IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 01/12/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA, Appellee,	)	1 CA-CR 10-0934
	)	DEPARTMENT C
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
SHELLIE LAMERE TORRES,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court in Mohave County

Cause No. CR 2010-00136

The Honorable Steven F. Conn, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Melissa M. Swearingen, Assistant Attorney General
Attorneys for Appellee

Jill L. Evans, Mohave County Appellate Defender — Kingman
By Diane S. McCoy, Deputy Appellate Defender
Attorneys for Appellant

B R O W N, Judge

¶1 Shellie Lamere Torres appeals from her convictions for possession of dangerous drugs and possession of drug

paraphernalia. Defendant argues that the stop and search of her vehicle was unlawful. She also raises evidentiary issues related to the trial testimony of a law enforcement official. For the reasons that follow, we find no reversible error and therefore affirm.

BACKGROUND[1]

¶2 In February 2010, agent Wales of the United States Drug Enforcement Administration ("DEA") and Sergeant Gutierrez of the Lake Havasu City Police Department were parked in an undercover vehicle at a Lake Havasu City gas station conducting surveillance on an investigation unrelated to this matter. While they were there, Torres parked her SUV in the gas station parking lot approximately 75 to 100 yards from Wales and Gutierrez. Torres and her boyfriend, S.R., exited the SUV, proceeded to the back of the vehicle where they argued, and then re-entered the passenger compartment. This scenario repeated itself. Their erratic and hurried movements caught Wales' and Gutierrez's attention, to whom it appeared that the couple was "tweaking," or under the influence of methamphetamine. When S.R. attempted to close the hatchback lid on Torres with a crowbar or pipe, Wales and Gutierrez began to approach the SUV

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

on foot. Before they reached the SUV, Torres and S.R. drove away. Wales followed in his own unmarked law enforcement vehicle.[2]

¶3 Shortly after leaving the gas station, Wales observed Torres abruptly stop the SUV in the middle of the traffic lane. He pulled closer behind her, and she pulled partially off the roadway. Wales continued past Torres and stopped 50 to 75 yards away so he could further observe the SUV. Torres proceeded to drive away, and after about one-quarter of a mile she again stopped abruptly in the travel lane. Wales drove past the SUV and stopped 20 to 25 yards away. At some point during his observations of the SUV, Wales contacted local law enforcement dispatch and requested assistance from a marked unit.

¶4 After he heard a "distress type of screaming" coming from the SUV and noticed the SUV was "rocking back and forth . . . indicat[ing] that there may have been a physical altercation inside of the vehicle[,]" Wales decided he could not wait for assistance, activated his emergency lights, and pulled the SUV over. After approaching the SUV and checking Torres's driver license, Wales asked whether anything illegal was in the vehicle. Torres responded, "No, there shouldn't be." This response further raised Wales' suspicions, and he requested

[2] Gutierrez remained in his vehicle to continue the surveillance in the other investigation.

consent to search the SUV. Torres assented. A K-9 unit arrived shortly thereafter, and the dog alerted to the presence of narcotics in Torres's vehicle. Wales searched the SUV and discovered a usable amount of methamphetamine in a small plastic baggie in Torres's purse, which was found on the left side of the SUV's driver side floorboard. Lake Havasu City Police Officer Dastrup, who had meanwhile arrived at the scene, arrested Torres.

¶5 The State charged Torres with one count each of possession of dangerous drugs, a class 4 felony, and possession of drug paraphernalia, a class 6 felony. *See* Ariz. Rev. Stat. ("A.R.S.") §§ 13-3407(A)(1) (Supp. 2011),[3] -3415(A) (2010). After a two-day trial, the jury found Torres guilty as charged, and the court sentenced her to two years probation. This timely appeal followed.

DISCUSSION

I. The Vehicle Stop

¶6 Before trial, Torres moved to suppress evidence obtained as a result of the search of her SUV. As the basis for her motion, Torres argued that Wales, as a federal law enforcement agent, was not properly authorized to enforce Arizona's criminal laws in Mohave County. She further argued

[3] We cite a statute's current version when it has remained materially unchanged since the date of the offense.

that she did not consent to the search. The trial court held an evidentiary hearing and denied Torres's motion. Torres contends the court's ruling was in error because Arizona law does not authorize a peace officer to conduct an investigative stop "outside of his geographical area."[4] We disagree.

¶7 In reviewing the denial of a motion to suppress, we employ an abuse of discretion standard. *State v. Chavez*, 208 Ariz. 606, 607, ¶ 2, 96 P.3d 1093, 1094 (App. 2004). We consider only the evidence submitted at the suppression hearing, and we view those facts in the manner most favorable to upholding the trial court's ruling. *State v. Box*, 205 Ariz. 492, 493, ¶ 2, 73 P.3d 623, 624 (App. 2003). Also, we defer to the trial court's determinations as to the credibility of witnesses. *State v. Ossana*, 199 Ariz. 459, 461, ¶ 7, 18 P.3d 1258, 1260 (App. 2001). Although we defer to the trial court's factual determinations, we review de novo its ultimate legal conclusion. *Box*, 205 Ariz. at 495, ¶ 7, 73 P.3d at 626.

¶8 In denying Torres's suppression motion, the trial court relied on A.R.S. § 13-3871 (2010), which provides:

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[4] Torres also asserts that even if Wales had the proper authorization, he did not have reasonable suspicion to justify an investigatory stop. However, because Torres did not raise that argument in the trial court or assert on appeal that the court fundamentally erred, we decline to address it. *See infra* ¶ 14.

> The authority of a peace officer may extend in any of the following circumstances to any place within the state:
>
> 1. Where he has the prior consent of the chief of police, marshal, sheriff, or other department or agency head with peace officer jurisdiction, or his duly authorized representative, having the primary responsibility for law enforcement within the jurisdiction or territory.
>
> 2. Under any of the circumstances set forth in § 13-3883.[5]

Thus, pursuant to § 13-3871, if Wales had the consent of the Mohave County Sheriff, he had the authority of a peace officer in Mohave County.[6] Here, the court found Wales had the implicit consent of the Mohave County Sheriff. This finding is supported by the record.

¶9 Wales testified he is a DEA agent "responsible for La Paz and Mohave Counties . . . [to assist] other law enforcement agents with the investigation of drug crimes." Wales explained that he works primarily out of Lake Havasu City and has been working with Mohave County law enforcement agencies, including

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[5] Section 13-3883 (Supp. 2011) provides that a peace officer, without a warrant, "may stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of any traffic law committed in the officer's presence[.]"

[6] Torres does not contest that Wales is a DEA agent and therefore a "peace officer" under Arizona law. *See* A.R.S. § 13-105(29) (Supp. 2011) ("Peace officer" defined as "any person vested by law with a duty to maintain public order and make arrests . . . .").

the sheriff's office, on a daily basis for five years. Wales testified that during that time he has never been informed by Mohave County that he is not allowed to operate there. This evidence supports the court's finding that Wales had the implicit consent of county law enforcement agencies, including the sheriff, to operate as a peace officer in Mohave County.

¶10 Accordingly, the trial court did not abuse its discretion in denying Torres's motion to suppress on the basis of Wales' purported lack of authority.[7] *See State v. Cowles*, 207 Ariz. 8, 9, ¶ 3, 82 P.3d 369, 370 (App. 2004) ("Generally, a court abuses its discretion where the record fails to provide substantial support for its decision or the court commits an error of law in reaching the decision.") (citation omitted). Because we conclude Wales was authorized as a peace officer to conduct an investigatory stop of Torres, we need not address whether he was authorized as a private citizen to do so.

II. Evidentiary Issues

¶11 Torres raises three issues regarding evidentiary rulings made by the trial court. We review the court's rulings

[7] Torres also argues that the "illegal stop" based on Wales' lack of authority "tainted" her subsequent consent to search the SUV. Because we conclude Wales was authorized to conduct the stop, we summarily reject this argument. We note that Torres refers in her brief to "the stop" and "the arrest." Because Torres presents no argument challenging the propriety of her arrest by Dastrup, and she makes no meaningful assertion that Wales' investigatory stop amounted to an arrest, we assume her use of the term "arrest" refers to the investigatory stop.

for an abuse of discretion. *State v. Davolt*, 207 Ariz. 191, 208, ¶ 60, 84 P.3d 456, 473 (2004).

A. Torres's Impairment

¶12 Torres first challenges the court's denial of her motion in limine seeking to preclude Wales from testifying that he suspected Torres was driving under the influence of methamphetamine when he stopped her. Torres argued such evidence was irrelevant, unduly prejudicial, and improper character evidence. *See* Ariz. R. Evid. 401 to 404. In denying the motion, the court found the challenged evidence (1) properly established the context of the stop by showing "that the police aren't just driving around, at random pulling people over[;]" (2) was relevant to show Torres knowingly possessed methamphetamine in her purse; and (3) was not unduly prejudicial.

¶13 Torres argues Wales' testimony regarding his suspicions of Torres's impairment was not relevant because "the legality of the search" was not an issue at trial. We reject this argument. Torres argued at trial the methamphetamine was not hers and she had no knowledge of the drugs in her purse. In light of this defense, Wales' personal observations that Torres appeared to be under the influence of methamphetamine before the stop were relevant to show she knowingly possessed the drug. Accordingly, we find no abuse of discretion.

¶14 Torres asserts there was insufficient foundation for Wales' and Gutierrez's impairment testimony because they "would have been testifying as experts in this regard." She also argues that the officers' testimony regarding characteristics of methamphetamine impairment is similar to drug courier profile evidence, which is inadmissible under *State v. Lee*, 191 Ariz. 542, 959 P.2d 799 (1998). Torres did not make these arguments in her motion in limine, nor does she direct us to an objection made at trial on these grounds. Our independent review of the record also does not reveal any proper objections. Thus, we ordinarily review for fundamental error. *State v. Lopez*, 217 Ariz. 433, 434-35, ¶ 4, 175 P.3d 682, 683-84 (App. 2008) (fundamental error review applies when a defendant fails to properly object in the trial court). However, because Torres does not argue that the trial court fundamentally erred, we do not address Torres's assertions. *See State v. Moreno-Medrano*, 218 Ariz. 349, 354, ¶¶ 16-17, 185 P.3d 135, 140 (App. 2008) (declining to review for fundamental error when appellant failed to raise claim in trial court and failed on appeal to address whether alleged error was fundamental); *see also State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (noting that failure to argue a claim usually constitutes abandonment and waiver of such claim); *State v. Sanchez*, 200 Ariz. 163, 166,

¶ 8, 24 P.3d 610, 613 (App. 2001) (finding issue waived because defendant failed to develop argument).

B. Wales' Testimony Regarding Case Insignificance

¶15 In response to lines of questioning during his cross-examination regarding his incomplete incident report and the lack of forensic evidence in this case, Wales stated during redirect that, due to the small amount of drugs found on Torres, "this is not the crime of the century." The next trial day, Torres requested the court instruct the jury "that she is facing possible prison time" or "that this is a serious matter" because otherwise Wales' statements would "leave with the jury . . . [the impression] that this isn't a serious matter[.]" The court refused to give the instructions, reasoning that based on its perception of the case so far, namely the small amount of drugs found and Torres's lack of a significant criminal record, "she's probably not going to go to prison." The court also noted that: "As far as instructing the jury that this is a serious case, I think the fact that they are here in the Superior Court, doing a trial that is taking two days, should make it obvious that this is not a trivial case."

¶16 Torres argues Wales' testimony was inadmissible because it constituted improper opinion testimony. We review for fundamental error only because Torres did not object to this statement at the time it was made. *Lopez*, 217 Ariz. at 434-35,

¶ 4, 175 P.3d at 683-84. However, Torres again fails to argue that the admission of the testimony amounts to fundamental error, and we therefore do not address this argument. *See supra* ¶ 14.

¶17 Torres also argues the court erred in failing to give the requested curative instructions because Wales' testimony on redirect "trivializ[ed]" the case. Torres provides no applicable authority to support her argument; thus, we do not address it. *See State v. Moody*, 208 Ariz. 424, 452 n.9, 94 P.3d 1119, 1147 n.9 (2004) ("In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised.") (quoting *Carver*, 160 Ariz. at 175, 771 P.2d at 1390); *Sanchez*, 200 Ariz. at 166, ¶ 8, 24 P.3d at 613.

C. Wales' Rebuttal Testimony

¶18 During the State's rebuttal, Wales testified that when he interviewed Torres after her arrest, "[s]he said that she had previously purchased methamphetamine."[8] Torres did not make a contemporaneous objection to this testimony, but she did raise

[8] Torres refers to other purportedly inappropriate rebuttal testimony regarding the messiness of her vehicle and the size of the baggie containing the methamphetamine found in Torres's purse. However, she fails to indicate whether she made a timely objection to this testimony, and she once again does not argue the court committed fundamental error in failing to sua sponte remedy the purported improper testimony. Thus, Torres has waived any challenge to this testimony on fundamental error grounds. *See supra* ¶ 14.

it as a basis for her motion for mistrial made after the close of evidence. Torres argued the State did not disclose the statement referred to in Wales' rebuttal testimony as required by Ariz. R. Crim. P. 15.1(b)(2), (7), and she argued the evidence was irrelevant, unduly prejudicial, and constituted improper character evidence.

¶19 The court denied Torres's request for a mistrial, finding (1) that Torres's verbal comment was not a "statement" for Rule 15 purposes; and (2) the testimony was "true rebuttal evidence that is being presented to rebut the assertion by the defendant that she doesn't use methamphetamine, and she has never bought methamphetamine[.]"

¶20 The court did not abuse its discretion in refusing to grant a mistrial. *See State v. Adamson*, 136 Ariz. 250, 260, 665 P.2d 972, 982 (1983) (denial of a motion for mistrial reviewed for abuse of discretion). First, the court correctly determined that Torres's verbal comment was not a statement for disclosure purposes. *See* Ariz. R. Crim. P. 15.4(a)(1) ("statement" defined to mean a writing adopted by a person, or a writing or other recording of a person's oral communications). Second, the record supports the court's ruling. Torres testified on direct examination that she never used methamphetamine, and, during cross-examination, Torres asserted she had never bought the drug. Thus, her statement to Wales that she had previously

purchased methamphetamine was admissible to rebut her trial testimony. *See State v. Martinez*, 127 Ariz. 444, 447, 622 P.2d 3, 6 (1980) (holding that otherwise inadmissible bad act evidence may become relevant for impeachment when a defendant's testimony opens the door)*; State v. Shepherd*, 27 Ariz. App. 448, 450, 555 P.2d 1136, 1138 (1976) ("The general rule of rebuttal evidence is that the State may offer any competent evidence which is a direct reply to or in contradiction of any material evidence introduced by the accused."); *State v. Tovar*, 187 Ariz. 391, 393, 930 P.2d 468, 470 (App. 1996) ("Once a defendant has put certain activity in issue by . . . denying wrongdoing, the government is entitled to rebut by showing that the defendant has lied.") (citation omitted).[9]

¶21 Because the trial court denied her motion for mistrial, Torres requested a jury instruction admonishing the jury not to consider her statement regarding her previous purchase of methamphetamine for purposes of determining her guilt of the drug possession charge. The court denied the requested instruction. Torres argues the court abused its

[9] We also reject Torres's argument that the court should have precluded the evidence under Ariz. R. Crim. P. 15.1(b). That rule requires, at a defendant's request, preclusion of evidence that is not disclosed by the State at least thirty days before a plea offer's deadline if the court determines the evidence "materially impacted the defendant's decision . . . to accept or reject a plea offer." Ariz. R. Crim. P. 15.8. Here, Torres never requested the court make such a determination.

discretion in doing so. *See State v. Cox*, 214 Ariz. 518, 521, ¶ 16, 155 P.3d 357, 360 (App. 2007) ("Absent a clear abuse of discretion, we will not reverse a trial court's decision to refuse a jury instruction."). The State appears to concede error because Ariz. R. Evid. 105 required the court to give the limiting instruction.[10] The State argues nonetheless that the error was harmless.

¶22 An error is harmless "if the state, in light of all of the evidence, can establish beyond a reasonable doubt that the error did not contribute to or affect the verdict." *State v. Valverde*, 220 Ariz. 582, 585, ¶ 11, 208 P.3d 233, 236 (2009) (citation and internal quotation omitted). "The inquiry . . . 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." *Id.* (citations and internal quotations omitted). We conclude that the verdict in this case was "surely unattributable" to any error in failing to give the requested limiting instruction.

¶23 The evidence at trial overwhelmingly showed Torres was guilty of possessing methamphetamine and paraphernalia. Police

[10] Rule 105 states: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

discovered the drug in a baggie in her purse, which was on the driver side floor of the vehicle Torres had just been driving. The discovery occurred after she was observed engaging in erratic, hurried behavior indicative of being under the influence of methamphetamine. Although Torres claimed the drugs were not hers, the jury could have readily discredited this defense. *See State v. Bronson*, 204 Ariz. 321, 328, ¶ 34, 63 P.3d 1058, 1065 (App. 2003) (jury has the right to credit or discredit testimony). We accordingly find any error in failing to give Torres's requested jury instruction was harmless. *See State v. Trostle*, 191 Ariz. 4, 16, 951 P.2d 869, 881 (1997) (finding that, although comment on defendant's failure to testify was impermissible, error was harmless in light of the overwhelming evidence of guilt); *see also United States v. Gant*, 17 F.3d 935, 944 (7th Cir. 1994) ("[T]he less believable the defense, . . . the more likely the conclusion that the constitutional error did not contribute to the conviction.") (quotation omitted).

CONCLUSION

¶24 For the foregoing reasons, we affirm Torres's convictions and sentences for possession of dangerous drugs and possession of drug paraphernalia.

/s/
_____
MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/
_____
PATRICIA K. NORRIS, Judge

/s/
_____
PHILIP HALL, Judge