IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DRAKE JERMELL CLARK,
Appellant.

No. 2 CA-CR 2019-0048
Filed August 7, 2020

Appeal from the Superior Court in Pinal County
No. S1100CR201703312
The Honorable Christopher J. O'Neil, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Michael T. O'Toole, Chief Counsel
By Amy Pignatella Cain, Assistant Attorney General, Tucson
Counsel for Appellee

Michael Villarreal, Florence
Counsel for Appellant

OPINION

Judge Brearcliffe authored the opinion of the Court, in which Presiding Judge Staring and Chief Judge Vásquez concurred.

B R E A R C L I F F E, Judge:

¶1 Drake Clark appeals from his convictions after a jury trial. Clark was tried on four charges: aggravated driving while impaired to the slightest degree and while his license or privilege to drive was suspended pursuant to A.R.S. §§ 28-1381(A)(1) and 28-1383(A)(1) (count one); aggravated driving with a drug defined in A.R.S. § 13-3401 or its metabolite in his body (tetrahydrocannabinol or "THC") while his license or privilege to drive was suspended pursuant to §§ 28-1381(A)(3) and 28-1383(A)(1) (count two); aggravated driving while impaired to the slightest degree while a person under fifteen years of age was in the vehicle, §§ 28-1381(A)(1) and 28-1383(A)(3) (count three); and aggravated driving with a drug defined in § 13-3401 or its metabolite in his body while a person under fifteen years of age was in the vehicle, §§ 28-1381(A)(3) and 28-1383(A)(3) (count four). He was acquitted on counts one and three and convicted on counts two and four.

¶2 The trial court sentenced Clark to concurrent prison terms of ten years on count two and 3.75 years on count four. In this appeal, Clark contends that this court should vacate the guilty verdicts and enter acquittals on his two convictions due to insufficient evidence. The evidence leading to his convictions was insufficient, he argues, because he met his burden as to his affirmative defense that the concentration of marijuana in his system was insufficient to cause impairment. We affirm.

Factual and Procedural Background

¶3 We view the facts in the light most favorable to sustaining Clark's convictions. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 2 (App. 2008). In April 2017, Pinal County Sheriff's Deputy Jeffrey McElwain stopped Clark's car when he observed its right, front headlight out, and its temporary registration plate "offset to an extreme angle" such that it was illegible. After McElwain initiated the stop, Clark travelled "approximately

a quarter of a mile" before stopping, despite passing a number of areas where Clark could have safely pulled over.

¶4 After the car stopped, McElwain saw Clark, a passenger, and an infant child inside. "Immediately upon contact" with Clark, McElwain noted his "bloodshot and watery" eyes, "groggy" speech, and a "very . . . lethargic, kind of slow demeanor." McElwain asked Clark for his driver license, but Clark gave him an Arizona identification card. McElwain also saw a registry identification card, commonly referred to as a "medical marijuana card," on Clark's lap. *See* A.R.S. § 36-2804.02. McElwain asked Clark if he had marijuana in the car; Clark responded affirmatively and showed McElwain the marijuana. Clark told McElwain that he had smoked marijuana earlier that day.

¶5 A routine computer check revealed that Clark had a suspended license. Clark denied knowing his license was suspended. He then agreed to participate in field sobriety tests but told McElwain he had a bullet in his right thigh that could affect his performance. During the tests, McElwain noted a number of "indicators of impairment," including that Clark "[c]ouldn't keep his hands to his sides and improper turn" indicating an "imbalanced, unsteady gait," he failed to walk "heel to toe" as instructed about eleven of the eighteen steps, he failed to estimate the passage of thirty seconds beyond the provided margin of error, he was unable to stand still upon being instructed to do so without swaying, and he was unable to keep his head tilted back upon being instructed to do so. After Clark failed to successfully complete even one of the tests, and based on his other observations, McElwain arrested Clark.

¶6 At trial, in addition to calling Deputy McElwain, the state called Jeff Moberg, a forensic scientist with the Arizona Department of Public Safety's toxicology unit. He testified that a sample of Clark's blood taken after the stop contained a concentration of 3.6 nanograms per milliliter of the marijuana metabolite THC. Moberg also testified to the general effects of marijuana usage and that the "level of THC present in the blood . . . is just a snapshot of what's in the blood at that particular time. That doesn't correlate to what effect is being had in the body with the THC." He further testified he had seen documentation of levels as low as "one nanogram" causing impairment.

¶7 Following the close of the state's evidence, Clark moved for a directed verdict of acquittal pursuant to Rule 20, Ariz. R. Crim. P., on counts one and three, arguing the state had failed to demonstrate that he had been

impaired. He maintained "there [was] very limited evidence that Mr. Clark was impaired. There [was] not a whole lot of bad driving. In fact, no bad driving prior to any traffic stop" and he was suffering from "a variety of injuries when he performed the field sobriety test." The trial court denied the motion, finding "there [was] substantial evidence such that the jury could determine that the defendant [was] guilty viewing those facts in the light most favorable to the State."

¶8 Contrary to what he had told Deputy McElwain at the time of the stop, Clark testified he had smoked marijuana the day before his arrest but not the day of the arrest. He admitted his five-month-old baby had been in the car, and that he knew he did not have a valid driver license at the time of the offense. Michael Grommes, a forensic toxicologist called as an expert witness for the defense, testified that, based on his past consultations, 3.6 nanograms of THC in a blood sample is a low value. However, he could not say based on the 3.6 nanograms result alone whether someone was impaired or not impaired. Grommes also criticized Moberg's testing procedures and stated that the 3.6 nanograms result was not "valid or reliable." He also testified that an injury such as Clark's—a bullet in the leg—could affect performance on field sobriety tests.

¶9 In its final jury instructions, the trial court instructed the jury that, under the Arizona Medical Marijuana Act ("AMMA")[1], if it found the defendant had proved by a preponderance of the evidence that the concentration of marijuana in his system was "insufficient to cause impairment," it must find him not guilty of counts two and four. As noted above, the jury found Clark guilty of the crimes charged in counts two and four, but not guilty of those charged in counts one and three, and the court sentenced Clark as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Analysis

¶10 Clark asserts here that his acquittal on counts one and three—and the state's failure to prove he was "impaired to the slightest degree"—"could only be interpreted to mean" he "met his affirmative defense that the concentration of marijuana in his system was 'insufficient to cause impairment.'" He claims it is "inconsistent to believe" that the jurors used and balanced identical evidence and did not find guilt applying the impaired-to-the-slightest-degree standard, yet found he had failed to

[1]A.R.S. §§ 36-2801 to 36-2821.

establish that a 3.6 nanogram THC level was insufficient to cause impairment. Consequently, Clark argues, because he met his burden as to this affirmative defense, there was insufficient evidence to support his convictions and the "verdicts on [c]ounts 2 and 4 should be vacated and acquittals entered."[2]

¶11 Among its arguments in response, the state contends that Clark failed to preserve the insufficiency issue as fundamental error by first failing to raise it at all below and then by not arguing it as fundamental, prejudicial error on appeal. Although we conclude that Clark has not waived his claim of insufficient evidence on appeal, he does not show that fundamental error occurred.

Preservation of Claim of Insufficient Evidence as Fundamental Error

¶12 As a preliminary matter, it is undisputed that Clark moved for a judgment of acquittal at trial pursuant to Rule 20, Ariz. R. Crim. P., for insufficient evidence on counts one and three, but not as to counts two and four, the counts on which he was convicted and as to which he appeals. Because he did not argue below that there was insufficient evidence to support convictions on counts two and four, he has forfeited relief for all but fundamental and prejudicial error. *State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018); *see also State v. Zinsmeyer*, 222 Ariz. 612, ¶ 27 (App. 2009) (concluding fundamental error review appropriate when argument not raised in Rule 20 motion), *overruled on other grounds by State v. Bonfiglio*, 231 Ariz. 371 (2013).

¶13 A party claiming fundamental error "bears the burden of proving both that the error was fundamental and that the error caused him prejudice." *State v. Valverde*, 220 Ariz. 582, ¶ 12 (2009). An appealing party is also bound by Rule 31.10(a)(7), Ariz. R. Crim. P., to include in his briefing his contentions, citations to legal authority, and appropriate references to

[2]In the conclusion of his opening brief, Clark asserts "an improper [i]nstruction was given that limited the jurors ability to consider whether the Defendant established the affirmative defense 'that the marijuana or its metabolite was in a concentration insufficient to cause impairment.'" However, Clark fails to develop this argument on appeal, *see* Ariz. R. Crim. P. 31.10(a)(7)(A) (opening brief must contain argument "with supporting reasons for each contention"), and we thus consider it waived, *see State v. Bolton*, 182 Ariz. 290, 298 (1995) (failure to argue claim on appeal constitutes waiver).

the record, and failure to do so "usually constitutes abandonment and waiver of that claim." *State v. Carver*, 160 Ariz. 167, 175 (1989). Although Clark argues that his convictions were not supported by sufficient evidence, he does not argue in his briefing that the claimed error below was fundamental error or expressly allege prejudice. The state, relying on *Moreno-Medrano*, 218 Ariz. 349, argues that, "because Clark fails to argue in his opening brief that the error was both fundamental and prejudicial, he has waived review of this issue." It asserts we should find lack of preservation of fundamental error as to Clark's insufficiency claim and thus decline to address it.

¶14 One of Moreno-Medrano's claims was that the trial court improperly reduced certain fees and assessments to a judgment and criminal restitution order effective upon his conviction rather than at the time of completion of his sentence. *Id*. ¶ 16. But Moreno-Medrano had failed to raise the claim in the trial court, and therefore, in accord with *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20 (2005), we concluded he had forfeited all but fundamental error. *Moreno-Medrano*, 218 Ariz. 349, ¶ 16. But further, because Moreno-Medrano had failed to argue on appeal that the court's error constituted fundamental and prejudicial error, we concluded he had similarly waived any argument of fundamental error on appeal. *Id*. ¶ 17.

¶15 Since *Moreno-Medrano*, we have extended its waiver principle to other claims of fundamental error. *See e.g.*, *State v. Peltz*, 242 Ariz. 23, ¶ 7 (App. 2017) (prosecutorial misconduct); *State v. Salcido*, 238 Ariz. 461, ¶ 16 (App. 2015) (denied motion to suppress for claimed illegal arrest). We have even extended *Moreno-Medrano* waiver to a claim, like that here, of insufficiency of the evidence. *See, e.g.*, *State v. Romero*, No. 2 CA-CR 2011-0231 (Ariz. App. Nov. 30, 2012) (mem. decision). However, for the reasons that follow, we now conclude, given the nature of a claim of insufficiency of the evidence, that extending *Moreno-Medrano* waiver to such a claim is improper.

¶16 As stated by the United States Supreme Court in *Jackson v. Virginia*, it is "an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof," which is "defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." 443 U.S. 307, 316 (1979). And, when "a conviction occurs in a state trial" without proof beyond a reasonable doubt as to each element of the offense, "it cannot constitutionally stand." *Id*. at 318. As stated by this court in *State v. Rhome*,

"both the Arizona and United States Constitutions guarantee every criminal defendant the right to have 'a jury find him guilty of all the elements of the crime with which he is charged'" and the state must "prove each element of the offense, beyond a reasonable doubt." 235 Ariz. 459, ¶ 4 (App. 2014) (quoting *State v. Martinez*, 210 Ariz. 578, ¶ 7 (2005)). Accordingly, our courts have long held that a conviction based on insufficient evidence is fundamental, prejudicial error. *Rhome*, 235 Ariz. 459, ¶ 4 ("Fundamental error therefore occurs when a person is convicted of 'a crime when the evidence does not support a conviction.'" (quoting *State v. Stroud*, 209 Ariz. 410, n.2 (2005))); *State v. Gray*, 227 Ariz. 424, n.1 (App. 2011) ("[T]he state's failure to prove each element of an offense of conviction would be fundamental error, as it constitutes 'error going to the foundation of the case' and would necessarily deprive a defendant of a fair trial." (quoting *Henderson*, 210 Ariz. 561, ¶ 19)); *Zinsmeyer*, 222 Ariz. 612, ¶ 27 ("A conviction based on insufficient evidence constitutes fundamental error."), *overruled on other grounds by Bonfiglio*, 231 Ariz. 371.

¶17 Although we do not typically address arguments not expressly made by the parties, "waiver is a procedural concept that courts do not rigidly employ in mechanical fashion." *State v. Aleman*, 210 Ariz. 232, ¶ 24 (App. 2005). "[W]e may forego application of the [waiver] rule when justice requires." *Liristis v. Am. Family Mut. Ins. Co.*, 204 Ariz. 140, ¶ 11 (App. 2002). We often address fundamental errors even where a defendant has failed to argue fundamental error on appeal. *See State v. Fernandez*, 216 Ariz. 545, ¶ 32 (App. 2007) ("Although we do not search the record for fundamental error, we will not ignore it when we find it."); *Salcido*, 238 Ariz. 461, ¶ 17 (vacating appellant's convictions upon finding double jeopardy violation although not raised in opening brief, such violations constitute fundamental, prejudicial error, and are not waived by failure to raise them below). Indeed, under *Anders v. California*, when a defendant can make no other argument on appeal, we will examine the sufficiency of the evidence to support each conviction. 386 U.S. 738, 744 (1967); *State v. Rushing*, 156 Ariz. 1, 4 (1988) (reviewing the record for fundamental error pursuant to *Anders* and finding insufficient evidence to support conviction).

¶18 A conviction based on insufficient evidence is fundamental error whether a defendant expressly argues fundamental error or not. Given the affront to our system of justice by a conviction unsupported by evidence, a defendant ought not be bound to use the magic words "fundamental error" to receive the benefit of fundamental error review and avoid *Moreno-Medrano* waiver. It is enough for a defendant to assert on

appeal that his conviction was not supported by sufficient evidence. Similarly, *Moreno-Medrano* will not bar fundamental error review of a claim of insufficient evidence due to the defendant's failure to expressly argue prejudice. Prejudice in a case of an unsupported conviction is manifest: a defendant has been convicted of a crime that the state has failed to prove. *See Gray*, 227 Ariz. 424, n.1 (conviction based on insufficient evidence necessarily deprives defendant of a fair trial). Under such circumstances, a defendant has been deprived of a fair trial and has been prejudiced. *See Jackson*, 443 U.S. at 316-18; *see also Escalante*, 245 Ariz. 135, ¶ 21 (defendant establishes prejudice upon showing that the "error was so egregious that he could not possibly have received a fair trial"). No additional argument or showing of prejudice ought to be required in such a case. *See Escalante*, 245 Ariz. 135, ¶ 21.

¶19 Consequently, consistent with our jurisprudence, where a defendant has not expressly argued fundamental and prejudicial error due to insufficient evidence, waiver under *Moreno-Medrano* will not apply so as to foreclose fundamental error review. Stated differently, a claim on appeal that the defendant has been convicted based on insufficient evidence, so long as otherwise complying with Rule 31.10(a)(7), Ariz. R. Crim. P., is sufficient to preserve fundamental error review. To the extent we have in the past decided otherwise based on *Moreno-Medrano*, we disapprove of and depart from that reasoning. Here, because Clark's sufficiency claim is inherently a claim of fundamental, prejudicial error, notwithstanding that he failed to argue in his briefing that the court committed fundamental, prejudicial error, we will address the claim.

Sufficiency of the Evidence

¶20 Because it is fundamental, prejudicial error to convict a defendant of a crime with insufficient evidence, if Clark can demonstrate that there was insufficient evidence supporting his convictions under § 28-1383, we must find fundamental, reversible, error. *Escalante*, 245 Ariz. 135, ¶ 21 (defendant bears the burden of persuasion to prove fundamental error). Clark does not, however, meet his burden here.

¶21 "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis . . . is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316 (1987). "Substantial evidence is 'evidence that reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.'" *State v. Fimbres*, 222 Ariz. 293, ¶ 4 (App. 2009) (quoting *Stroud*, 209 Ariz. 410, ¶ 6). We will reverse a conviction for insufficient evidence only

if "there is a complete absence of probative facts to support [the jury's] conclusion." *State v. Mauro*, 159 Ariz. 186, 206 (1988). "The finder-of-fact, not the appellate court, weighs the evidence and determines the credibility of witnesses." *Fimbres*, 222 Ariz. 293, ¶ 4 (quoting *State v. Cid*, 181 Ariz. 496, 500 (App. 1995).

¶22 "A person is guilty of aggravated driving or actual physical control while under the influence of . . . drugs if the person . . . [c]ommits a violation of § 28-1381 . . . while the person's driver license or privilege to drive is suspended . . . [or] [w]hile a person under fifteen years of age is in the vehicle." § 28-1383(A)(1), (3). Under § 28-1381(A)(3), a person may be convicted of driving while under the influence if the person has "marijuana or its impairing metabolite" in his body. *Dobson v. McClennen*, 238 Ariz. 389, ¶ 20 (2015). Clark does not dispute the evidence as to count two demonstrating that his driver license was suspended at the time of the offense, or, as to count four that a minor under the age of fifteen years was in his car. He contends rather that, in light of his affirmative defense under the AMMA, the state failed to prove that he was "impaired" by the marijuana in his system. And, he argues that the evidence he presented showed he was not impaired, and that this was confirmed by the jury's acquittal on the two charges that require a finding of actual impairment.

¶23 The AMMA provides an affirmative defense to a defendant charged under § 28-1381(A)(3) who can show that he was authorized to use medical marijuana and "that the concentration of marijuana or its impairing metabolite in [his] body was insufficient to cause impairment." *Dobson*, 238 Ariz. 389, ¶ 23. The defendant bears the burden of proving this affirmative defense by a preponderance of the evidence. *Id.* At trial, as described above, the state's toxicology expert, Moberg, testified that Clark's blood contained 3.6 nanograms of THC per milliliter. If this testimony was fully credited by the jury, it was sufficient to demonstrate that Clark had marijuana "or its metabolite" in his body, in violation of § 28-1381(A)(3). *State ex rel. Montgomery v. Harris*, 234 Ariz. 343, ¶ 24 (2014) (marijuana users "violate (A)(3) if they are discovered with any amount of THC or an impairing metabolite in their body"). Moberg also testified that, at the level of THC in Clark's blood, or indeed, according to "literature," even at lower levels, THC causes impairment.

¶24 Clark's expert, Grommes, testified that 3.6 nanograms per milliliter of THC is a low value, and testified to "issues" with the state's testing. However, Grommes also testified that he would not, as a matter of expert opinion, say "that somebody is or is not impaired" based on a

finding of a 3.6 nanogram level of THC alone. Although Grommes was not prepared to say one way or the other that the level of THC in Clark's blood indicated impairment, Moberg was prepared to say it could, and did so. If the jury believed Moberg, even if it did not believe that Clark was actually impaired at the time of the stop, it believed that THC or its metabolite was present in Clark's blood and in a concentration *sufficient* to cause impairment. That is all the law requires.

¶25 Additionally, to the extent that Clark argues that he received an impermissible "inconsistent verdict," as the state asserts, in Arizona we do not disturb inconsistent verdicts on different counts. *See State v. Zakhar*, 105 Ariz. 31, 32 (1969) ("consistency between the verdicts on the several counts of an indictment is unnecessary"). Therefore we will not do so here. Nonetheless, although, as we explained above, it is not necessary to sustain Clark's convictions, a reasonable jury could have determined, given the evidence presented, that Clark was actually impaired at the time of the stop: Clark drove a quarter of a mile after the deputy initiated the stop, he told the deputy he had smoked marijuana the same day he was pulled over, and he failed multiples field sobriety tests, including tests that arguably should not have been affected by his physical limitations. Nonetheless, the jury did not convict Clark of charges that required actual impairment; a showing as to which the state bore the burden of proof beyond a reasonable doubt. The same evidence may have, however, bolstered Moberg's testimony that the level of THC in Clark's blood was *sufficient* to cause impairment; an opinion Clark did not overcome by a preponderance of the evidence.

¶26 Clark's argument essentially goes to the credibility of the witnesses and the weight of the evidence. However, it is not our role to judge witness credibility or weigh the evidence; that is the role of the jury. *State v. Williams*, 209 Ariz. 228, ¶ 6 (App. 2004). Clark has failed to carry his burden of showing that the evidence was insufficient to support his convictions on counts 2 and 4 and thus that fundamental, prejudicial error occurred.

Disposition

¶27 For the foregoing reasons, we affirm Clark's convictions and sentences.