DIVISION ONE
FILED: 7/23/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. JERRELLE LEMAR WILLIAMS, Appellant.	)	1 CA-CR 11-0607 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-108307-001

The Honorable Susan M. Brnovich, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
by Joseph T. Maziarz, Chief Counsel, Criminal Appeals Section
and Barbara A. Bailey, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Tennie B. Martin, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Defendant Jerrelle Lemar Williams appeals his convictions and sentences for drug-related crimes. Defendant

contends that the superior court reversibly erred by ruling that text messages police discovered on his cell phone were admissible at trial. We agree with Defendant that the court erred -- the messages were inadmissible under Ariz. R. Evid. ("Rule") 404(b). But on this record, we conclude that the error was harmless. We therefore affirm Defendant's convictions and sentences.

FACTS AND PROCEDURAL HISTORY[1]

¶2 Before standing trial for three counts of sale or transportation of dangerous drugs and one count of possession or use of dangerous drugs, Defendant moved to suppress evidence of text messages received on and sent from his cell phone before his arrest. Defendant argued that the text messages, which referenced drugs, were inadmissible under Rule 404(b) and on hearsay grounds. The court denied Defendant's motion, finding that Rule 404(b) "does not apply" and that the messages were not hearsay.

¶3 At trial, an undercover detective testified that he bought methamphetamine from Defendant on three occasions: February 3, 4, and 10, 2010. On February 11, 2010, police took Defendant into custody after conducting a traffic stop and discovering seventeen milligrams of methamphetamine in a vial in

[1] "We view the facts in the light most favorable to sustaining the convictions." *State v. Musgrove*, 223 Ariz. 164, 166, ¶ 2, 221 P.3d 43, 45 (App. 2009).

Defendant's pocket. The police confiscated a cell phone from Defendant during the arrest.

¶4 The undercover detective testified at trial that the text messages found on Defendant's cell phone related to drug trafficking. The incoming text messages, received from various phone numbers on the dates indicated below, stated:

> February 2: "Bring a 20 to Robson by 7:00. There is a McDonald's on San Jose Street."
>
> February 7: "Hey, big homey, can you pick me up 40. I will get with you when I get back."
>
> February 9: "Hey, I know you got a bill of people here, et cetera, et cetera, but before you get them first, can you kick me down first because I really, really have to go ten minutes ago."
>
> February 9: "Hey, homey, I know I just got plugged with you through my boy Rico and all, maybe you can do a dub loaner until Friday's pay day. . . ."
>
> February 10: "Can you get a T now?"
>
> February 10: "Do you want that scale?"
>
> February 11: "Hey, would it be worth my time to drive back out there for just a 20?"

The detective also testified that outgoing text messages during the same time period, most of which used the number "0" as code for "yes," similarly related to drug trafficking. Defendant objected to the admission of all of the text messages except for those from February 10.

¶5 During closing arguments, the prosecutor stated:

> We have the text messages that show that the person on this phone that the detective was using, detective had been in contact with and had called was -- was a drug dealer and you can tell that from the text messages, the content of those text messages. So we don't have the wrong person here.
>
> . . .
>
> We have the text messages that show yes this phone that was on the defendant was from a drug dealer.

¶6 The jury found Defendant guilty on all counts. The court sentenced Defendant to concurrent prison terms of 15.75 years for the convictions for sale or transportation of dangerous drugs, and to a concurrent prison term of 10 years for the conviction for possession or use of dangerous drugs. Defendant timely appeals. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031 and 13-4033(A).

DISCUSSION

¶7 Defendant contends that the superior court erred by admitting the evidence of the text messages because the messages were "other acts" and the court "allowed the testimony [regarding the messages] without making any of the requisite findings required by Rule 404(b)."[2] We review the superior

[2] Defendant does not reassert his challenge to the evidence on hearsay grounds. This argument has therefore been waived. *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (holding that the failure to argue a claim usually constitutes abandonment and waiver of such claim). Moreover, even if Defendant had preserved his hearsay argument, he would not

court's evidentiary ruling for an abuse of discretion. *State v. Beasley*, 205 Ariz. 334, 337, ¶ 14, 70 P.3d 463, 466 (App. 2003).

¶8 Under Rule 404(b), "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[,]" but "may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The rule's "central purpose is to protect criminal defendants from unfair use of propensity evidence." *State v. Machado*, 226 Ariz. 281, 283, ¶ 14, 246 P.3d 632, 634 (2011).

¶9 Here, the superior court erred by concluding that the text messages were not offered as propensity evidence. The logical inference to be drawn from the messages is that Defendant was continually involved in drug trafficking, and the prosecutor argued that this meant Defendant was the person who sold the drugs in this case. The messages were plainly offered for the impermissible purpose of proving Defendant's "character . . . in order to show action in conformity therewith." The court abused its discretion by ruling that the messages were not precluded by Rule 404(b).

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prevail, for the reasons described in *State v. Chavez*, 225 Ariz. 442, 239 P.3d 761 (App. 2010).

¶10 The error was, however, harmless. We will not reverse a conviction for a harmless error in the admission or exclusion of evidence. *See State v. Anthony*, 218 Ariz. 439, 445-46, ¶¶ 38-39, 189 P.3d 366, 372-73 (2008); *State v. Doerr*, 193 Ariz. 56, 64, ¶ 33, 969 P.2d 1168, 1176 (1998). Error is harmless if we can say, beyond a reasonable doubt, that it did not affect the verdict. *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). "The inquiry on review 'is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.'" *State v. Eastlack*, 180 Ariz. 243, 251, 883 P.2d 999, 1007 (1994) (citation omitted); *see also State v. Calhoun*, 115 Ariz. 115, 117-18, 563 P.2d 914, 916-17 (App. 1977) (evidentiary error deemed harmless in light of remaining overwhelming evidence of guilt).

¶11 Ignoring the challenged text messages, the remaining trial evidence of record firmly establishes Defendant's guilt. The undercover detective testified that he actually bought methamphetamine on three separate occasions from Defendant in face-to-face transactions. The detective identified Defendant at trial and stated that he had "[n]o doubt" that it was Defendant who sold him the drugs. Further, Defendant did not object to the February 10 text messages that were also related

to drug-trafficking.[3] The challenged messages were therefore merely cumulative evidence. *See State v. Shearer*, 164 Ariz. 329, 339-40, 793 P.2d 86, 96-97 (App. 1989) (holding that the introduction of inadmissible evidence was harmless error when it was cumulative to and consistent with other trial testimony).

¶12 Based on the totality of the evidence, we conclude that Defendant's convictions were "surely unattributable" to the challenged text messages. The court's erroneous admission of the messages was clearly harmless and did not constitute reversible error.

CONCLUSION

¶13 We affirm Defendant's convictions and sentences.

/s/
_____
PETER B. SWANN, Presiding Judge

CONCURRING:

/s/
_____
DIANE M. JOHNSEN, Judge

/s/
_____
RANDALL M. HOWE, Judge

[3] With respect to the February 10 messages, the detective testified that a "T" is 1/16 of an ounce of drugs and that drug dealers typically use scales to measure drugs for sale.