

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

ALFREDO RENE POSADAS, *Appellant*.

No. 1 CA-CR 19-0031
FILED 3-3-2020

Appeal from the Superior Court in Maricopa County
No. CR2017-135158-001
The Honorable Joseph P. Mikitish, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Jana Zinman
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Mark E. Dwyer
Counsel for Appellant

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Maria Elena Cruz and Chief Judge Peter B. Swann joined.

C A T T A N I, Judge:

¶1 Alfredo Posadas appeals his convictions and sentences for possession of dangerous drugs for sale, possession of narcotic drugs for sale, misconduct involving weapons, and two counts of possession of drug paraphernalia. Posadas argues that the superior court erred by incorrectly advising him that statements made during a settlement conference could be used to impeach him at trial. Although we agree that the superior court erred, Posadas has not established that he was prejudiced by the error, and we affirm his convictions and sentences.

FACTS AND PROCEDURAL BACKGROUND

¶2 In July 2017, police officers initiated a traffic stop after Posadas stopped his car on a crosswalk. During the traffic stop, officers discovered a gun, a digital scale, heroin, and methamphetamine. The officers arrested Posadas, and he was charged with the crimes detailed above.

¶3 During a pretrial settlement conference, the superior court erroneously informed Posadas that “[e]verything that is said here . . . is not admissible at trial with one small exception. If you were to make some statements about what did or didn’t happen here and then were to testify at trial to something different, the State could point out the inconsistencies of what you’ve said.” Posadas participated in the conference, briefly responding to questions asked by the court, but he did not make any statements about the nature or facts of his case. Following the settlement conference, the State offered Posadas a more favorable plea offer than what had been offered previously, but he did not accept the offer.

¶4 After a jury trial in which Posadas did not testify, the jury found him guilty as charged, and the court sentenced him to multiple, concurrent prison terms, the longest of which is 13.5 years. Posadas appeals, and we have jurisdiction under A.R.S. § 13-4033(A)(1).

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DISCUSSION

¶5 Posadas argues that the superior court’s misstatements during his settlement conference violated due process and deprived him of meaningful participation in his settlement conference.

¶6 Under Arizona Rule of Evidence 410, statements made during plea negotiations are not admissible to impeach a defendant if he takes the stand at trial. “To permit the use of plea discussions for impeachment would have a strong chilling effect on plea negotiations.” *State v. Vargas*, 127 Ariz. 59, 61 (1980). Here, Posadas correctly asserts that the superior court erred by informing him that any statements made during his settlement conference could be used to impeach him at trial.

¶7 Because Posadas did not object to the court’s misstatements in superior court, we review the record for fundamental, prejudicial error. *See State v. Duran*, 233 Ariz. 310, 312–13, ¶¶ 12, 19 (2013); *State v. Henderson*, 210 Ariz. 561, 568, ¶ 19 (2005). A defendant establishes fundamental error by showing “(1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, or (3) the error was so egregious that he could not possibly have received a fair trial.” *State v. Escalante*, 245 Ariz. 135, 142, ¶ 21 (2018). Under the second *Escalante* prong, “[a]n error takes away an ‘essential right’ if it deprives the defendant of a constitutional or statutory right necessary to establish a viable defense or rebut the prosecution’s case.” *Id.* at 141, ¶ 19. Not only must a defendant show that an error deprived him of a fundamental right, he must also make a separate showing of prejudice, *i.e.*, a likelihood that the outcome of his case would have been more favorable absent the complained-of error. *Id.* at ¶ 21.

¶8 Here, the court’s erroneous interpretation of Rule 410 implicated a fundamental right – the constitutional right to testify. *See State v. Gulbrandson*, 184 Ariz. 46, 64 (1995); *Vargas*, 127 Ariz. at 61. Accordingly, we must determine whether the error was prejudicial.

¶9 Posadas failed to show that he was prejudiced by the court’s incorrect statement either during the settlement conference or at trial. Posadas offered no evidence, and the record does not support, that but for the court’s incorrect statement, his participation in the settlement conference would have been different or that the State would have extended a different plea offer. Moreover, there is no constitutional or statutory right to a plea offer. *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977); *State v. Jackson*, 209 Ariz. 13, 15, ¶ 6 (App. 2004). And here, notwithstanding

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Posadas's limited participation in the settlement conference, the State offered him a more favorable plea offer than had previously been offered, but he rejected the offer. Thus, he has not established prejudice relating to his participation in the settlement conference.

¶10 Nor has Posadas established that the incorrect statement during the settlement conference prejudiced his trial proceedings. Posadas's counsel did not assert at trial that Posadas would have testified absent the court's misstatement, much less provide evidence of what that testimony would have been. Accordingly, Posadas has not established that he was prejudiced by the court's incorrect statement.

CONCLUSION

¶11 For the foregoing reasons, although the superior court erred by advising Posadas that statements made during a settlement conference could be used to impeach him at trial, Posadas has failed to establish that the error prejudiced his case, and we affirm his convictions and sentences.



AMY M. WOOD • Clerk of the Court
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