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

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| STATE OF ARIZONA, Appellee, | ) | 1 CA-CR 09-0313 |
| | ) | DEPARTMENT C |
| v. | ) | **MEMORANDUM DECISION** |
| LEROY MONTOYA, Appellant. | ) | (Not for Publication – Rule 111, Rules of the Arizona Supreme Court) |

Appeal from the Superior Court in Mohave County

Cause No. CR 2007-0058

The Honorable Lee F. Jantzen, III, Judge

**AFFIRMED**

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**B R O W N**, Judge

**¶1** Leroy Montoya appeals from his convictions and sentences for one count each of contracting without a license,

criminal damage, fraudulent schemes and artifices, and participating in a criminal street gang. He raises two issues regarding the trial court's instructions to the jury, and he asserts that insufficient evidence supports his convictions for fraudulent schemes and artifices and participating in a criminal street gang. Montoya further contends the court committed reversible error in admitting improper other act evidence. Finally, Montoya argues the prosecutor's misconduct resulted in an unfair trial. For the reasons that follow, we affirm.

**BACKGROUND**[1]

**¶2** The victim, E.L., resided in California and owned a vacation home at 1715 River Garden Drive in Mohave County ("1715"). Montoya, a documented member of the "Mexican Mafia" prison gang, and his family rented a nearby house at 1721 River Garden Drive ("1721") until they were evicted. In August, 2006, E.L. went to 1715 to address matters raised in a nuisance notice he received regarding the property.

**¶3** While E.L. was at 1715, he met Montoya who gave him a business card that indicated Montoya was the co-owner of a

[1] We view the evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences against Montoya. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

business named "Quality Homes & Investments."[2] Montoya offered to clean up 1715 and perform minor repairs to rectify the issues raised in the notice. E.L. agreed and returned to California. Montoya completed the agreed-upon repairs, and performed additional work on 1715 as needed and authorized by E.L. In mid-September 2006, Montoya informed E.L. that the work on 1715 was completed. E.L. paid Montoya a total of $3,500.

**¶4** Meanwhile, unbeknownst to E.L., Montoya began "renting out" 1715.[3] E.C. testified that she and her family "rented" 1715 for a few days, but moved because they could not get any electric service. J.R. also testified that when she and her family "rented" 1715, the only electricity available was from an extension cord to a neighboring home. Montoya's wife arranged for electric service to commence December 5, 2006.

**¶5** On December 6, 2006, Officer Harrison was investigating a report of criminal damage at 1721[4] when he

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[2] The business card was identical to the one Montoya used in a prior construction agreement that formed the basis for a cease and desist order issued to Montoya by the Arizona Registrar of Contractors on February 24, 2006, for contracting without a license.

[3] E.L. was aware that Montoya's "employee," Randy, was staying at 1715 for a period of time before November 5, 2006.

[4] The damage, discovered by the property manager for 1721, included a "room" built in the garage, an irreparable garage door, broken eggs on the floor, broken windows, unhinged doors, and smashed-in walls.

observed Montoya and C.T., a documented gang member, exiting 1715. Harrison asked Montoya whether he lived at 1715 and Montoya explained that he did "sometimes" when not living in California. While talking with Montoya at 1715, Montoya demanded Harrison leave "his property."

**¶6** Around this time, Sergeant Gillman learned that E.L. held title to 1715. He telephoned him in California to inquire whether anyone was permitted to live there, because "illegal activity" had been reported at 1715. E.L. was "very stunned," and replied that the house should be vacant. With E.L.'s authorization, on December 13, 2006, police officers entered the property and found indicia of people living on the premises, including a car parked in the backyard that was registered to Montoya's wife.

**¶7** A week later, police responded to a report of trespassing at 1715 and found a group of five or six teenage boys in the home, at least some of whom were documented members of the South Side Boyz ("The Boyz"), a local gang. Police learned that Montoya was "in charge" of 1715 and had given permission to the gang members to be there.

**¶8** On January 2, 2007, E.L. entered the home with police officers; they observed a significant amount of damage and personal property that did not belong there. While they were there, Montoya arrived with a "group," including his wife, and

proceeded to retrieve items that had been removed and placed on the street in front of 1715. Montoya was taken into custody.

**¶9** The State charged Montoya with one count of criminal trespass in the first degree, a class six felony; two counts of criminal damage (one count each relating to 1715 and 1721), a class six felony; one count of fraudulent schemes and artifices, a class two felony; and one count of participating in a criminal street gang, a class two felony. The State later charged Montoya with one count of contracting without a license, a class one misdemeanor. The superior court consolidated the misdemeanor charge with the other charges for trial.

**¶10** The jury found Montoya not guilty of criminal trespass and the criminal damage charge relating to 1721. The jury returned guilty verdicts on the remaining counts. The court sentenced Montoya to thirty days' time served for the misdemeanor conviction and concurrent terms of imprisonment of four and thirteen years, respectively, for the criminal damage and fraud convictions. For the participating in a criminal street gang conviction, the court imposed a thirteen-year prison sentence to be served consecutively to the other sentences. Montoya timely appealed.

## DISCUSSION

### I. Jury Instructions

**¶11** Montoya raises two issues related to the trial court's jury instructions. The first issue relates to the court's instruction regarding the charge of participating in a criminal street gang, and the second deals with the court's response to a question from the jury.

**¶12** "The purpose of jury instructions is to inform the jury of the applicable law in understandable terms." *State v. Noriega*, 187 Ariz. 282, 284, 928 P.2d 706, 708 (App. 1996) (citation omitted). "A set of instructions need not be faultless." *Id.* However, the instructions must not mislead the jury and "must give the jury an understanding of the issues." *Id.* "It is only when the instructions taken as a whole are such that it is reasonable to suppose the jury would be misled thereby that a case should be reversed for error" in the instructions. *State v. Schrock*, 149 Ariz. 433, 440, 719 P.2d 1049, 1056 (1986) (citation omitted). Ordinarily, we review a decision to instruct the jury for abuse of discretion. *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995) (citation omitted). However, when a party fails to object to an instruction either before or at the time it is given, we review only for fundamental error. *Schrock*, 149 Ariz. at 440, 719 P.2d at 1056 (citation omitted).

### A. Participating in a Criminal Street Gang

**¶13** Montoya argues the trial court's instruction for the crime of participating in a criminal street gang misstated the law. As Montoya concedes, we review for fundamental error because he failed to bring this issue to the trial court's attention. *Id.* To obtain relief under fundamental error review, Montoya has the burden to show that error occurred, the error was fundamental, and that he was prejudiced thereby. *State v. Henderson*, 210 Ariz. 561, 567-68, ¶¶ 20-22, 115 P.3d 601, 607-08 (2005) (citations omitted).

**¶14** The statute under which Montoya was charged reads, in relevant part:

> Participating in or assisting a criminal syndicate; leading or participating in a criminal street gang
>
> A. A person commits participating in a criminal syndicate by:
>
> 1. Intentionally organizing, managing, directing, supervising or financing a criminal syndicate with the intent to promote or further the criminal objectives of the syndicate; or
>
> . . .
>
> 5. Hiring, engaging or using a minor for any conduct preparatory to or in completion of any offense in this section.
>
> B. A person shall not be convicted pursuant to subsection A of this section on the basis of accountability as an accomplice unless he

> participates in violating this section in one of the ways specified.
>
> . . .
>
> G. A person who violates subsection A, paragraph 1, 2, 3 or 4 of this section for the benefit of, at the direction of or in association with any criminal street gang, with the intent to promote, further or assist any criminal conduct by the gang, is guilty of a class 2 felony.
>
> . . . .

Ariz. Rev. Stat. ("A.R.S.") § 13-2308 (2006).[5]

**¶15** The court instructed:

> The crime of participating in a criminal street gang requires proof that the defendant intentionally organized, managed, directed or supervised a minor with the intent to promote or further the criminal objectives of the gang.
>
> . . .
>
> A person commits participating in a criminal syndicate by, one, intentionally organizing, managing, directing, supervising or financing a criminal syndicate with the intent to promote or further the criminal objective of the syndicate; or two, hiring, engaging or using a minor for any conduct preparatory to or in completion of any offense in this section.

[5] The statute was substantially revised in 2007; we therefore refer in this decision to the version in effect at the time the offense was committed. We cite a statute's current version if it has not been materially revised. *State v. Lewis*, 226 Ariz. 124, 125 n.1, ¶ 1, 244 P.3d 561, 562 n.1 (2011).

The court further instructed, consistent with A.R.S. §§ 13-105(8) (2010), -2301(C)(7) (2010):

> "Criminal street gang" means an ongoing formal or informal association of persons whose members or associates individually or collectively engage in the commission, attempted commission, facilitation or solicitation of any felony act and who has at least one individual who is a criminal street gang member.
>
> "Criminal syndicate" means any combination of persons or enterprises engaging, or having the purpose of engaging, on a continuing basis, in conduct that violates any one or more provisions of any felony statute in this state.

**¶16** Montoya's central argument appears to focus on the court's inclusion of the "criminal syndicate" instructions with the "criminal street gang" instructions.[6] Montoya also makes other confusing, undeveloped, and repetitive assertions of purported error, but he does not explain how these "errors" prejudiced him beyond speculating that the jury "may have" been misled or "likely" convicted him on an improper basis.

**¶17** We find that the instructions conveyed the essential elements of the offense and did not misstate the applicable law. *See State v. Hoskins*, 199 Ariz. 127, 145, ¶ 75, 14 P.3d 997, 1015 (2000) (reviewing the adequacy of jury instructions in

[6] Montoya asserts that the trial court erred when it included an instruction for the crime of assisting a criminal syndicate, which was neither charged nor defined as a lesser included offense.

their entirety to determine whether they accurately state the law). Although it appears that the instructions also included superfluous elements that were not required for the offense, this error benefitted Montoya by suggesting to the jurors that they had to find additional elements for a guilty verdict. *State v. Sierra-Cervantes*, 201 Ariz. 459, 463-64, ¶ 29, 37 P.3d 432, 436-37 (App. 2001) (concluding that because the court's error concerning a jury instruction benefitted the Defendant, reversal was not required). Even if that the challenged instructions were incorrect, Montoya's speculation regarding any possible prejudice is insufficient for relief under fundamental error review. *See State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006) (holding appellant did not meet burden of establishing prejudice when none appeared in the record and argument was based solely on speculation); *see also State v. Gallegos*, 178 Ariz. 1, 11, 870 P.2d 1097, 1107 (1994) ("Mere speculation that the jury was confused is insufficient to establish actual jury confusion.").

**B. Response to Jury Question; Mere Presence**

**¶18** During its deliberations, the jury presented the trial court with the following question: "If [Montoya] did not physically damage 1715 . . . himself, can he be found guilty because he did have knowledge and did not inform [E.L.] of the damage?" Over Montoya's objection, the trial court refused to

answer the question in the negative and instead referred the jury to the instructions with directions to consider the evidence. Montoya argues the court abused its discretion by not answering "no" to the jury's question. Asserting the State prosecuted him under an accomplice liability theory on the 1715 criminal damage charge, Montoya also claims the court erred in refusing to instruct the jury on mere presence.

**¶19** Turning first to the mere presence instruction, Montoya correctly states that, in a prosecution for accomplice liability based on actual presence, a court must give such an instruction when requested if the evidence supports it. *Noriega*, 187 Ariz. at 286, 928 P.2d at 710. This directive, however, has no applicability here for two reasons. First, Montoya does not point to, nor could we find in the record, any request for a mere presence instruction.[7] Second, the State did not argue Montoya's accomplice liability regarding the damage at 1715 was based on his presence there; rather, the State argued Montoya was guilty because he provided the means and opportunity

[7] And because Montoya does not argue the trial court committed fundamental error by not instructing the jury on mere presence, any such argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, 354, ¶ 17, 185 P.3d 135, 140 (App. 2008) (declining to review for fundamental error because appellant did not argue that the trial court committed fundamental error); *State v. Sanchez*, 200 Ariz. 163, 166, ¶ 8, 24 P.3d 610, 613 (App. 2001) (finding issue waived because the Defendant failed to develop argument in his brief).

to The Boyz to cause the damage. *See* A.R.S. § 13-301(3) (2010) (defining "accomplice" as one who provides means or opportunity to another person to commit an offense).

The court's response to a jury question is reviewed for abuse of discretion. *See State v. Fernandez*, 216 Ariz. 545, 548, ¶ 8, 169 P.3d 641, 644 (App. 2007). It is for the trial court to decide in exercising its discretion whether additional instructions were needed. Because the instructions given were adequate, we cannot say the court abused its discretion in referring the jury back to them. *See State v. Stevens*, 184 Ariz. 411, 413, 909 P.2d 478, 480 (App. 1995). Indeed, the court would have erred had it responded "no" to the jury's question because Montoya could have been found guilty of damaging 1715 even though he did not himself directly cause the damage. Consistent with the State's theory and the court's instruction on accomplice liability, the jury could have found Montoya guilty because he provided unauthorized access to 1715, thereby providing the means and opportunity to cause the damage. For these reasons, we find no abuse of discretion in the court's instructions or response to the jury's question.

**II. Sufficiency of the Evidence**

**¶20** Montoya challenges the sufficiency of the evidence supporting his convictions for participating in a criminal street gang and fraudulent schemes and artifices.

**¶21** Insufficiency of the evidence occurs when "there is a complete absence of probative facts *to support the conv*iction." *State v. Soto–Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (citation omitted). Substantial evidence required for conviction can be either direct or circumstantial and "[e]vidence wholly circumstantial can support differing, yet reasonable inferences sufficient to defeat a motion for directed verdict." *State v. Anaya*, 165 Ariz. 535, 543, 799 P.2d 876, 884 (App. 1990). In particular, elements such as intent and agreement may be proven by circumstantial evidence. *State v. Routhier*, 137 Ariz. 90, 99, 669 P.2d 68, 77 (1983); *State v. Willoughby*, 181 Ariz. 530, 540, 892 P.2d 1319, 1329 (1995). Finally, the credibility of witnesses is a matter for the jury. *Soto–Fong,* 187 Ariz. at 200, 928 P.2d at 624.

**A. Participating in a Criminal Street Gang**

**¶22** Montoya argues the trial evidence was not sufficient to show he participated in a criminal street gang in violation of A.R.S. § 13-2308(A)(1). Instead, according to Montoya, the evidence merely demonstrated his "association" with The Boyz. We reject Montoya's argument, finding that substantial evidence supports Montoya's conviction for participating in a criminal street gang, as defined *supra* ¶ 14.

**¶23** A gang expert with the Bullhead City Police Department, Officer Viles, testified that Montoya's "X3" chest

tattoo symbolized the "Surenos," an umbrella group of Southern California Hispanic gangs, and signified Montoya's allegiance to the Mexican Mafia. Viles stated that once in the Mexican Mafia, a member is "always tied to [the] gang in one way or another[,]" and death is generally the only way to terminate one's membership. Someone who does manage to exit the gang, according to Viles, would have the "X3" tattoo removed. Viles also testified that Montoya's nickname, "Big Dog," signifies a "leader of a particular gang."

**¶24** Viles also testified that law enforcement observed a significant increase in violent gang activity amongst The Boyz in 2006. During this time, Montoya associated with known members of The Boyz, who were photographed with him flashing gang signs and wearing gang clothing. Montoya admitted that he would meet with young men who were members of The Boyz and mentor them.

**¶25** In addition to the evidence showing Montoya was "in charge" of 1715 and allowed unauthorized access to the property, E.C. testified that Montoya asked her to buy food for a party, apparently at which a violent jumping-in ceremony occurred.[8] E.C. refused, and two days later she was assaulted by members of The Boyz. Finally, there was testimony that Randy, Montoya's

[8] According to E.C., Montoya was not at 1715 when the attack occurred.

"employee" observed "a bunch of juveniles . . . [who] frequent[ed] . . . 1715" vandalizing 1721, the home from which Montoya and his family had been evicted.

**¶26** The foregoing evidence raises reasonable inferences that Montoya intentionally organized, managed, directed or supervised The Boyz for the purpose of promoting the gang's criminal objectives, including criminal trespass,[9] criminal damage, and assault.[10] The evidence further raises reasonable

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[9] Montoya's acquittal of the criminal trespass charge does not, as Montoya contends, affect the sufficiency of the evidence supporting his conviction for participation in a criminal street gang. Montoya appears to misconstrue "criminal objectives" in § 13-2308 as referencing the criminal activity of the person accused of violating the statute. Properly read, the statute refers to the criminal activity of the criminal syndicate or gang members who the accused is alleged to be supervising.

Montoya's apparently related assertion that A.R.S. § 13-2308(A)(1) required the State to prove Montoya used the juvenile gang members to themselves organize, manage, direct, supervise, or finance a criminal syndicate, is without merit. The statute does not restrict a subject minor's criminal conduct to the activities set forth in § 13-2308(A)(1). *See* A.R.S. § 13-2308(C) ("A person who violates subsection A, paragraph 1, 2, 3 or 4 of this section for the benefit of, at the direction of or in association with any criminal street gang, with the intent to promote, further or assist *any criminal conduct* by the gang, is guilty of a class 2 felony.") (emphasis added). Accordingly, the State correctly construed the statute as imposing criminal liability on Montoya if he assisted The Boyz in their criminal trespassing at 1715.

[10] Citing *State v. Tocco*, Montoya asserts that the elements of "criminal syndicate" require proof that the defendant acts, knowing or intending that his conduct will further the criminal objectives of the criminal syndicate, violating any felony statute of this state on a continuing basis." 156 Ariz. 110, 115-16, 750 P.2d 868, 873-74 (App. 1986) (internal quotations

inferences that this was "for the benefit of, at the direction of or in association with" The Boyz. *See* A.R.S. § 13-2308(G). Thus, there is not "a complete absence of probative facts to support the conviction." *Soto–Fong,* 187 Ariz. at 200, 928 P.2d at 624. Moreover, we construe all reasonable inferences raised by the evidence against the defendant. *Manzanedo,* 210 Ariz. at 293, ¶ 3, 110 P.3d at 1027. Consequently, Montoya's conviction for participating in a criminal street gang is based on sufficient evidence.

**B. Fraudulent Schemes and Artifices**

**¶27** Montoya argues his conviction for fraudulent schemes and artifices should be reversed because the evidence did not sufficiently show he received a benefit from his unauthorized "rental" of 1715. *See* A.R.S. § 13-2310(A) (2010) ("Any person who, pursuant to a scheme or artifice to defraud, knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions is guilty of a class 2 felony.").

**¶28** The term "benefit" means "anything of value or advantage, present or prospective." A.R.S. § 13-105(3). This

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omitted). Montoya further states that "continuing basis" means a series, meaning three or more successive events. On this record, we find that reasonable evidence admitted at trial revealed that criminal trespass, criminal damage, and assault, in addition to the other offenses discussed at trial, constitute a series of felonies.

broad definition encompasses both pecuniary and non-pecuniary gain. *State v. Henry*, 205 Ariz. 229, 233, ¶ 15, 68 P.3d 455, 459 (App. 2003).

**¶29** Montoya clearly benefitted from renting 1715. First, E.C. testified that a family member paid Montoya rent, which Montoya refused to return when E.C. requested it back. Second, J.R. and G.P. testified that they each gave Montoya $500 for rent at 1715. Finally, Montoya obtained a non-pecuniary benefit when he "allowed" fellow gang members to use 1715 as a place to stay and store their personal belongings.

**¶30** The foregoing is substantial evidence that Montoya obtained a benefit by fraudulently renting out 1715. Accordingly, sufficient evidence supports Montoya's fraudulent schemes and artifices conviction.

**III. Evidentiary Rulings**

**¶31** Montoya challenges two of the trial court's rulings admitting testimony into evidence. He first argues that evidence of a gang member being stabbed outside 1715 on December 9, 2006, was irrelevant and unduly prejudicial. On the same bases, Montoya also challenges the admissibility of evidence regarding the contracting without a license allegation, and he contends this evidence constituted improper prior act evidence.

**¶32** We review a superior court's rulings on the admissibility of evidence for abuse of discretion. *State v.*

*Tucker*, 215 Ariz. 298, 313, ¶ 58, 160 P.3d 177, 192 (2007) (citation omitted). "An abuse of discretion occurs when the reasons given by the court for its decision are clearly untenable, legally incorrect, or amount to a denial of justice." *State v. Childress*, 222 Ariz. 334, 338, ¶ 9, 214 P.3d 422, 426 (App. 2009) (citation omitted).

**¶33** To be admissible, evidence must be relevant, and all relevant evidence is admissible except as otherwise provided by law. Ariz. R. Evid. 402. Evidence is relevant "if it has any tendency to make the existence of any fact that is of consequence more or less probable than it would be without the evidence." *State v. Oliver*, 158 Ariz. 22, 28, 760 P.2d 1071, 1077 (1988) (citation omitted). "This standard of relevance is not particularly high." *Id.* The evidence need not support a finding of an ultimate fact; "it is enough if the evidence, if admitted, would render the desired inference more probable." *State v. Paxson*, 203 Ariz. 38, 41-42, ¶ 17, 49 P.3d 310, 313-14 (App. 2002) (citation omitted).

**¶34** Evidence that is otherwise relevant is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice." Ariz. R. Evid. 403. "Evidence is unfairly prejudicial only if it has an undue tendency to suggest a decision on an improper basis, such as emotion, sympathy or horror." *State v. Gulbrandson*, 184 Ariz. 46, 61, 906 P.2d 579,

594 (1995). Because "[t]he trial court is in the best position to balance the probative value of challenged evidence against its potential for unfair prejudice," it has broad discretion in deciding whether to exclude evidence as unfairly prejudicial. *State v. Harrison*, 195 Ariz. 28, 33, ¶ 21, 985 P.2d 513, 518 (App. 1998), *aff'd*, 195 Ariz. 1, 985 P.2d 486 (1999).

**¶35** "It is only when the evidence is likely to be used for an impermissible purpose that it can be excluded for prejudice." Morris K. Udall et al., *Arizona Practice: Law of Evidence* § 82, at 168 (3d ed. 1991). Under Rule 404(b), "[e]vidence of prior acts is admissible if relevant and admitted for a proper purpose, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *State v. Beasley*, 205 Ariz. 334, 337, ¶ 14, 70 P.2d 463, 466 (App. 2003). Such evidence is not admissible "to prove the defendant's propensity to commit the crime." *State v. Van Adams*, 194 Ariz. 408, 415, ¶ 20, 984 P.2d 16, 23 (1999).

**A. The Stabbing**

**¶36** Over Montoya's relevance objection, Officer Trebes testified that on December 9, 2006, he responded to a stabbing at 1715. In front of the residence, Trebes and another officer found "a bunch of broken beer bottles, blood drops all over the ground, and . . . a knife that [they] believed was involved in the case." At the hospital, Trebes talked with "Mr. Mejia," a

juvenile member of The Boyz, who said he sustained his severe injuries by falling over a fence. Mejia did not cooperate "at all" in the investigation.

**¶37** Montoya maintains the above testimony should have been precluded on relevance grounds because "there was no connection made to [Montoya], or even to any of the other alleged members of The Boyz. There was only a tenuous connection made to . . . 1715[.]" Montoya further contends "[t]he evidence was highly prejudicial, since this evidence was the only incident of violence that was tied to . . . 1715 . . . and which the jury likely inferred was gang activity."

**¶38** Montoya's assertions are not supported by the record. Montoya testified that Mejia was one of the young men (who were members of The Boyz) he had met with in Bullhead City, and Officer Trebes testified the scene of the stabbing was "in front of 1715." Thus, the stabbing was sufficiently "connected" to Montoya and 1715. Further, the stabbing was not the "only incident" of possible gang-related violence at 1715. The record

shows a violent gang initiation ritual occurred there on or near the same date.[11] Accordingly, we find no abuse of discretion in admitting evidence of the December 2009 stabbing.

**B. Contracting Without a License**

**¶39** Montoya argues the court improperly allowed evidence of prior allegations against him for contracting without a license, and he challenges the admissibility of an Arizona Registrar of Contractors cease and desist order related to those previous allegations.[12] Montoya claims the evidence was irrelevant bad character evidence, and unfairly prejudicial.

**¶40** We reject Montoya's argument. Evidence of prior allegations of contracting without a license—allegations that involved the same business card Montoya gave to E.L.—was relevant to show that Montoya knew his contracting with E.L. was unlawful. The evidence was not unduly prejudicial, and therefore, evidence of the prior allegations was admissible. *See* Ariz. R. Evid. 404(b) (Evidence of prior acts is admissible

[11] Montoya does not explain how, if the stabbing were the only gang-related incidence of violence at 1715, its unfair prejudicial effect substantially outweighed its probative value. *See* Ariz. R. Evid. 403.

[12] Montoya also summarily asserts that the contracting without a license charge in this case should not have been consolidated with the other charges. Because he does not provide substantive argument regarding this purported error, we do not address this issue. *See State v. Sanchez*, 200 Ariz. 163, 166, ¶ 8, 24 P.3d 610, 613 (App. 2001) (holding that defendant waived issue that he failed to develop in his brief).

if relevant and admitted for a proper purpose "such as to prove . . . knowledge, . . . or absence of mistake or accident.").

**IV. Prosecutorial Misconduct**

**¶41** Finally, Montoya argues his trial was unfair and he was entitled to a mistrial because the prosecutor engaged in misconduct during opening statements, improperly questioned witnesses on the stand, and misstated the law and referred to matters not in evidence during closing arguments.

**¶42** "Because the trial court is in the best position to determine whether an attorney's remarks require a mistrial, we will not disturb its judgment absent an abuse of discretion." *Tucker*, 215 Ariz. at 319, ¶ 88, 160 P.3d at 198 (citation omitted). To succeed on a mistrial motion based on alleged instances of prosecutorial misconduct, a defendant must show that "(1) misconduct exists and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial." *State v. Morris*, 215 Ariz. 324, 335, ¶ 46, 160 P.3d 203, 214 (2007) (quotations omitted). To warrant reversal, "[t]he misconduct must be so pronounced and persistent that it permeates the entire atmosphere of the trial'" *Id*. (quotations omitted). As for instances of misconduct to which Montoya did not object at trial, we review only for fundamental error. *State v. Lamar*, 205 Ariz. 431, 441, ¶ 50, 72 P.3d 831, 841 (2003).

### A. Opening Statements

**¶43** After opening statements concluded, Montoya unsuccessfully moved for a mistrial based on the prosecutor's forecast during his opening that the jury would hear evidence of criminal conduct by The Boyz, including incidents where two gang members were shot.

**¶44** The trial court did not abuse its discretion in denying Montoya's mistrial motion, because the prosecutor's comments, even if improper, were not so prejudicial as to deny Montoya a fair trial. During defense counsel's opening statement, he referred to the prosecutor's statements and informed the jury it would hear no evidence that Montoya was involved with those crimes, and stated, "Those are not the crimes you will hear about." Defense counsel's statements, in conjunction with the court's instructions that the jury was to consider only the evidence presented to it and that the statements of the attorneys were not evidence, cured any potential prejudice. *See State v. Bowie*, 119 Ariz. 336, 339-40, 580 P.2d 1190, 1193-94 (1978) ("Any possible prejudice from the opening statement was overcome by the court's cautionary instructions that evidence did not come from the attorneys and that the verdict must be determined only by reference to the evidence . . . .").

### B. Questioning Witnesses

**¶45** While questioning one of the officers who accompanied E.L. to 1715 when Montoya was arrested, the prosecutor asked the court if he could ask the witness how Montoya left 1715. Montoya subsequently moved for a mistrial, arguing the prosecutor's question implied that Montoya left 1715 in a patrol car. The court denied the motion.

**¶46** The court acted within its discretion in denying Montoya's request for a mistrial because the prosecutor's request to the court for permission to ask a question of a witness was not improper. Further, even assuming the jury inferred from the question that Montoya left 1715 in a patrol car, we fail to see how this prejudiced Montoya. Other admitted evidence clearly showed that Montoya left 1715 in a patrol car because he was under arrest.

**¶47** Montoya also points to several instances where the court sustained objections to the prosecutor's questions of various witnesses and argues prosecutorial misconduct occurred. We disagree that questions successfully objected to constitute misconduct or that Montoya was prejudiced, especially in light of the court's instruction to the jury to disregard any question and answer for which the court sustained an objection. *See State v. Newell,* 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006) (stating jurors are presumed to follow instructions); *State v.*

*Murray*, 184 Ariz. 9, 34–35, 906 P.2d 542, 567–68 (1995) (holding that defendant suffered no demonstrable prejudice from a witness's comment which implied that the defendants were in jail after being arrested). Consequently, we find no reversible error.

**C. Closing Arguments**

**¶48** Montoya highlights several comments made by the prosecutor during closing arguments that allegedly referred to matters not in evidence and misstated the law. Montoya did not object to these statements or otherwise bring them to the trial court's attention; therefore we review for fundamental error. *Lamar*, 205 Ariz. at 441, ¶ 50, 72 P.3d at 841.

**¶49** We find that no fundamental error occurred. First, Montoya's assertion that the prosecutor "insinuated" he had evidence of Montoya's guilt but could not present it because witnesses were too intimidated to testify is not supported by the record. The record instead reveals that the prosecutor challenged the credibility of testimony by witnesses who *did* testify but were arguably afraid to directly implicate Montoya. The prosecutor did not engage in misconduct by referring to testimony that was not in evidence.

**¶50** Montoya next argues that A.R.S. § 13-2308(B) prohibits a conviction based on accomplice liability, thus the prosecutor improperly argued Montoya was guilty as an accomplice for "all

of the crimes . . . imputed to the gang." Montoya incorrectly construes the statute and the record. Section 13-2308(B) does not bar accomplice liability in all cases; rather, it prohibits a conviction based on accomplice liability, "unless [the accused] participate[d] in violating this section in one of the ways specified." A.R.S. § 13-2308(B). The prosecutor also did not argue Montoya was guilty of the crimes "imputed to the gang." Indeed, the prosecutor specifically stated Montoya was not on trial for committing those offenses.

**¶51** Montoya also contends the prosecutor misstated the law by arguing Montoya's guilt could be based on his using a minor to commit any offense in the criminal code. We have already determined that the State's position was correct regarding this element of the offense of participating in a criminal street gang. No misconduct occurred on this basis.

## CONCLUSION

**¶52** For the foregoing reasons, Montoya's convictions and sentences are affirmed.

/s/
_____
MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
MAURICE PORTLEY, Presiding Judge

/s/
_____
MARGARET H. DOWNIE, Judge