DIVISION ONE
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PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 09-0478
	)	1 CA-CR 09-0479
Appellee,	)	(Consolidated)
	)	
v.	)	DEPARTMENT C
	)	
EDWIN ARREDONDO CASTRO,	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
Appellant.	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
_____	)	

Appeal from the Superior Court in Maricopa County

Cause Nos. CR2004-007601-001 DT and CR2005-141410-001 DT
(Consolidated)

The Honorable Joseph C. Welty, Judge
The Honorable Edward O. Burke, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General — Phoenix
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Attorneys for Appellant

K E S S L E R, Judge

¶1 Edwin Arredondo Castro ("Castro") appeals from his convictions and sentences for drug offenses in Cause No. CR2005-

141410 and from the revocation of his probation in Cause No. CR 2004-007601 as a consequence of those convictions. Castro contends his statements to the police were admitted in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). He also argues that there was insufficient evidence to support his convictions and that the trial court erred in instructing the jury and in imposing sentence. For reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 On December 9, 2005, Castro presented a prescription for Percocet at a Fry's Food and Drug store. The prescription was written on a form bearing the letterhead of Dr. Alfonso Salas and was signed by "A. Salas M.D.". Castro had been seen by Dr. Salas for back pain and was prescribed Percocet for about one month sometime prior to March 2004. The pharmacy technician called the doctor's office to verify the prescription and discovered it was forged.

¶3 When questioned by the police about the prescription, Castro admitted to manufacturing it by copying and completing a blank prescription form that had been attached to the back of the prescription for Percocet he had obtained from Dr. Salas. It was further learned that Castro had been successful in having forged prescriptions for Percocet filled at the store on three earlier occasions in 2005.

¶4 Castro was charged in Cause No. CR2005-141410 with one count of attempted acquisition of narcotic drugs by fraud, deceit, misrepresentation or subterfuge, a class 4 felony; and three counts of acquisition of narcotic drugs by fraud, deceit, misrepresentation or subterfuge, each a class 3 felony. The State also alleged that Castro had a historical prior felony conviction in Cause No. CR2004-007601 for attempted acquisition of narcotic drugs by fraud, deceit, misrepresentation or subterfuge in 2004, and that he was on probation for that conviction at the time he committed the 2005 offenses. In addition, the State petitioned to have his probation in Cause No. CR2004-007601 revoked based on his commission of the new offenses.

¶5 During a jury trial, Castro was found guilty as charged on all four counts. On the date set for sentencing, the trial court *sua sponte* ordered a new trial based on a finding that Castro "did not receive a fair and impartial trial due to ineffective assistance of counsel." The State appealed the grant of a new trial, and this Court reversed and remanded for sentencing. *State v. Castro*, 1 CA-CR 07-0053, 2008 WL 2791999 (Ariz. App. Feb. 14, 2008) (mem. decision). At sentencing, the trial court found Castro had one prior historical felony conviction and that he was on probation when he committed the offenses in 2005. The trial court sentenced Castro on his

convictions in CR2005-141410 as a repetitive offender to concurrent presumptive prison terms of 4.5 years on the attempt offense, and 6.5 years on the three completed offenses. The trial court further found Castro in automatic violation of his probation in CR2004-007601 based on his convictions in CR2005-141410, revoked his probation, and imposed a consecutive presumptive prison term of 2.5 years with credit for 138 days of presentence incarceration.

¶6 Castro filed timely appeals in both CR2005-141410 and CR2004-007601, and the appeals were consolidated.[1] We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031, and -4033(A)(1) (2010).[2]

DISCUSSION

A. Admission of Castro's Statements

¶7 Castro argues that his statements to the police should have been excluded because they were obtained in violation of *Miranda*. Specifically, he contends the police violated *Miranda* by questioning him prior to advising him of his rights, by not

[1] We note that during the pendency of this appeal, Castro filed a Rule 32 motion under the Arizona Rules of Criminal Procedure ("Ariz. R. Crim. P."), which the court dismissed without prejudice on February 17, 2010 until this Court issued a mandate in this direct appeal.

[2] We cite to the most current version of the statute when it has not been substantively revised since the date of the offense.

obtaining a valid waiver of his rights, and by ignoring his attempt to invoke the right to counsel. We find that all of these claims have been waived because a motion to suppress the statements was not filed and no objection was raised by Castro to their admission at trial. "Issues concerning the suppression of evidence which were not raised in the trial court are waived on appeal." *State v. Tison*, 129 Ariz. 526, 535, 633 P.2d 335, 344 (1981); *see also* Ariz. R. Crim. P. 16.1(c) ("Any motion, defense, objection, or request not timely raised under Rule 16.1(b) shall be precluded, unless the basis therefor was not then known, and by the exercise of reasonable diligence could not then have been known, and the party raises it promptly upon learning of it."). This waiver rule applies "even though rights of constitutional dimension have been lost." *Tison*, 129 Ariz. at 535-36, 633 P.2d at 344-45.

¶8 Castro attempts to avoid this result by claiming that admission of his statements rises to the level of fundamental error. Fundamental error is "error going 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. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). To qualify as "fundamental error," the error must be

"clear, egregious, and curable only via a new trial." *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). The defendant has the burden of establishing both that fundamental error occurred and that actual prejudice resulted. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607. Prejudice depends on whether a reasonable jury could have reached a different result. *Id*. at 569, ¶ 27, 115 P.3d at 609. This, in effect, is the same standard used for harmless error except that the defendant must show the error was not harmless. *Id.* at 570-71, ¶¶ 38-39, 115 P.3d 601, 610-11.

¶9 "'It is the duty of a trial court to hold a hearing as to voluntariness of a statement or confession, if a question as to its voluntariness is raised-either by the attorneys, or one is presented by the evidence.'" *State v. Fassler*, 103 Ariz. 511, 513, 446 P.2d 454, 456 (1968) (citing *State v. Goodyear*, 100 Ariz. 244, 248, 413 P.2d 566, 569 (1966). The court must hold a hearing outside the jury's presence and rule upon the issue of voluntariness when the evidence presents even a "slight suggestion" that a confession may not be voluntary. *State v. Simoneau*, 98 Ariz. 2, 7, 401, P.2d 404, 408 (1965). Further, when the totality of the circumstances surrounding a confession suggests involuntariness, it prompts the court's duty to conduct a hearing. *State v. Stanley*, 167 Ariz. 519, 523-24, 809 P.2d 944, 948-49 (1991).

¶10 In the present case, there was insufficient evidence to alert the trial court to hold a suppression hearing. Additionally, because his attorney did not file a motion to suppress Castro's statements and did not raise an objection to their admission at trial, the facts and circumstances surrounding Castro's questioning were not developed in the record. In fact, the only testimony on the issue of custody was that Castro was arrested *after* he made the incriminating statements he contends were erroneously admitted.

¶11 Thus, in reviewing the record on appeal, we cannot determine whether Castro was in custody when he made the statements he contends were admitted in violation of *Miranda*. While we could remand this issue for clarification, *see State v. Zamora*, 220 Ariz. 63, 67-69, ¶¶ 8, 13, 202 P.3d 528, 532-34 (App. 2009), we decline to do so because the evidence necessary to alert the trial court is insufficient and undeveloped. In the absence of any such evidence, there is simply no record alert whether Castro was in custody when he made the statements so his claim of fundamental error necessarily fails.[3]

[3] Our disposition of the *Miranda* issue raised by Castro on appeal does not preclude him from filing, and the superior court from deciding, a Rule 32 petition alleging an ineffective assistance of counsel claim resulting from defense counsel's failure to file a motion to suppress Castro's statements or raise an objection to their admission at trial.

B. Denial of Rule 20 Motion

¶12 Castro also argues that the trial court erred in denying his Rule 20 motion for judgment of acquittal. Rule 20 requires a trial court to enter judgment of acquittal "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(A). "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). In reviewing a claim of insufficient evidence, "[w]e construe the evidence in the light most favorable to sustaining the verdict[s], and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)). Claims of insufficient evidence are reviewed *de novo*. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993).

¶13 Castro was charged with violation and attempted violation of A.R.S. § 13-3408(A)(6) (2010), which states: "A person shall not knowingly: Obtain or procure the administration of a narcotic drug by fraud, deceit, misrepresentation or

subterfuge." Castro contends the evidence was insufficient to establish that he knew Percocet was a narcotic drug.

¶14 On the first point, a pharmacist testified that Percocet consists of a mixture of Oxycodone and acetaminophen. The statutory definition of "narcotic drugs" includes "Opium." A.R.S. § 13-3401(20)(iii) (2010). "Opium," in turn, is defined to include any compound or mixture with Oxycodone. A.R.S. § 13-3401(21)(dd). The pharmacist's testimony was therefore more than sufficient to support a finding that Percocet is a narcotic drug. Moreover, it is an undisputable fact that Percocet is a narcotic drug under Arizona law. *See* Physicians' Desk Reference 1211 (2001) (listing Percocet as "Oxycodone HCL and acetaminophen tablets, USP"). Thus, the trial court could properly take judicial notice that Percocet is a narcotic drug and instruct the jury accordingly. *See State v. Hunt*, 118 Ariz. 431, 436, 577 P.2d 717, 722 (1978) (holding court can take judicial notice that "Dilaudid" is a narcotic drug); Ariz. R. Evid. 201 (permitting court to take judicial notice of any fact that is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").

¶15 When a statute defining an offense includes a culpable mental state without distinguishing between the elements of the offense, "the prescribed mental state shall apply to each such element unless a contrary legislative purpose plainly appears."

A.R.S. § 13-202 (2010); *see also State v. Norris*, 221 Ariz. 158, 160, ¶ 9, 211 P.3d 36, 38 (App. 2009) (holding "[t]he plain language of 13-3405 indicates the culpable mental state of 'knowingly' applies to each element of the listed offenses"). Therefore, to convict Castro on the charged offenses, the State had to prove that he knew Percocet was a narcotic drug. *State v. Salinas*, 181 Ariz. 104, 106, 887 P.2d 985, 987 (1994); *State v. Diaz*, 166 Ariz. 442, 445, 803 P.2d 435, 438 (App. 1990), *vacated in part on other grounds*, 168 Ariz. 363, 813 P.2d 728 (1991).

¶16 The culpable mental state of knowledge for commission of an offense can be established by circumstantial evidence. *State v. Speer*, 221 Ariz. 449, 460, ¶ 57, 212 P.3d 787, 798 (2009). Indeed, proof of a defendant's state of mind generally must be circumstantial in nature. *State v. Vann*, 11 Ariz. App. 180, 182, 463 P.2d 75, 77 (1970). In the present case, there was substantial circumstantial evidence from which the jury could infer that Castro knew Percocet was a narcotic drug. The evidence included that Castro was prescribed Percocet for back pain, that he forged prescriptions to obtain more of the drug, that the pharmacist filled the prescription with the generic of Percocet (Oxycodone, a statutorily defined narcotic drug), and that the pharmacist counseled Castro when the prescriptions were filled by telling Castro "what the drug is[,]" which we must

infer shows Castro knew Percocet was a narcotic drug. Considered together, the jury could reasonably find from this evidence that Castro knew Percocet was a narcotic drug. Thus, the trial court did not err in denying the motion for judgment of acquittal. *See State v. Pawley*, 123 Ariz. 387, 393, 599 P.2d 840, 846 (App. 1979) (holding no error in denying motion for acquittal where reasonable minds could differ on whether defendant was aware of narcotic character of tablets possessed) (citation omitted).

C. Jury Instructions

¶17 Castro also maintains that the trial court erred by instructing the jury that Percocet is a narcotic drug and by improperly instructing the jury on the elements of the offenses. We review *de novo* whether jury instructions correctly state the law. *State ex rel. Thomas v. Granville*, 211 Ariz. 468, 471, ¶ 8, 123 P.3d 662, 665 (2005). Because Castro failed to object to the jury instructions, our review is limited to fundamental error. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607; *see also* Ariz. R. Crim. P. 21.3 (precluding claim of error on appeal regarding jury instructions absent objection).

¶18 As discussed above, the fact that Percocet is a narcotic drug is a matter subject to judicial notice. Thus, the trial court could properly instruct the jury on this fact. Ariz. R. Evid. 201(g). Accordingly, there was no error, let

alone fundamental error, in the trial court instructing the jury that Percocet is a narcotic drug.

¶19 We also find no merit to the contention that the trial court erred in instructing the jury on the elements of the offenses. Castro argues that the trial court should have set forth the elements of the offense of Obtaining Narcotics by Fraud, in the manner suggested in the Revised Arizona Jury Instructions (RAJI) (Criminal) at 34.086 (3d ed. 2008). He asserts that by failing to do so, the trial court applied the culpable mental state of knowingly only to the act of obtaining or procuring rather than to the element that the substance was a narcotic drug.

¶20 We review the adequacy of jury instructions in their entirety to determine if they accurately reflect the law. *State v. Hoskins*, 199 Ariz. 127, 145, ¶ 75, 14 P.3d 997, 1015 (2000) (citation omitted). We will not reverse "unless we can reasonably find that the instructions, when taken as a whole, would mislead the jurors." *State v. Sucharew*, 205 Ariz. 16, 26, ¶ 33, 66 P.3d 59, 69 (App. 2003) (quoting *State v. Strayhand*, 184 Ariz. 571, 587, 911 P.2d 577, 593 (App. 1995)); *see also State v. Norgard*, 103 Ariz. 381, 383, 442 P.2d 544, 546 (1968) ("Instructions must be considered as a whole, and no case will be reversed because of some isolated paragraph or portion of an instruction which, standing alone, might be misleading.").

¶21 As an initial matter, we note that the trial court is not required to instruct the jury in accordance with the RAJI. *See State v. Logan*, 200 Ariz. 564, 566, ¶ 12, 30 P.3d 631, 633 (2001) (explaining that the RAJI are not court approved instructions, but rather merely proposed jury instructions created by the State Bar of Arizona). In the present case, the trial court instructed the jury on the charged offenses as follows:

> **Attempted Acquisition or Administration of Narcotic Drugs**
>
> The crime of Attempted Acquisition or Administration of Narcotic drugs requires proof of the following:
>
> The defendant knowingly attempted to procure the administration of a narcotic drug by fraud, deceit, misrepresentation or subterfuge.
>
> **Acquisition or Administration of Narcotic Drugs**
>
> The crime of Acquisition or Administration of Narcotic Drugs requires proof of the following:
>
> The defendant knowingly obtained or procured the administration of a narcotic drug by fraud, deceit, misrepresentation or subterfuge.

The trial court further instructed the jury on the definition of "knowingly" as follows:

> "Knowingly" means that a defendant acted with awareness of or belief in the existence

> of conduct or circumstances constituting an offense. It does not mean that a defendant must have known the conduct was forbidden by law.

¶22 These instructions track the statutory language for the offense of obtaining narcotics by fraud and the culpable mental state of knowingly. *See* A.R.S. §§ 13-3408(A)(6), 13-105(10)(b) (2010). In accordance with the statutory language, the trial court's instructions placed "knowingly" in front of all the elements of the offense, indicating under common grammatical construction that this mental state applies to each of the elements. *State v. Fierro*, 220 Ariz. 337, 340, ¶ 13, 206 P.3d 786, 789 (App. 2008). Because the instructions correctly stated the law, there was no error. *Id.*

D. Sentencing as a Repetitive Offender

¶23 Finally, Castro argues that the trial court erred in sentencing him on his convictions in Cause No. CR2005-141410 as a repetitive offender pursuant to A.R.S. § 13-604 (Supp. 2005). He asserts that the trial court should have imposed the sentence in conformity with A.R.S. § 13-3419(A) (2001). We review sentencing issues involving statutory interpretation *de novo*. *State v. Gomez*, 212 Ariz. 55, 56, ¶ 3, 127 P.3d 873, 874 (2006).

¶24 Subject to certain exceptions, A.R.S. § 13-3419(A) governs sentencing for multiple drug offenses not committed on the same occasion but consolidated for trial. *State v.*

Dominguez, 192 Ariz. 461, 464, ¶ 8, 967 P.2d 136, 139 (App. 1998). One such exception is A.R.S. § 13-604, which provides for enhanced punishment for repetitive offenders. This statute states, in pertinent part: "The penalties prescribed by this section shall be substituted for the penalties otherwise authorized by law if the previous conviction . . . is charged and . . . found by the court." A.R.S. § 13-604(P). This language is "plain and unambiguous" that the legislature intended for A.R.S. § 13-604 to provide an exclusive sentencing scheme for repetitive offenders. *State v. Tarango*, 185 Ariz. 208, 209-10, 914 P.2d 1300, 1301-02 (1996). Because Castro was found to have a prior historical felony conviction, the trial court properly sentenced him for the 2005 offenses as a repetitive offender pursuant to A.R.S. § 13-604. *State v. Diaz*, 224 Ariz. 322, 324, ¶ 15, 230 P.3d 705, 707 (2010).

CONCLUSION

¶25 Finding no error, we affirm Castro's convictions and sentences in CR2005-141410 and the revocation of his probation in CR2004-007601.

/S/

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DONN G. KESSLER, Judge

CONCURRING:

/S/

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MARGARET H. DOWNIE, Presiding Judge

/S/

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PETER B. SWANN, Judge