez's denial because Gonzalez acknowledged that he had repeatedly asked Pinzon if there were any drugs in the vehicle. Kasun stated a person who had no knowledge of drugs would not repeatedly ask such a question. Because Gonzalez raises this issue for the first time on appeal, we review for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

¶4 Counsel for Gonzalez elicited from Kasun the very testimony of which he now complains, a circumstance he concedes in his reply brief. Any error was thus invited, and Gonzalez is

precluded from complaining about it on appeal. *See State v. Pandeli*, 215 Ariz. 514, 528, ¶ 50, 161 P.3d 557, 571 (2007) (citing well-established principle that "a defendant who invited error at trial may not then assign the same as error on appeal"); *State v. Moody*, 208 Ariz. at 453, ¶ 109, 94 P.3d at 1148 (holding that defendant invited any error in expert witness offering opinion on his credibility by asking expert whether defendant had been called "a malingerer, which is a medical term for liar," to which expert responded, "yes"); *State v. Lawrence*, 123 Ariz. 301, 304-05, 599 P.2d 754, 757-58 (1979) (affirming denial of mistrial, reasoning, "[I]t is evident that defense counsel invited error by venturing onto dangerous ground and carelessly framing a question" that invited witness to testify on inadmissible matter).

B. Audsley's Testimony

¶5 During her direct and re-direct testimony, Audsley testified that there were inconsistencies in the stories told by Gonzalez and Pinzon, and that Gonzalez's body language raised her suspicion as to whether he was being truthful. Once again, because Gonzalez did not object at trial, we review for fundamental error. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607.

¶6 It was not fundamental error to admit Audsley's testimony. The testimony was relevant to rebut defense

counsel's cross-examination of both Audsley and Kasun, which attempted to establish the officers performed a shoddy investigation that failed to produce enough evidence to convict Gonzalez. *See Doerr*, 193 Ariz. at 63, ¶¶ 27-28, 969 P.2d at 1175. The jury was provided with an audio copy of Audsley's interview, and although the jury was not able to see Gonzalez's body language on the audio recording, it was able to hear what he said and reach its own conclusions regarding Gonzalez's honesty. Audsley's statements were equivocal, stating that Gonzalez's inconsistent stories and body language "raised [her] suspicion" as to whether Gonzalez was being "honest."

¶7 Under these circumstances, we are not persuaded that admitting Audsley's testimony was fundamental error, that is, error that reached the foundation of Gonzalez's case, took from him a right essential to his defense, or was error of such magnitude that he could not possibly have received a fair trial. *See Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. Nor are we persuaded that a reasonable jury could have reached a different verdict absent Audsley's brief comments on her suspicions, which were cumulative of statements Gonzalez elicited from Kasun. *See id.* at 569, ¶ 27, 115 P.3d at 609; *State v. Shearer*, 164 Ariz. 329, 340, 793 P.2d 86, 97 (App. 1989) (stating that improperly admitted testimony, which was

"almost entirely cumulative," was harmless). We accordingly decline to reverse on this basis.

II. Sufficiency of Evidence

¶8 Gonzalez next argues the State "failed to present any evidence from which the jury could reasonably infer that he knew he was aiding or assisting the codefendant in transporting methamphetamine for sale." To convict Gonzalez of transportation of methamphetamine for sale, either as a principal or as an accomplice, the State was required to prove: (1) Gonzalez knew the subject vehicle contained methamphetamine, and (2) he knew he was transporting the methamphetamine for sale. Ariz. Rev. Stat. ("A.R.S.") section 13-3407(A)(7) (2010); *see State v. Fierro*, 220 Ariz. 337, 339, ¶ 5, 206 P.3d 786, 788 (App. 2008) (addressing similar "knowingly" requirement under A.R.S. § 13-3405).

¶9 We review *de novo* the denial of a motion for judgment of acquittal and the sufficiency of the evidence to support a conviction. *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011). We view the facts in the light most favorable to upholding the jury's verdict, and resolve all conflicts in the evidence against Gonzalez. *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). We do not distinguish between direct and circumstantial evidence. *State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993).

Credibility determinations are exclusively the province of the jury. *See State v. Just*, 138 Ariz. 534, 545, 675 P.2d 1353, 1364 (App. 1983). "We review the sufficiency of evidence presented at trial only to determine if substantial evidence exists to support the jury verdict." *State v. Stroud*, 209 Ariz. 410, 411-12, ¶ 6, 103 P.3d 912, 913-14 (2005).

¶10 In viewing the evidence as a whole, we find there was sufficient circumstantial evidence to prove Gonzalez knew he was transporting a dangerous drug, methamphetamine, for sale. Gonzalez was extremely nervous during the traffic stop, and admitted he was suspicious there was something in the vehicle. According to Gonzalez, he was so concerned about the presence of drugs in the vehicle that he asked Pinzon several times whether there was anything illegal in the car. Gonzalez and Pinzon provided several evasive, inconsistent statements when questioned by Kasun; they gave contradictory statements as to the purpose of their trip, where they were going, how long they were going to stay at their destination, and how long they had known one another.

¶11 The cleanliness of the dashboard, the crack in the windshield on the passenger's side, the fresh glue around the windshield, and the screwdriver with fresh glue on it on the back floorboard provided further circumstantial evidence from which the jury could reasonably infer that Gonzalez knew there

were illegal drugs hidden underneath the dashboard. Manera's testimony that a drug-trafficking organization would not entrust $112,000 worth of methamphetamine to persons who did not know what they were transporting provided further circumstantial evidence that Gonzalez knew he was transporting illegal drugs. Finally, the value ($112,000) and amount of methamphetamine (2.5 pounds) constituted sufficient evidence showing that the methamphetamine was being transported for sale. *See State v. Arce*, 107 Ariz. 156, 161-62, 483 P.2d 1395, 1400-01 (1971) (explaining that the "for sale" element may be inferred by circumstantial evidence, including the amount of drugs present).

III. Jury Instruction

¶12 Gonzalez argues the trial court fundamentally erred in giving a jury instruction that omitted from the elements of transportation of dangerous drugs for sale any requirement that the State prove he "knew that he was transporting methamphetamine." Jury instructions "must be considered as a whole, and a case will not be reversed when an error appears in an isolated part of the instructions, 'unless it appears that the questioned instruction, when considered in connection with all the instructions in the case, was calculated to mislead the jury as to the law.'" *Lay v. City of Mesa*, 168 Ariz. 552, 555, 815 P.2d 921, 924 (App. 1991) (quoting *Larriva v. Widmer*, 101 Ariz. 1, 4, 415 P.2d 424, 427 (1966)).

¶13 Gonzalez requested the standard jury instruction about which he now complains on appeal. A week before trial, Gonzalez filed Defendant's Proposed Jury Instructions, in which he requested the Revised Arizona Jury Instruction ("RAJI") for selling, transporting, importing, transferring of dangerous drugs for sale. The requested instruction reads as follows:

> The crime of transporting dangerous drugs for sale, importing dangerous drugs into this state for sale, selling dangerous drugs, [or] transferring dangerous drugs requires proof of the following:
>
> 1. The defendant knowingly transported dangerous drugs for sale, imported dangerous drugs into this state for sale, sold dangerous drugs, [or] transferred dangerous drugs; *and*
>
> 2. The substance was in fact a dangerous drug.

RAJI (Stat. Crim.), at 387-88 (3d ed. Supp. 2011). The court instructed the jury in accordance with this standard instruction, as requested by Gonzalez.

¶14 In the instruction, the word "knowingly" precedes and modifies the phrase "transported dangerous drugs for sale." The testimony at trial established that methamphetamine is a dangerous drug. Therefore, when read as a whole, the instruction clearly advised the jury that in order to find Gonzalez guilty, the state would have to prove Gonzalez knowingly transported methamphetamine for sale.

¶15 Even assuming the standard instruction was in error, Gonzalez invited any such error, and he is precluded from complaining about it on appeal. *See State v. Logan*, 200 Ariz. 564, 566-67, ¶ 15, 30 P.3d 631, 633-34 (2001) (holding that invited error doctrine barred a defendant from claiming as error on appeal a jury instruction that he had requested). The invited error doctrine is designed to prevent defendant from "inject[ing] error in the record and then profit[ing] from it on appeal," as in this case. *See id.* at 566, ¶ 11, 30 P.3d at 633 (alteration in original) (citing *State v. Tassler*, 159 Ariz. 183, 185, 765 P.2d 1007, 1009 (App. 1988)). This is not a case in which a defendant simply acquiesced in error. *See State v. Lucero*, 223 Ariz. 129, 138, ¶ 31, 220 P.3d 249, 258 (App. 2009). Rather, this is a case in which Gonzalez caused the very result of which he now complains.

Conclusion

¶16 For the foregoing reasons, in addition to those set forth in the separately filed opinion, we affirm Gonzalez's conviction and sentence.

/S/______________________________
Andrew W. Gould, Judge

CONCURRING:

/S/______________________________
Maurice Portley, Presiding Judge

/S/______________________________
Ann A. Scott Timmer, Judge